

No. 10-1576

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DERRICK GARDNER,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

On Appeal from the United States District Court
for the Northern District of Illinois
Case No. 1:09-cv-00577

The Honorable Ronald A. Guzman

**BRIEF AND REQUIRED SHORT APPENDIX
OF PETITIONER-APPELLANT DERRICK GARDNER**

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 10-1576

Short Caption: Gardner v. United States

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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Derrick Gardner

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Mayer Brown LLP; Quarles & Bradley LLP; Gerald J. Collins (solo practitioner)

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ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: /s/ David M. Gossett Date: May 13, 2011

Attorney's Printed Name: David M. Gossett

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ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: /s/ Stephen E. Sachs (with permission) Date: May 13, 2011

Attorney's Printed Name: Stephen E. Sachs

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JURISDICTIONAL STATEMENT

Petitioner-Appellant Derrick Gardner is serving a 15-year sentence in federal prison. He was convicted in the U.S. District Court for the Northern District of Illinois of being a felon in possession of a firearm. 18 U.S.C. §§ 922(g)(1), 924(e). On January 29, 2009, Gardner timely moved to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. SA183.¹ The district court had jurisdiction under 18 U.S.C. § 3231 and 28 U.S.C. § 1331. *See Harris v. Warden*, 425 F.3d 386, 388 (7th Cir. 2005).

The district court denied Gardner's motion and entered final judgment on January 21, 2010. A1. On March 1, 2010, Gardner timely filed a notice of appeal, combined with a request for a certificate of appealability ("COA"). SA226; *see* Fed. R. Gov. § 2255 Proc. 11(b); Fed. R. App. P. 4(a)(1)(B) (2010). The district court denied the COA request on March 2, 2010. SA230. This Court issued a COA on November 16, 2010. SA231. It has appellate jurisdiction under 28 U.S.C. § 1291. *See also id.* §§ 2253(a), (c), 2255(d).

¹ The required short appendix is cited as "A_" and the separate appendix as "SA_." Items in the record on appeal—those filed in *United States v. Gardner*, No. 09-cv-577 (N.D. Ill.)—are cited by district court document number and page as "R:_" Items in the supplemental record—those filed in Mr. Gardner's criminal case, *United States v. Gardner*, No. 03-cr-428-1 (N.D. Ill.), that were added to the record by the district court's Order of May 3, 2011 (R28)—are cited as "SR:_" Items in this Court's docket are cited as "Doc. #:_"

INTRODUCTION

Derrick Gardner was arrested for unlawfully possessing a gun. According to the police, Gardner noticed their squad car while exiting an apartment building and walked 40 feet toward the car in silence. When asked where he was coming from, he responded “407.” (This was the apartment number of a recent assault-in-progress call, which gave the police grounds for an investigatory stop under *Terry v. Ohio*, 392 U.S. 1 (1968).) Gardner then walked the remaining 10 feet to the squad car without speaking. Unprompted, he placed his hands on the hood, waiting for the police to pat him down and to discover the pistol hidden in the right pocket of his jacket.

Gardner asked his appointed attorneys to present a different story. He wanted to argue that the officers stopped and searched him without asking any questions; that he had never been to Apartment 407 (as its residents could confirm); that he would not have told the police that he had been there; and that he did not resemble the 5’7”, 165-pound suspect of the assault-in-progress call, being 6’2” and 240 pounds. He wanted to move to suppress the evidence obtained from the search—the officers’ statements as well as the gun—which constituted the only evidence of his unlawful possession.

Gardner’s attorneys refused to file that motion. The basis for their refusal was that Gardner would not stipulate to having possessed the gun, which they thought was necessary for him to raise a Fourth Amendment

challenge. They did not, however, tell Gardner that he could admit possession of the gun in a suppression motion without having it used against him at trial. See *Simmons v. United States*, 390 U.S. 377 (1968). Ignorant of the *Simmons* rule, Gardner tried to file his own suppression motion *pro se*, which noted that he still “dispute[d]” the issue of possession. His *pro se* motion was stricken; his trial attorney called no defense witnesses and presented no evidence; and Gardner was convicted by a jury and eventually sentenced (after a *Booker* appeal) to the mandatory minimum of 15 years.

Gardner’s trial attorneys provided ineffective assistance of counsel. The evidence from the contested search was the only evidence connecting Gardner to the gun. Not seeking to suppress that evidence was a “blunder of the first magnitude.” *Owens v. United States*, 387 F.3d 607, 608 (7th Cir. 2004). Had Gardner’s attorneys advised him properly, he would have admitted possession of the gun, filed a counseled suppression motion, gotten the evidence excluded, and avoided 15 years in prison. In fact, Gardner’s attorneys should have filed the motion whether their client knew about the *Simmons* rule or not. That is because, as Gardner has repeatedly argued, it is *not* necessary for a defendant to admit his guilt before asserting a Fourth Amendment challenge to an unlawful search.

Gardner raised these issues in a § 2255 motion, signed under penalty of perjury. But the district court denied the motion without an evidentiary

hearing. Because Gardner “alleges facts that, if proven, would entitle him to relief,” he is entitled to an opportunity to prove his claims. *Sandoval v. United States*, 574 F.3d 847, 850 (7th Cir. 2009) (internal quotation marks omitted). The judgment of the district court should be vacated.

ISSUE PRESENTED FOR REVIEW

Whether the district court erred by denying Gardner’s claim of ineffective assistance of trial counsel without an evidentiary hearing.

STATEMENT OF THE CASE

Gardner was indicted on one count of violating 18 U.S.C. §§ 922(g)(1) and 924(e). SA28. He pled not guilty and was appointed counsel. SA31. Gardner attempted to file a *pro se* motion to suppress the gun and related testimony on Fourth Amendment grounds. SA33. His counsel resisted filing the motion and sought to withdraw. SA51. Gardner’s *pro se* motion was stricken, and the Court appointed substitute counsel. SA60–61. Citing further disagreements over filing motions, Gardner moved to dismiss his new counsel, but that motion was denied. SA62, 64.

On December 16 and 17, 2003, the case was tried to a jury. SA80–134. The gun was introduced into evidence, and the police testified extensively about its discovery. *See, e.g.*, SR62:38–58. The jury found Gardner guilty. SA135. Gardner reasserted his Fourth Amendment objections in a *pro se* motion for a new trial, but the motion was denied. SA136, 142. On February

19, 2004, the court sentenced Gardner to 235 months under then-binding Guidelines. SR57:7, 9; SA148–49.

Gardner timely appealed on February 23, 2004. SA153. This Court appointed new counsel (SA156), who raised a single issue of sentencing error. After a limited remand under *United States v. Paladino*, 401 F.3d 471 (7th Cir. 2005), this Court vacated the sentence, and Gardner was resentenced to the mandatory minimum of 15 years. SA157–67. Gardner again timely appealed his sentence. SA178. His appellate counsel sought to withdraw under *Anders v. California*, 386 U.S. 738 (1967); the Court dismissed Gardner’s appeal and then, on April 21, 2008, denied rehearing. SA180–82. Gardner’s conviction became final on July 21, 2008, when the time for certiorari expired. *Clay v. United States*, 537 U.S. 522, 527 (2003); S. Ct. R. 13.1, 13.3, 30.1.

On January 29, 2009, Gardner filed a timely motion to vacate, set aside, or correct his sentence. SA183; *see* 28 U.S.C. § 2255(f)(1). The district court denied the motion on January 21, 2010. A1. On March 1, 2010, Gardner timely filed a notice of appeal and requested a COA (SA226), which the district court denied (SA230). After some collateral litigation in this Court and in the district court over whether Mr. Gardner could proceed *in forma*

pauperis,² this Court subsequently granted a COA, finding that Gardner “has made a substantial showing of the denial of a constitutional right” with regard to ineffective assistance of trial counsel. SA231; *see* 28 U.S.C. § 2253(c).³

STATEMENT OF FACTS

A. Gardner’s Arrest

On October 14, 2002, Chicago police officers Michael White and Thomas Polick responded to an “[a]ssault in progress” call at Apartment 407 of a Chicago apartment building. The call was later updated with a report of a “man with a gun.” SA85–86. When they arrived at the building, the officers observed Gardner standing near the building’s exit, 50 feet from their marked squad car. SA87, 99.

According to the officers’ testimony, Gardner—without being prompted—began walking toward the police. SA88. When he was ten feet away, White asked him, “Where are you coming from,” and Gardner responded, “407.” SA89, 120–21. Gardner then “immediately put his hands on the front

² This Court had earlier dismissed Gardner’s appeal for failure to pay the filing fee. Doc. #10-1. Gardner asked that his appeal be reinstated, and the Court required him to move to proceed *in forma pauperis*. Docs. #11–12. Gardner complied, and the Court recalled its mandate, reinstated the appeal, and referred Gardner’s *IFP* motion to the district court. Docs. #13–15. The district court denied the motion, describing Gardner’s appeal as frivolous. Doc. #16. Gardner sought relief from this Court, which allowed him to renew his *IFP* motion. Docs. #17–18. He did so, and the motion was granted together with a COA. Docs. #19–20.

³ Gardner raised three claims in his § 2255 motion, but the Court granted a COA limited to only one. Gardner does not seek amendment of the COA.

of the car.” SA89. White conducted a pat-down search, finding a pistol in Gardner’s right jacket pocket and reaching into the jacket to recover it. SA89, 104.

Confronted with the pistol, Gardner allegedly told police that he had found it “in the bushes.” SA93. Gardner was taken to a police station, where officers discovered that he had prior convictions. SR62-2:57. (The government later introduced evidence of several convictions for drug crimes and one for robbery. SR62-2:61–65.)

B. Pre-Trial Motions

1. On April 23, 2003, Gardner was indicted in the district court on one count of being a felon in possession of a firearm. SA28. He pled not guilty on May 13, 2003, and the court appointed Sergio Fidel Rodriguez of the Federal Defender Program as his attorney. SA31.

2. During the next several months, Gardner and Rodriguez clashed over Gardner’s desire to file a motion to suppress evidence. On September 29, 2003, Rodriguez asked the court for leave to withdraw as counsel. SA52. According to Rodriguez, Gardner “had voiced a dissatisfaction with counsel, particularly regarding the desire to file a motion to suppress evidence prior to trial.” SA53. This issue “had been raised previously,” and Rodriguez believed “that without a factual affidavit to assert standing by the Defendant, such a motion could not be filed.” *Id.*

At the same time, Gardner filed his own *pro se* motion, asking the court “to suppress all evidence and statements that were subsequent to any alleged possession” of a weapon, arguing that “[s]uch evidence is the fruit of an illegal search and seizure of the defendant.” SA36. He contended that the assault-in-progress call had identified the suspect as someone the victims knew, who was 5’7” and 165 pounds (unlike the 6’2”, 240-pound Gardner). SA37–38. Gardner argued that the police lacked the reasonable suspicion for the stop required by *Terry* (SA38–44), as he did not resemble the suspect and was “innocently standing outside of a building in which hundreds of persons inhabit” (SA38). He also argued that the officers’ account was “incredible and goes against logic,” as a suspect fleeing Apartment 407 “would not have been standing around [for] ten minutes waiting for the police to arrive.” SA49.

Instead, Gardner asserted that he

was standing outside of the apartment building[] minding his own business when CPD [O]fficer White approached Mr. Gardner * * * and ordered the defendant to put his hands on the police car. * * * Officer [W]hite at this time without cause searched the defendant, whereupon the officer claims that he retrieved a loaded gun from the person of Mr. Gardner.

SA37–38. Consistent with his plea of not guilty to the possession charge, Gardner included a disclaimer that avoided any admission of guilt: “(The defendant disputes that he was actually carrying a gun, or that the officer retrieved a gun from his person).” SA38.

This motion, filed *pro se* while Gardner was represented by counsel, was ordered stricken by the district court. SA60.

3. The court granted Rodriguez's motion to withdraw, rescheduled the trial, and appointed Gerald J. Collins as Gardner's new counsel. SA61. On November 17, 2003, Gardner sought to dismiss Collins, stating under penalty of perjury that "[t]his defendant has requested his attorney to file motions, which [he] has failed to do." SA63. That motion was also denied. SA64.

At the pretrial conference on December 11–12, 2003, Gardner again sought to discharge Collins, asking the court to "hear those motions that I asked him to put in when he last came to see me." SA68. The court answered that "we previously discussed that[,] both with your prior attorney whom you discharged because he would not file that motion and with Mr. Collins being present because you wanted him discharged as well." SA69. When Gardner noted that he had "asked [Collins] to file certain motions and he hasn't filed them," the court replied that

I agreed with Mr. Collins[,] you cannot file a motion to suppress an item taken from you while at the same time denying that the item was taken from you. It's just that simple. It's just that simple. And two attorneys have told you that, so what other motions do you have?

SA70. Gardner also cited other disagreements with Collins, including that Collins "is trying to get me to stipulate to certain things that I am not going

to stipulate to,” such as “[t]hat I had a weapon.” SA72. The court gave Gardner the chance to retain private counsel at his own expense, but he could not. SR98-2:2–3.

C. Trial, Sentencing, And Appeal

1. Gardner’s two-day jury trial began on December 16, 2003. The police officers testified at length about their encounter with Gardner and the discovery of the gun. SR62-2:38–58; SA87–122, 127–34. Collins’s defense strategy highlighted remaining uncertainties (such as an absence of preserved fingerprints) and potential inconsistencies in the officers’ testimony. See, *e.g.*, SR62-3:34–41. But while Collins recalled one of the officers for additional cross-examination, he did not call any witnesses in Gardner’s defense, and rested immediately after the close of the government’s case. SA134. The jury convicted Gardner. SA135.

2. Gardner filed a *pro se* motion for a new trial, invoking his failed motion to suppress. SA136. The government addressed the motion during the sentencing hearing, arguing that Gardner, who was represented by counsel, could not file *pro se* motions. SA145. It also argued that Gardner’s pretrial motion “did not acknowledge that he had possession of the gun at the time the officers searched him,” and that “[i]f he does not have a possessory interest in the firearm, then he has no Fourth Amendment interests to vindicate.” SA145–46. Rather than defend Gardner’s motion, Collins apparently adopted

the government's view, stating, "This same issue I have repeatedly discussed with Mr. Gardner as late as 10:30 this morning on the 24th floor. I know prior counsel, Mr. Rodriguez, discussed the same issue with Mr. Gardner." SA146.

The district court denied the motion on four grounds. Three were procedural: the motion was not signed, was filed *pro se* while Gardner was represented, and had not been served on the government. SA146–47. As to the substance, the court explained that "[t]he defendant's prior counsel and his present counsel have refused to file this motion because the motion asserts that the defendant had no possessory interest in the very thing he's seeking to suppress. Therefore, he lacks standing. This has been explained to the defendant before." SA147.

3. Gardner was sentenced under the Guidelines to 235 months. SA149. With newly appointed counsel, Gardner appealed his sentence, and this Court eventually vacated and remanded for resentencing under advisory Guidelines. SA160. The district court resentenced Gardner to the mandatory minimum of 15 years, "based on the defendant's age" (39 at sentencing) and the court's resulting belief that he would be "at extremely low risk to be a recidivist criminal" once released. SA165, 167. Gardner's second appeal—again on sentencing grounds—was dismissed after appellate counsel filed an *Anders* brief, and his conviction became final. SA178–82.

D. Post-conviction Proceedings

1.a. Gardner filed a timely *pro se* motion under 28 U.S.C. § 2255. SA183. Under penalty of perjury, he stated that Officer White “ran up to me with his hands on his weapon, grabbed me by the waistband of my pants and forced me to the car while ordering me to place my hands on the hood.” SA201. He also affirmed that he had “never been to apartment #407,” and that he had asked his attorney to subpoena the apartment’s residents to testify in his defense. SA201–02.

Gardner’s sworn statement conceded “[t]hat [O]fficer White did in fact recover a gun from my jacket pocket during a pat down search of my person[.]” SA202. But “neither my trial counsel, nor the court, adequately explained to me that my testimony at an evidentiary hearing could not be used against me at trial to establish guilt.” *Id.* Thus, “because I didn’t understand the legalities of an evidentiary hearing and the exclusionary rule, I disputed possession of the gun in my initial ‘pro se’ suppression motion because I believed my assertion had to stay consistent with my plea of ‘not guilty’ or it would be used against me at trial.” *Id.* This led to Rodriguez’s and Collins’s refusal to file a suppression motion, despite Gardner’s requests. SA189.

b. Based on these factual allegations, Gardner argued that he is entitled to a new trial. He contended that the police lacked reasonable suspicion for the stop and search, thus violating his Fourth Amendment rights.

Because Gardner had an indisputably “legitimate expectation of privacy in the area searched” (his pocket), he had standing to challenge the search, regardless of whether he had “admitted to possessing the fruit of the search” prior to trial. SA191–93.

Gardner also argued that his appointed counsel, in the district court and on appeal, had provided ineffective assistance under the Sixth Amendment. In the district court, his counsel had failed to “file a suppression motion, or even assist Gardner with his ‘pro se’ version,” although the motion would likely have succeeded. SA195. Counsel’s “decision * * * was not based on any strategic considerations,” but rather on an “erroneous interpretation of the law.” SA194. Likewise, Gardner’s appellate attorney had failed to raise the Fourth Amendment issue on appeal. SA197–98.

Based on these claims, Gardner sought an evidentiary hearing to determine “[t]he factual circumstances [surrounding] the petitioner’s arrest,” as well as “facts outside of the record,” such as the statements of the residents of Apartment 407. SA199. Gardner asked the court to grant a hearing, “make findings of fact consistent with the contentions herein,” and “Grant a New Trial with new counsel.” SA200.

2. The district court ordered briefing, and the government opposed Gardner’s motion. R3; SA211. Its response included an affidavit from Collins, in which he “recall[ed] telling [Gardner] that if he did testify falsely at

any hearing or at trial, any guideline sentence that he might receive could be enhanced two[] levels because he gave false testimony.” SA224. But Collins “d[id] not recall ever telling [Gardner] that he could testify at a suppression hearing and that any admissions that he made at the suppression hearing could not be used against him at trial.” *Id.*

3.a. The district court denied the § 2255 motion. A2. The court held that Gardner’s Fourth Amendment claim was barred by *Stone v. Powell*, 428 U.S. 465 (1976), and moreover lacked sufficient merit to support an ineffective assistance claim. A3–A4. Defining a Fourth Amendment seizure as “some meaningful interference with an individual’s possessory interests in [his] property” (A4 (alteration in original; quoting *Soldal v. Cook County*, 506 U.S. 56, 61 (1992))), the court noted that Gardner had “explicitly disclaimed a possessory interest in the gun and even denied that the police officer had found a gun on him” (*id.*). It therefore held that Gardner’s “motion to suppress was a nonstarter.” *Id.*

b. The district court also rejected Gardner’s argument that his counsel had been ineffective for not informing him of the *Simmons* rule. A4.

First, the court conceded that Gardner’s claim “would succeed—and merit a hearing—* * * if he had sufficient evidence to back it up,” but concluded that “[h]e does not.” A4. The court stated that “[Gardner’s] trial counsel’s affidavit does not support Gardner’s testimony,” and that “the

record”—namely Gardner’s *pro se* motion to suppress—“refutes it.” *Id.* (citing SA38, 224). The court therefore considered Gardner’s sworn statements to be “bare, unsubstantiated, [and] thoroughly self-serving.” *Id.* (alteration in original; internal quotation marks omitted).

Second, the court found that “there was no reason for Gardner’s trial attorney to advise him” about the *Simmons* rule. A5. In its view, the record was silent on whether “Gardner ever told his trial attorney * * * that the officer had recovered the gun from him.” *Id.* As Gardner’s *pro se* suppression motion contained a sentence disputing his guilt, Collins might have believed that Gardner never had possessed the gun and that *Simmons* was therefore irrelevant. *Id.*

Third, the court suggested that Gardner’s counsel might have been trying to protect him from a perjury charge or enhanced sentence. Collins had warned Gardner against false testimony “at any hearing or at trial.” A5. The court reasoned that “had Gardner admitted possession at his suppression hearing and then denied possession of the gun during trial, his statements during the suppression proceedings might have been used to impeach him.” *Id.*

4. Gardner timely filed a notice of appeal and requested a COA, which the district court denied. SA226, 230. On further review, this Court granted Gardner a COA, finding that he “has made a substantial showing of the deni-

al of a constitutional right as to whether he received ineffective assistance when his trial counsel refused to file a motion to suppress on his behalf and did not explain to Gardner that any testimony he provided at a suppression hearing could not be used against him at trial.” SA231. The Court thereafter appointed the undersigned *pro bono* counsel to represent Gardner in this matter. Docs. #21, 26.

SUMMARY OF ARGUMENT

As a criminal defendant, Gardner had “a Sixth Amendment right to be represented by effective counsel.” *Burt v. Uchtman*, 422 F.3d 557, 566 (7th Cir. 2005). He is entitled to a new trial if he can show (1) that defense counsel’s performance was deficient and “fell ‘outside the wide range of professionally competent assistance,’” and (2) that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Johnson v. United States*, 604 F.3d 1016, 1019 (7th Cir. 2010) (quoting *Strickland v. Washington*, 466 U.S. 668, 690, 694 (1984)). Viewed in light of the record, Gardner’s sworn allegations satisfy that standard. He is entitled to an evidentiary hearing to prove that those allegations are true.

I. Gardner’s trial counsel provided deficient performance by failing to file a meritorious suppression motion. Like the defendant in *Johnson*, Gardner “asserts that the police had no constitutionally-valid basis to search” his

person and clothing, “and that a motion to suppress could have resulted in the suppression of the fruits of that search.” 604 F.3d at 1019. “Because that search yielded the [evidence] which formed the basis of the charge and the centerpiece of the government’s case”—the officers’ testimony and the gun—“the decision not to seek suppression was a critical one,” and counsel’s performance was competent only if “the decision to forego a motion to suppress was a reasonable trial strategy.” *Id.* Their decision was unreasonable in two ways.

First, Gardner’s attorneys in the district court neglected to inform him that admissions in the suppression motion or subsequent hearing could not be used to prove his guilt at trial. *See Simmons*, 390 U.S. 377. As a lay defendant who had pled “not guilty,” Gardner understandably believed that admitting possession of the gun might send him to prison. Yet Gardner’s attorneys refused to file a suppression motion because he would not stipulate to having possessed the gun. As their refusal was rooted in a failure to inform their client of the relevant law, it cannot be described as a reasonable strategy. Gardner adequately alleged these failings in his sworn § 2255 motion, and the district court erred by disregarding his account. Nor was it proper for the government and the district court to speculate, without an evidentiary hearing, on alternative rationales that his attorneys *might* have had. *See infra* Part I.A.

Second, counsel’s position on the motion to suppress was based on a misapprehension of law. A criminal defendant need not admit guilt in order to bring a Fourth Amendment challenge. Because Gardner had a reasonable expectation of privacy in the contents of his pocket, he had standing to raise a Fourth Amendment challenge to an unlawful pat-down search, whether or not he asserted any possessory interest in the gun. Nor was Gardner required to admit possession in order to suppress the fruits of that unlawful search—the officers’ testimony and the gun produced in court. *See infra* Part I.B.

II. Each of these errors severely prejudiced Gardner. If his allegations are true, a suppression motion would have been granted: the officers lacked reasonable suspicion for the stop and pat-down search, of which their trial testimony and the gun were fruits. These were the crucial pieces of evidence on which Gardner was convicted. Defense counsel thus “fumbled what should have been a successful motion to suppress evidence” (*Owens*, 387 F.3d at 607), and Gardner is serving a 15-year sentence as a result.

The district court was required to “grant a prompt hearing” and “make findings of fact” on Gardner’s § 2255 motion “[u]nless the motion and the files and records of the case conclusively show[ed] that [he was] entitled to no relief.” 28 U.S.C. § 2255(b). Because Gardner’s ineffective assistance claim “alleges facts that, if proven, would entitle him to relief,” his motion should not

have been denied without an evidentiary hearing. *Sandoval*, 574 F.3d at 850 (internal quotation marks omitted); *see also Lafuente v. United States*, 617 F.3d 944, 946 (7th Cir. 2010) (*per curiam*). *See infra* Part II.

STANDARD OF REVIEW

On appeal from the denial of a § 2255 motion, this Court “review[s] questions of law de novo and findings of fact for clear error.” *Sandoval*, 574 F.3d at 850. The Court reviews the “decision whether to order an evidentiary hearing for abuse of discretion” (*Lafuente*, 617 F.3d at 946), but a district court “by definition abuses its discretion when it makes an error of law” (*United States v. Ligas*, 549 F.3d 497, 501 (7th Cir. 2008) (internal quotation marks omitted)).

ARGUMENT

Although the Fourth Amendment’s exclusionary rule is usually inapplicable under § 2255 (*Brock v. United States*, 573 F.3d 497 (7th Cir. 2009)), a petitioner may allege ineffective assistance under the Sixth Amendment based on a failure to file a suppression motion under the Fourth Amendment. *See Kimmelman v. Morrison*, 477 U.S. 365 (1986); *Owens*, 387 F.3d 607. On the undisputed record, Gardner’s attorneys’ failure to file such a motion was deficient performance. Additionally, Gardner’s allegations would, if proven, demonstrate that his Fourth Amendment claim had merit and that he was prejudiced by its omission. The district court therefore should not have dis-

missed his motion without holding an evidentiary hearing and making findings of fact.

I. Gardner's Attorneys' Performance Was Deficient.

Gardner's attorneys should have attempted a Fourth Amendment objection. Indeed, it was an "an unreasonable trial strategy" for his lawyers "to decide not to *attempt* to render the sole piece of direct evidence against [their] client inadmissible, even if [they] were not certain [they] would be successful." *Dixon v. Snyder*, 266 F.3d 693, 703 (7th Cir. 2001) (emphasis added).

Gardner's Fourth Amendment claim had merit. To stop Gardner and conduct the pat-down search, Officers White and Pollick needed "reason to suspect that he had been engaged in * * * wrongdoing" (*Gentry v. Sevier*, 597 F.3d 838, 846 (7th Cir. 2010)), as well as "an articulable suspicion that [he was] armed and dangerous" (*United States v. Carlisle*, 614 F.3d 750, 754–55 (7th Cir. 2010)). On the facts as Gardner alleged them, neither was present. The police may have believed that there was a "man with a gun" in the area, but they had no reason to think Gardner was their man: according to his *pro se* suppression motion as well as his sworn § 2255 motion, he did not resemble the suspect and did not tell the police that he had come from the threatened apartment. Given that reasonable suspicion is absent where a report of "two men' * * * causing a disturbance" provides "no description of the two men" (*United States v. Ienco*, 182 F.3d 517, 524 (7th Cir. 1999)), the same is

necessarily true where, as here, the description given does not match the defendant. There is “no indication that a motion to suppress evidence resulting from such searches would have been futile” (*Gentry*, 597 F.3d at 851), and Gardner’s attorneys should have attempted it.

The attorneys’ refusal was based on a belief that Gardner first had to admit possession of the gun. Rodriguez had insisted on “a factual affidavit to assert standing” (SA53), leading Gardner to attempt a *pro se* motion without any admission of guilt. Likewise, Gardner complained in open court that Collins was “trying to get me to stipulate to certain things,” such as “[t]hat I had a weapon.” SA72. As the district court itself noted, “two attorneys” had told Gardner that “you cannot file a motion to suppress an item taken from you while * * * denying that the item was taken from you” (SA70; *see also* SA147). And it was “for that reason,” according to the government’s representation below, that “neither [attorney] would file a motion to suppress.” SA213. As described above, this decision was unreasonable: not only had Gardner’s attorneys failed to advise him of the *Simmons* rule, but their understanding of the law was simply incorrect.

The attorneys’ “decision * * * not to seek to suppress evidence” was “beyond the pale of an objectively reasonable strategy.” *Gentry*, 597 F.3d at 851. It was undisputed below that Gardner’s attorneys conditioned their filing of a suppression motion on Gardner’s admitting possession of the gun. It

was undisputed that Gardner’s attorneys did not inform him of the *Simmons* rule. It is clear as a matter of law that their underlying rationale was legally incorrect. And “[t]he record does not indicate that any strategic benefit would have been accorded to [the defendant] by his trial counsel’s failure to seek the suppression of the evidence.” *Id.* at 852. The district court should therefore have concluded, as a matter of law, that the performance of Gardner’s attorneys was deficient.

A. Gardner’s attorneys rendered deficient performance by failing to inform him of the *Simmons* rule.

1. The attorneys’ failure to inform him of the *Simmons* rule was unreasonable.

Gardner’s attorneys refused to file a motion to suppress because Gardner refused to admit possession of the gun. Competent attorneys would have overcome that problem by relying on *Simmons*. As the Supreme Court recognized in *Simmons*, “[i]t seems obvious that a defendant,” believing “that his testimony may be admissible against him at trial,” may “sometimes be deterred from presenting the testimonial proof of standing necessary to assert a Fourth Amendment claim.” 390 U.S. at 392–93. The Court therefore held that “when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt.” *Id.* at 394; *see also Johnson*,

604 F.3d at 1021. But this immunity has meaning only if the defendant is told about the rule, and thus is no longer “deterred.”

That is the step Gardner’s attorneys missed. As the government conceded in response to Gardner’s § 2255 motion, Collins “did not inform [Gardner] that admissions made for purposes of a motion to suppress cannot be used at trial.” SA219 n.3. Neither, according to Gardner’s affidavit, had Rodriguez. See SA202 (describing Gardner’s lack of knowledge). Their oversight snatched defeat from the jaws of victory, forfeiting “a compelling ground for excluding evidence essential to convict [their] client.” *Owens*, 387 F.3d at 608.

This Court has previously held that attorneys render deficient performance by disregarding the *Simmons* rule. In *Owens*, the defendant’s theory “at trial was going to be that he had no connection with the house” where drugs were found. 387 F.3d at 608. His attorney, believing that the defense’s theory must remain consistent throughout, declined to argue that it was his house that was searched, thus depriving the defendant of Fourth Amendment standing. This Court found deficient performance because the lawyer “[a]pparently * * * was not familiar with the *Simmons* rule; he should have been.” *Id.* at 609. Likewise, in *Johnson*, the Court explained that such ignorance is “not a proper basis on which to forego [a] motion to suppress.” 604 F.3d at 1021.

Whether or not Collins and Rodriguez had heard of *Simmons* themselves, they left their client in the dark. *Cf. United States v. Streater*, 70 F.3d 1314, 1318–23 (D.C. Cir. 1995) (finding ineffective assistance where counsel misinformed his client that any suppression testimony could be used at trial). “The right to counsel is intended to place a criminal defendant in the approximate position that he would occupy if he were learned in the law and could thus defend himself effectively.” *Owens*, 387 F.3d at 610. Had Gardner “been learned in the law[,] he would have admitted” possession of the gun, “gotten the evidence * * * suppressed, and been acquitted because there was negligible evidence of his guilt other than what was found in the search.” *Id.*; *see also* SA202.

Like most defendants, Gardner was not learned in the law, which is why the Constitution entitled him to an attorney who was. But neither of his two attorneys provided him with this crucial—and far from obvious—advice. Their performance was therefore deficient.

2. *The district court erred by rejecting Gardner’s Simmons claim.*

The district court recognized that Gardner’s claim of ineffective assistance, based on his attorneys’ failure to inform him of the *Simmons* rule,

“would succeed—and merit a hearing”—if adequately supported. A4.⁴ It nonetheless rejected Gardner’s claim, apparently for three reasons: that Gardner lacked evidence to support his claim; that he was estopped by his previous denial of possession; and that his attorneys may have had other reasons for their actions. None of these grounds has merit.

a. Gardner’s claim was adequately supported.

Gardner alleged below that his attorneys had not told him of the *Simmons* rule. The district court incorrectly concluded that Gardner lacked evidence to support this claim. Citing two paragraphs of Collins’s affidavit, the court suggested that Gardner’s “trial counsel’s affidavit does not support Gardner’s testimony.” A4. But as the government itself recognized, Gardner “alleges that counsel did not inform him about the *Simmons* rule, and counsel confirms that this is true.” SA221 (emphasis added). Collins’s affidavit states that he has no recollection of informing Gardner about the *Simmons* rule. SA224. There is simply no contradiction between Collins’s account and Gardner’s.

The court also stated that “the record refutes [Gardner’s affidavit]” (A4), citing the page of his *pro se* suppression motion that “dispute[d]” the is-

⁴ While Gardner raised the *Simmons* issue most clearly in his § 2255 affidavit, rather than in the body of his petition, the issue was addressed by both the government and the district court, and thus is properly before this Court for its review. See *Bailey v. Int’l Bhd. of Boilermakers, Local 374*, 175 F.3d 526, 529–30 (7th Cir. 1999).

sue of his guilt (SA38). But that disclaimer is consistent with, not in contradiction to, Gardner's explanation that he believed he had to preserve his plea of not guilty. In any case, the relevant factual question is not whether Gardner possessed the gun—he swears that he did, the government argued that he did, and the jury's verdict conclusively establishes that he did—but whether his attorneys properly informed him of the *Simmons* rule.

Finally, the court described Gardner's statements as "bare, unsubstantiated [and] thoroughly self-serving." A4 (alteration in original; internal quotation marks omitted). Gardner's sworn statements are hardly unsubstantiated; they have already been confirmed in part by Collins, and they are capable of further confirmation by subpoenas to the residents of Apartment 407. (Penalizing Gardner for not obtaining their statements already would be Kafkaesque; he has no access to compulsory process until *after* a court permits discovery, and need not present material that is outside his "ability to have personal knowledge." *Lafuente*, 617 F.3d at 946.) As to being "self-serving," a post-conviction petitioner's "self-interest in testifying about matters for which he or she has direct knowledge goes to the weight and credibility of the testimony, not to its admissibility." *Dalton v. Battaglia*, 402 F.3d 729, 735 (7th Cir. 2005). This Court has "repeatedly stated that the record may include a so-called 'self-serving' affidavit provided that it is based on

personal knowledge” (*id.*), and also that a post-conviction petitioner’s “affidavit * * * alone may be sufficient” for relief (*Lafuente*, 617 F.3d at 946).

b. Gardner was not estopped from asserting his claim by any prior statement to the district court.

In rejecting Gardner’s submission as contrary to the record, the district court’s implicit reasoning seems to be—as the government argued below (SA219–20)—that Gardner is estopped by his previous disclaimer of guilt. In other words, having denied possession before trial, he will not be heard to admit possession now.

That reasoning is deeply flawed. Gardner’s disclaimer was by no means an unequivocal denial that he possessed the gun. Even if it had been, that unsworn statement would not trump his current sworn affidavit. Nor would it constitute a binding judicial admission that would prevent Gardner from asserting the contrary today.

i. To start with, Gardner never unequivocally denied to the district court that he possessed the gun. His statement in the *pro se* motion merely avoided an admission of guilt. In a parenthetical on the third page of his motion, Gardner stated that he “disputes that he was actually carrying a gun, or that the officer retrieved a gun from his person.” SA38. That is an accurate description of Gardner’s litigating position at the time, based on his plea of “not guilty.” It does not present any alternative account of the facts, much

less explain where the gun came from. It is a limitation on the scope of his admissions, not an admission itself. While the statement perhaps “could be read differently [to] infer an inconsistency” with his present allegations, “the mere necessity of making that inference confirms that the inconsistency is not inherent.” *Flannery v. RIAA*, 354 F.3d 632, 640 (7th Cir. 2004).

This Court is “not limited to the district court’s characterizations of the pleadings before it.” *McGee v. Bartow*, 593 F.3d 556, 567 (7th Cir. 2010). There is no reason to characterize this record as contradicting Gardner’s current position. As this Court instructed in *Robinson v. Fairman*, 704 F.2d 368 (7th Cir. 1983), “since petitioner drafted” the motion “without the aid of counsel, we cannot with assurance treat his remark * * * as a conclusive admission,” as it “is not beyond an explanation that might preclude” Gardner’s success. *Id.* at 372. Nor did Gardner make any other statement in the district court that unequivocally denied possession.⁵

ii. Even an unequivocal but unsworn denial would not prevent Gardner from arguing the contrary in this Court. In suggesting that Gardner was

⁵ In responding to the government’s forfeiture motion, Gardner repeatedly denied *owning* the weapon (*e.g.*, SA79, 124–26), but that of course is different from merely possessing it. Likewise, when Gardner described Collins’s requested stipulation at the pre-trial conference by saying, “I ain’t never seen the weapon, but that I had a weapon” (SA72), in context his statement may well refer to the strangeness, for a defendant unaware of the *Simmons* rule, of admitting the crime while continuing to plead not guilty. In any case, none of these statements constituted an unequivocal denial of possession, nor would they trump his present statements under oath.

estopped, the district court and the government relied on cases addressing guilty pleas, which bind defendants in post-conviction proceedings because they are entered formally and under oath. *See, e.g., Nunez v. United States*, 495 F.3d 544, 546 (7th Cir. 2007) (preventing defendants from “contradicting statements freely made under oath”); *vacated on other grounds*, 554 U.S. 911 (2008); *United States v. Stewart*, 198 F.3d 984, 986 (7th Cir. 1999) (forbidding arguments that “contradict[] * * * a prior sworn statement”); *see also United States v. Peterson*, 414 F.3d 825, 827 (7th Cir. 2005) (“inconsistent declarations under oath”); *United States v. Ellison*, 835 F.2d 687, 693 (7th Cir. 1987) (“voluntary responses made by a defendant under oath”). But as the government recognized below, “Defendant’s motion to suppress was not sworn.” SA220 n.4.⁶

Gardner’s § 2255 motion, however, *was* sworn under penalty of perjury. SA188. The accompanying affidavit may not be rejected as a “sham” unless it contradicts “prior statements that were made under oath.” *Bank of Illinois v. Allied Signal Safety Restraint Sys.*, 75 F.3d 1162, 1169 (7th Cir. 1996). To retract a prior statement “not under oath,” Gardner needs only “a good explanation” (*Higgins v. Mississippi*, 217 F.3d 951, 955 (7th Cir. 2000)), which is

⁶ Counsel have been unable to locate a copy of the last page of Gardner’s *pro se* suppression motion, which is missing from the copy in the district court’s PACER record as well as that court’s archived paper record. But the government, which would have been served with the motion before trial, agrees that it was not sworn.

amply provided by his affidavit and his ignorance of the *Simmons* rule. To treat Gardner's unsworn statement as equivalent to a formal declaration under oath would endorse what this Court firmly rejected in *Stewart*—that sworn and unsworn statements carry the same weight, and that “an oath to tell the truth means nothing.” 198 F.3d at 987.

iii. Nor can Gardner's unsworn statement be construed as a binding judicial admission. Such admissions are formal statements that “have the effect of withdrawing a fact from contention” between the parties. *Keller v. United States*, 58 F.3d 1194, 1198 n.8 (7th Cir. 1995) (internal quotation marks omitted). Gardner's statement did not have this effect: the government continued to argue that he *did* possess the gun. Unlike a judicial admission, an “evidentiary admission, or prior inconsistent statement, * * * does not bind the witness”; an “opposing party can use it to try to discredit the witness's testimony, but the witness may be able to explain it away.” *Seshadri v. Kasraian*, 130 F.3d 798, 801 (7th Cir. 1997).

At most, Gardner's statement in his *pro se* motion is an evidentiary admission and would not be binding. “[S]tatements in superseded or withdrawn pleadings constitute evidentiary, as opposed to judicial, admissions, which may be controverted or explained by the party.” *Flannery*, 354 F.3d at 640 (internal quotation marks omitted); *see also Sullivan v. William A. Randolph, Inc.*, 504 F.3d 665, 669 (7th Cir. 2007). The district court ordered

Gardner's *pro se* motion stricken from the record (SA60), which had the effect of withdrawing the pleading. And had competent counsel filed a superseding motion to suppress, any *pro se* admissions necessarily would have "los[t] their binding force" (*Flannery*, 354 F.3d at 640 (internal quotation marks omitted)), leaving the errant statement as just "one more bit of evidence to weigh" in assessing Gardner's credibility in a proper hearing (*Higgins*, 217 F.3d at 954; *accord 188 LLC v. Trinity Indus., Inc.*, 300 F.3d 730, 736 (7th Cir. 2002)). As this Court has recognized, "a false step early in a case does not blot out the opportunity to prevail on a claim that is sound factually and legally." *Moriarty v. Larry G. Lewis Funeral Directors Ltd.*, 150 F.3d 773, 778 (7th Cir. 1998).

c. The district court's alternative explanations for counsel's actions do not support dismissal.

The district court offered two additional hypotheses to justify the conduct of Gardner's attorneys: first, that they reasonably thought the *Simmons* rule was irrelevant to the case, and second, that they sought to protect Gardner from a potential perjury charge. A5. Both theories are entirely speculative, and neither supports dismissal.

i. The court's first theory is that Gardner's attorneys might have believed him not to be guilty. The court construed the record as silent on whether Gardner had actually told them of his guilt. A5. As a result, the at-

torneys may have thought the *Simmons* rule irrelevant, as Gardner would not be testifying to anything in a suppression hearing that could have been used against him at trial. *Id.*

This theory is contrary to the record. Both of Gardner's attorneys had discussed the possibility of a suppression hearing with their client. In fact, both had frequently clashed with Gardner over the very issue of whether he would stipulate to possession. See SA53 (Rodriguez); SA70, 72, 146 (Collins). Any responsible attorney, in demanding such an admission from a lay client, would have had "obvious" reason to explain that the admission could not be used at trial. *Simmons*, 390 U.S. at 392. Rather than reading the § 2255 motion as leaving these questions open, the district court should have "look[ed] beyond the face of the motion to the record," and treated these "unincluded allegations of apparent facts as part of the petition." *Osagiede v. United States*, 543 F.3d 399, 406 (7th Cir. 2008) (internal quotation marks omitted). Its failure to do so was an error of law.

The record is equally inconsistent with the district court's suggestion that Gardner's attorneys had been convinced of his innocence by the statement in his *pro se* motion. A5. As described above, this statement did not represent an unequivocal denial of possession, much less a binding judicial admission. Additionally, Rodriguez's deficient performance necessarily began *before* the *pro se* motion was filed; it was Rodriguez's refusal to file a suppres-

sion motion that prompted Gardner’s amateur attempt. According to Gardner’s affidavit, Rodriguez had not told Gardner about the *Simmons* rule either (SA202); had he done so, Gardner could have avoided any alleged missteps in his *pro se* filing.⁷

Even if Gardner had denied possession of the gun in his *pro se* motion, a “reasonably competent attorney” would not have accepted that denial on face value, but would have “attempt[ed] to learn all of the facts of the case.” *Julian v. Bartley*, 495 F.3d 487, 495 (7th Cir. 2007). “[A] lawyer owes his client a duty to make reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary, and a failure to investigate can certainly constitute ineffective assistance.” *Adams v. Bertrand*, 453 F.3d 428, 436 (7th Cir. 2006) (internal quotation marks omitted). Two police officers had reported finding the gun on Gardner, and it was his word against theirs. Given this evidence, Gardner’s attorneys should have at least considered the possibility that their client might be guilty.

⁷ Gardner’s petition does not clearly distinguish between allegations of ineffective assistance by Rodriguez and by Collins—he complains, for example, of “counsel’s failure to file a suppression motion, or even [to] assist Gardner with his ‘pro se’ version.” SA195. But the arguments in the petition were all “part of the same basic * * * challenge, and both elements [of his ineffective assistance claim] were part of his submissions in * * * the district court.” *McGee*, 593 F.3d at 566. A court “should be willing to construe more liberally a *pro se* litigant’s claims than those of a counseled litigant” (*Byers v. Basinger*, 610 F.3d 980, 986 (7th Cir. 2010)), and “can hardly demand of a layman and pauper who draws his petition behind prison walls the skill of one trained in the law” (*Osagiede*, 543 F.3d at 405 (internal quotation marks omitted)).

By speculating on potential explanations, the district court also misallocated the burden of proof. A defendant who seeks an evidentiary hearing on a § 2255 motion need not preemptively rule out every possible explanation for counsel's errors. Instead, "[i]neffective assistance claims generally require an evidentiary hearing if the record contains insufficient facts to explain counsel's actions as tactical." *Osagiede*, 543 F.3d at 412. At the pleading stage, a § 2255 petitioner's allegations are usually untested. *After* a hearing, the court may find that they are "bogus," or that "the lawyer[s] * * * had strategic reasons for [their actions] even if [the defendant's] assertions are true." *Duarte v. United States*, 81 F.3d 75, 77 (7th Cir. 1996). But "for current purposes we must assume that [the defendant's] narration is factual, and the existence of other reasons remains to be determined." *Id.* Here, "[t]he record is unclear, at best," as to any alternative explanations, and "[a]n evidentiary hearing must therefore be held." *Matheney v. Anderson*, 253 F.3d 1025, 1040 (7th Cir. 2001).

Were any additional allegations needed, moreover, the district court should have afforded Gardner leave to amend. "Traditional federal practice, recognizing that pro se petitions are not skillfully drawn pleadings, gives such petitions a liberal construction and allows the petitioner to amend or explain the petition rather than dismiss it out of hand." *Robinson*, 704 F.2d at 372. In that case, as the petition "certainly provides a sufficient statement

of [Gardner's] allegation to permit further evaluation,” the “appropriate course” for this Court would be “to vacate the judgment * * * to afford the petitioner an adequate opportunity to submit * * * a supplemental affidavit.” *Kafo v. United States*, 467 F.3d 1063, 1071 (7th Cir. 2006); *accord Dellenbach v. Hanks*, 76 F.3d 820, 823 (7th Cir. 1996).

ii. The district court also suggested that, had Gardner testified at trial, any contrary statements at a suppression hearing could have been used for impeachment or to enhance his sentence. A5. The implication is presumably that Collins acted strategically, refusing to file a suppression motion in order to protect Gardner from the consequences of false trial testimony.

This theory, like the previous one, is contradicted by the record. As Collins told the court during the pre-trial conference, Gardner had told him “on numerous occasions” that he “ha[d] no intention” to testify at trial. *See* SA76. And as the court recognized at sentencing, the true reason for Collins’s failure to file the motion was his erroneous view of the law. *See* SA70. The idea that Collins’s actions were nonetheless intended to protect Gardner’s ability to testify is fanciful—especially given that Gardner *did not in fact* testify, even without any danger of impeachment and without any other witnesses appearing for the defense.

Moreover, the district court’s rationale is wholly speculative. Collins did not put forward any such explanation in his government-offered affidavit.

See SA224. Even if he had, “the record simply is not adequate to permit the district court to make th[is] determination” without an evidentiary hearing. *Bruce v. United States*, 256 F.3d 592, 598 (7th Cir. 2001). As Gardner’s only hope of a defense was to suppress the evidence, “defense counsel’s decision to forgo” a suppression motion “cannot be considered, without some factual basis, a tactical choice entitled to deference.” *Id.* at 599.

Finally, even if this supposed concern for Gardner’s future testimony were a reason to dissuade Gardner from filing a motion to suppress, it would not have been a reason for Collins or Rodriguez *not to tell* Gardner about the *Simmons* rule in the first place. Counsel do not render effective assistance by strategically withholding critical information from their clients. Gardner should not be denied an evidentiary hearing on the mere possibility that his counsel’s failures were strategic.

B. Gardner’s attorneys’ refusal to file a suppression motion was based on a misapprehension of law.

This Court has “repeatedly recognized” that a “decision of trial counsel based on a misapprehension of law may constitute objectively unreasonable performance.” *Johnson*, 604 F.3d at 1019. A criminal defense attorney has a “duty to know the applicable law, at least when it matters to his client’s defense.” *Osagiede*, 543 F.3d at 408 n.4. Thus, to show deficient performance, “it is enough [to show] that based on a misapprehension of the applicable law,

[the defendant's] attorney chose not to file a motion that could have been dispositive of the case.” *Johnson*, 604 F.3d at 1020.

The refusal of Gardner’s attorneys to move to suppress the testimony of the police and the gun found in Gardner’s pocket was based on a misapprehension of law. Both attorneys believed, in the words of the district court, that “you cannot file a motion to suppress an item taken from you while at the same time denying that the item was taken from you.” SA70. That is incorrect. *Any* evidence “obtained as a result of an illegal arrest is the fruit of the poisonous tree,” and such evidence “must be excluded unless the government can show that it was obtained as a result not of the illegality, but rather by means sufficiently distinguishable to be purged of the primary taint.” *United States v. Swift*, 220 F.3d 502, 507 (7th Cir. 2000) (quoting *Wong Sun v. United States*, 371 U.S. 471, 488 (1963)). Here, the government argued—and would have had to argue in any suppression hearing—that the gun was indeed found as a result of the search. If the district court agreed, it should have considered whether the search was lawful; if not, it should have acquitted Gardner *sua sponte*. Gardner’s refusal to admit possession did not prevent him from challenging the unlawful search.

In proceedings below, two theories were attributed to Gardner’s attorneys to support their decision. The first, adopted by the district court (*see* A4), was that if Gardner “had no possessory interest in the * * * thing he’s

seeking to suppress,” then “he lack[ed] standing” for a Fourth Amendment challenge (SA147). But under this Court’s case law, Gardner has standing to challenge the stop and search regardless of whether he claims any possessory interest in the objects found. The second theory, adopted by the government (*see* SA218), was that if Gardner did not admit possession of the gun, then he could not argue that “the gun was * * * the fruit of the search,” and thus “suppression of the gun was not an available remedy” (A2). However, Gardner had the right to suppress any evidence that the *court* found to be a fruit of the search, regardless whether *he* had admitted possession or not.

“Because the decision not to pursue the Fourth Amendment challenge in a motion to suppress” was, on the undisputed record, “based upon a misunderstanding of the applicable law and not based on a reasonable trial strategy,” Gardner’s “trial counsel’s performance was deficient under the Sixth Amendment.” *Johnson*, 604 F.3d at 1021.

1. Gardner could challenge the unlawful search without asserting a possessory interest in the gun.

The district court held that Gardner’s claim was a “nonstarter” because he failed to assert a possessory interest in the property seized. A4. This argument overlooks the fact that Gardner challenged the seizure and search of his *person*, not of his property, and thus had Fourth Amendment standing to raise his challenge. It is also contradicted by this Court’s case law, which re-

quires only an expectation of privacy in the area searched, not a possessory interest in the objects seized. Furthermore, the district court's reasoning is not supported by the single (out-of-circuit) authority on which it relied, and is in fact contradicted by other courts of appeals.

a. The district court defined a seizure, as did the Supreme Court in *Soldal*, as “some meaningful interference with an individual’s possessory interests in [his] property.” A4 (alteration in original; quoting *Soldal*, 506 U.S. at 61). Because Gardner’s *pro se* motion had “explicitly disclaimed a possessory interest in the gun,” the court concluded that no Fourth Amendment seizure had occurred. *Id.*

This argument fails on its own terms. *Soldal* held that the Fourth Amendment protects property even “where neither privacy nor liberty [is] at stake.” 506 U.S. at 62. But it never said that the Fourth Amendment fails to protect *people* where privacy and liberty *are* at stake. *See id.* (“the Amendment protects property *as well as privacy*” (emphasis added)). The violation asserted by Gardner was not the seizure of the gun, but of his person: he was stopped by the police without cause. And his *pro se* motion challenged not only a seizure, but also a search, namely Officer White’s unjustified pat-down of his jacket. Gardner had every right to challenge this search and this seizure as unlawful.

The district court appears to have relied on the doctrine of Fourth Amendment standing, under which “[a] criminal defendant * * * can only claim the benefits of the exclusionary rule if his own Fourth Amendment rights have been violated.” *United States v. Amaral-Estrada*, 509 F.3d 820, 826 (7th Cir. 2007). Because defendants “who object[] to the search of a particular area bear[] the burden of proving a legitimate expectation of privacy in the area searched” (*United States v. Mendoza*, 438 F.3d 792, 795 (7th Cir. 2006)), they occasionally must admit their connections to the particular place or thing in order to prove an invasion of their own rights as opposed to someone else’s. For example, one may legally “possess” contraband that is located in another’s house (*United States v. Salvucci*, 448 U.S. 83, 95 (1980); *Owens*, 387 F.3d at 608), another’s car (*United States v. Peters*, 791 F.2d 1270, 1280–82 (7th Cir. 1986), *superseded on other grounds by United States v. Guerrero*, 894 F.2d 261, 267 (7th Cir. 1990)), another’s briefcase (*United States v. Rush*, 890 F.2d 45, 48 (7th Cir. 1989)), or another’s backpack (*Carlisle*, 614 F.3d at 759–60), without having a reasonable expectation of privacy in those places, and without having Fourth Amendment standing if those places are searched.

But no one disputes that this case is about Gardner’s Fourth Amendment rights, and not anyone else’s. In fact, the government has not disputed that Gardner had a subjectively and objectively reasonable expectation of

privacy in the pocket of the jacket that he was wearing when searched by police. As the Supreme Court explained in *Terry*, “there can be no question” that an officer—here, Officer White—“‘seized’ petitioner and subjected him to a ‘search’ when [the officer] took hold of him and patted down the outer surfaces of his clothing.” 392 U.S. at 19. “Even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security * * *.” *Id.* at 24–25. Because Gardner’s own Fourth Amendment rights were infringed by the search, he had every right to challenge it as unlawful.

b. The district court’s reasoning is also inconsistent with this Court’s post-*Terry* case law. In *Johnson*, for example, the defendant had borrowed a car in which drugs had been hidden. 604 F.3d at 1018. The government argued that if the defendant did not know that the drugs were in the car and had “no desire to protect them from anyone,” he could not assert a reasonable expectation of privacy or a Fourth Amendment defense. *Id.* at 1021.

As the Court recognized, this is “a false dilemma”: “there is no inherent conflict between a trial defense based on [a] lack of knowledge that the drugs were in the car, and a motion to suppress contending that the search violated his reasonable expectation of privacy in the vehicle.” *Johnson*, 604 F.3d at 1021. The trigger for suppression is a violation of the defendant’s Fourth Amendment rights; so long as the defendant had a reasonable “expectation of

privacy in the area searched,” his rights were implicated, and he had no need to assert a possessory interest in every object found there. *Id.* at 1020. Thus, a defendant “could argue that he possessed such an expectation of privacy even though he was unaware that the drugs had been concealed within the car.” *Id.* at 1021.

The same reasoning applies here. Gardner possessed a reasonable expectation of privacy with regard to the area searched (his pocket). This was enough for standing, as it was *his* Fourth Amendment rights that were infringed when the police patted him down. Thus, he had a right to suppress any evidence arising from that unlawful search, regardless of whether he asserted a possessory interest in the gun.

c. The district court’s theory is not only contrary to this Court’s cases, but is unsupported by any other authority. In support of its decision, the court cited only one case, *United States v. Colón Osorio*, 360 F.3d 48 (1st Cir. 2004). *Colón Osorio*, however, did not even address the merits of the defendant’s Fourth Amendment claim, but turned instead on the defendant’s complete failure to argue the issue. The district court in *Colón Osorio* had denied a suppression motion because the defendant disclaimed a possessory interest in the allegedly planted firearm. The defendant did not appeal that denial. Instead, he filed an appeal regarding a separate, “supplemental” suppression motion that had been denied as untimely. *Id.* at 52. The First Circuit noted

that the defendant's supplemental motion, as well as his appellate argument, had "failed to address" the reasoning of the district court's ruling. *Id.* It therefore left the district court's timeliness ruling "undisturbed," even though the lower court "should have addressed [the] merits." *Id.* Because the First Circuit did not address the lower court's rationale any more than the defendant had, *Colón Osorio* provides no support for the district court's theory here.

d. The district court's theory has also been rejected by other courts of appeals. In *Streater*, the D.C. Circuit addressed facts very similar to those in *Johnson*: a defendant challenged the search of his car, but wanted to disclaim knowledge at trial of the drugs found inside. *See* 70 F.3d at 1319. The court held that "trial counsel misunderstood the applicable Fourth Amendment law" and had rendered deficient performance by telling the defendant that he "had to admit knowledge of the drugs in the car in order to establish standing to move to suppress them." *Id.* at 1321. The court reasoned that the defendant "had a reasonable expectation of privacy in the car, which gave him Fourth Amendment standing regardless of [whether he had] a possessory interest in the drugs." *Id.*

Similarly, in *United States v. Bagley*, 772 F.2d 482 (9th Cir. 1985), the defendant's trial theory was that he had previously given away the getaway car and so could not have driven it. This theory, the Ninth Circuit held, did

not prevent him from challenging a search of the car before trial, because “[a] mere *offer of proof* by the defendant that he is not the owner or possessor of a car does not establish the fact of ownership or possession” for Fourth Amendment purposes. *Id.* at 489 (emphasis added). The court therefore “reject[ed] the government’s argument” that the defendant’s “trial strategy vitiates his expectation of privacy in the automobile.” *Id.* Given that “the jury implicitly found that [the defendant] was in possession of the getaway car on the day of the robbery,” the defendant had every “right to raise constitutional errors on appeal which are consistent with the jury’s factual determinations during the trial.” *Id.*

As explained above, Gardner’s statement in his *pro se* motion was not an unequivocal denial that he had ever possessed the gun. But even if it had been, such an “offer of proof” did not prevent him from asserting his Fourth Amendment rights.

2. *Gardner had the right to exclude the fruits of the search without admitting possession.*

In opposing Gardner’s § 2255 motion, the government did not adopt the district court’s possessory-interest theory. Instead, the government argued that Gardner could not deny “possessing the gun and still seek to have it suppressed as the fruit of an unlawful search of his person.” SA218. On the government’s reading of Gardner’s *pro se* motion to suppress, “the discovery

of the gun was not the direct or indirect product of the search of his coat pocket, because the gun was not in the coat pocket.” *Id.* Thus, Gardner’s allegations “would not have supported suppression of the evidence.” SA219.

This theory does not fare any better than the district court’s. For one thing, the gun was not the only fruit of the search; Gardner also wanted to suppress the officers’ *testimony*, and the argument for suppressing this evidence is unaffected by his position on the gun. For another, once Gardner had proven at a suppression hearing that the search itself was illegal, the burden would have shifted to the *government* to show that the gun was *not* tainted. To the extent that Gardner bore any initial burden to connect the gun to the search, he did not need to offer an admission or affidavit of his own, but could have introduced evidence supplied by others (such as the police report). Finally, the government’s theory is not only contrary to traditional federal practice, but if adopted would produce absurd consequences, making innocent defendants more likely to be convicted than guilty ones.

a. Gardner did not need to admit possession in order to suppress the officers’ testimony.

By focusing exclusively on whether the gun was a fruit of the search, the government’s theory fails to address the most important fruits of that search: the officers’ testimony. Gardner’s *pro se* motion sought the suppression of “all evidence *and statements* that were subsequent to any alleged pos-

session” of a weapon, arguing that “[s]uch evidence is the fruit of an illegal search and seizure of the defendant.” SA36 (emphasis added). This included the officers’ extensive testimony about what happened during the unlawful search. *See, e.g.*, SR62-2:38–58; SA87–122, 127–34. Had Gardner’s attorneys moved to suppress this testimony, they would have eliminated the sole foundation for introducing the gun.

i. It is black letter law that “testimony as to matters observed during an unlawful invasion” must be “excluded in order to enforce the basic constitutional policies” behind the exclusionary rule. *Wong Sun*, 371 U.S. at 485. As the Court reasoned in *Wong Sun*, “verbal evidence” derived immediately from an unlawful stop “is no less the ‘fruit’ of official illegality than the more common tangible fruits of the unwarranted intrusion.” *Id.* This Court has similarly described as “evidence derived from an illegal seizure” any “in-court testimony representing the ‘fruits’ of earlier events that were, or could have been, the subject of a motion to suppress.” *United States v. Acox*, 595 F.3d 729, 733–34 (7th Cir. 2010).

If the officers lacked reasonable suspicion to stop and search Gardner, then their in-court statements about that stop and search would be “testimony as to matters observed during an unlawful invasion.” *Wong Sun*, 371 U.S. at 485. That testimony was a fruit of the unlawful search and subject to suppression. Whether or not Gardner disputed the *truth* of that testimony—in

particular, whether he was found with a gun—does not matter. The officers’ statements were testimony “as to matters observed” regardless of whether they were also true.

ii. Had Gardner succeeded in suppressing this testimony, he would also have succeeded in excluding the gun. The gun itself bore no fingerprints and thus had no obvious connection to Gardner. *See* SR62-2:106. The only foundation for introducing the gun was the officers’ testimony that they had taken it from Gardner. That testimony was far more crucial to the government’s case than the gun itself; without the testimony, the gun would have been subject to a motion in limine, and the government’s case would have collapsed. Gardner’s counsel thus had every reason to file a motion to suppress, had they not misunderstood the law.⁸

b. Gardner could rely on the government’s evidence to show that the gun was a fruit of the search.

The government’s theory also errs by ignoring the effect of the government’s own evidence in light of the parties’ burdens of proof. When an unlawful search or seizure occurs, it is the government, not the defendant, that

⁸ While Gardner did not call particular attention to the officers’ testimony in his *pro se* § 2255 motion, it is obviously included within his Sixth Amendment and Fourth Amendment claims. “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.” *United States v. Billups*, 536 F.3d 574, 578 (7th Cir. 2008) (quoting *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992)); accord *Bew v. City of Chicago*, 252 F.3d 891, 895–96 (7th Cir. 2001).

“bears the burden of proving that the discovery of the [evidence] was not tainted by the initial illegal conduct.” *Ienco*, 182 F.3d at 528. The defendant does bear an “initial burden of establishing a factual nexus between the illegality and the challenged evidence,” and must point to “specific evidence demonstrating taint”; but the government then has “the ultimate burden of persuasion to show that its evidence is untainted,” and “must prove that the particular evidence or testimony is not the fruit of the poisonous tree.” *Id.* (citing *United States v. Kandik*, 633 F.2d 1334, 1335 (9th Cir. 1980); *United States v. Crouch*, 528 F.2d 625, 629 (7th Cir. 1976)).

Gardner could easily have met his initial burden of showing a factual nexus between the gun and the search, without needing to supply any admission or affidavit of his own. The government had asserted that the gun was found in the search, and Gardner’s attorneys could have supported that assertion with any evidence they liked (such as the police report). *See* Fed. R. Evid. 104(a); *United States v. Matlock*, 415 U.S. 164, 172–73 (1974) (noting that hearsay may be admissible on a motion to suppress). At that point, the burden would have shifted to the government to show—if it chose—that the gun was *not* a fruit of the search. Otherwise, the gun had to be suppressed, regardless of whether Gardner had admitted possession.

While it is uncommon for a defendant to rely on the government’s evidence in this way, it is not unheard of. In *United States v. Singleton*, 987

F.2d 1444 (9th Cir. 1993), for example, the defendant moved to suppress all evidence seized during a warrantless search of a back house. While “one would have expected [him] to show his relationship to the back house and the government to show the opposite,” instead the defendant “tried to show he was not guilty by distancing himself from the critical evidence,” while “the government tried to show [that he] was guilty by connecting him with the critical evidence.” *Id.* at 1446. Thus, “[the defendant’s] evidence tended to prove that he did not have a legitimate expectation of privacy in the back house, while the government’s evidence tended to prove that he did” (*id.*), and both sides “essentially asked the judge to decide the [Fourth Amendment] issue in accordance with the other’s version” (*id.* at 1448).

As the Ninth Circuit concluded, the defendant was *not* estopped from making a Fourth Amendment claim simply because he had not admitted a connection to the house. Instead, “[t]he district court should have examined *all* of the evidence presented at the suppression hearing * * * and determined whether the evidence, regardless of the arguments presented by the parties, established that [the defendant] had carried his burden”—even if that burden were wholly supported by “the government’s evidence.” *Singleton*, 987 F.2d at 1449 (emphasis added). Thus, while “the defendant cannot * * * carry his burden of proof merely by reference to the government’s theory of the case, it is still possible that the government’s *evidence* will turn out to satisfy the de-

fendant's burden.” 6 Wayne R. LaFare, *Search and Seizure* § 11.2(b), at 47 n.57 (4th ed. 2004) (emphasis added; internal quotation marks omitted).

This Court recognized a limitation on this principle in *United States v. Ruth*, 65 F.3d 599 (7th Cir. 1995), noting that the government's evidence rarely will prove a subjective expectation of privacy. *See id.* at 605; *see also United States v. Meyer*, 157 F.3d 1067, 1079–80 (7th Cir. 1998). Here, however, unlike in *Ruth*, *Meyer*, or *Singleton*, there is no dispute as to Gardner's reasonable expectation of privacy in his jacket pocket. The only question is whether the gun was a fruit of the pat-down search of that pocket. That is an objective question and can be proven by external observers just as well as by Gardner himself.

The government's evidence in this case showed that Gardner possessed a gun and that it was found as a result of the contested search. This evidence would have amply discharged Gardner's initial burden—shifting the burden to the government to show, if it chose, that the gun was *not* found in the search. (Had it done so, of course, the government might have defeated the motion to suppress, but opened itself to a motion to acquit.) Gardner thus did not need to make any statement of his own, sworn or unsworn, about the gun's origins. He only needed to prove that the search was unlawful, and to rely on the government's evidence to show that the gun was a fruit of the search. His counsel's failure to make use of this rule, described in a standard

treatise on Fourth Amendment law (*see* LaFave, *supra*), constituted deficient performance.

c. The government's contrary theory departs from traditional practice and produces absurd results.

i. The essence of the government's argument is that Gardner must choose a single theory of defense: either he possessed the gun and can challenge its search, or he did not and must convince the jury of his innocence. That argument departs from traditional federal practice, which permits criminal defendants to make arguments in the alternative. If a defendant may, under *North Carolina v. Alford*, 400 U.S. 25 (1970), "enter a guilty plea while maintaining his innocence" (*Warren v. Richland County Cir. Ct.*, 223 F.3d 454, 456 n.1 (7th Cir. 2000)), may "simultaneously profess his innocence of a drug offense and dispute the amount of drugs allegedly involved" (*Monge v. California*, 524 U.S. 721, 729 (1998)), or may argue that he "was not guilty by reason of insanity or, in the alternative, could be found guilty only of manslaughter" (*United States ex rel. Ross v. Franzen*, 688 F.2d 1181, 1186 (7th Cir. 1982) (*en banc*)), then there is no reason why he may not argue that a search was unlawful and at the same time that the alleged fruits of that search have been falsified. That is how our legal system usually works. *Cf.* Fed. R. Civ. P. 8(d)(3) ("A party may state as many separate claims or defenses as it has, regardless of consistency.").

At least one court of appeals has already rejected an argument very similar to the government's. In *Riley v. Wyrick*, 712 F.2d 382 (8th Cir. 1983), the defendant had moved unsuccessfully before trial to suppress heroin packets on Fourth Amendment grounds. His counsel failed to renew the objection when the drugs were admitted at trial (thus forfeiting his appeal rights) because the defense theory was that police had planted the heroin instead. The Eighth Circuit found that the attorney's tactical decision lacked any "reasonable basis," because the "defense at trial and his suppression motion," though factually contradictory, "were not *legally* inconsistent." *Id.* at 385 (emphasis added). As the court explained, the defendant "was not precluded from challenging the constitutionality of evidence admitted against him simply because he also chose to contest the merits of the government's case." *Id.* The same is true here.

ii. By abandoning the traditional practice, the government's rule would produce absurd consequences. Suppose that the police claimed to have found *five* guns in Gardner's jacket, while he admitted to possessing only one. It would be laughable for a district court, having found the search unlawful, to exclude only one of the five, but then allow the other four into evidence because Gardner had not yet admitted to possessing them. All five guns would equally be fruits of the unlawful search, if they were evidence at all.

The government's rule would also place an extraordinary burden on *innocent* defendants whose Fourth Amendment rights have been violated. Suppose that police burst into a house without a warrant and planted evidence of drug trafficking. On the government's view, the homeowner could not maintain his innocence and at the same time invoke the exclusionary rule—even if the government concedes that the entry was unlawful. *Cf.* SA213 (“Whether or not the search of defendant's pockets was lawful, * * * suppression of the gun is not an available remedy.”). Thus, the evidence will go before the jury, and the innocent defendant (if he is not believed) might go to prison. But if the police had burst in and found drugs that actually belonged to the defendant, then that guilty defendant could challenge the unlawful search and be set free. Under this absurd system, an innocent defendant seeking the protections of the Fourth Amendment would be sorely tempted to make a false admission of guilt—even though it might be used for impeachment at trial, or as admissible evidence elsewhere (such as in a child custody dispute or related civil litigation).

The government bears a heavy burden to show that the Constitution shares this bizarre preference for the guilty over the innocent. Yet below the government offered not a single authority to support this view. *See* SA217–19. To the extent that Gardner's attorneys shared this incorrect view, their actions were based on a misapprehension of law.

II. Gardner Is Entitled To An Evidentiary Hearing To Demonstrate Prejudice.

As demonstrated above, the district court should have concluded, based on the undisputed record, that Gardner's attorneys offered deficient performance. Gardner is thus entitled to relief if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Johnson*, 604 F.3d at 1019 (quoting *Strickland*, 466 U.S. at 694). Gardner could not have corrected his attorneys' trial errors on appeal. And had his attorneys filed a proper motion to suppress, Gardner surely would have been acquitted—so long as the motion succeeded. Because the motion's merit turns on contested facts, Gardner was entitled to an evidentiary hearing.

A. Contrary to the government's argument below (SA217), Gardner could not have corrected his trial counsel's errors on appeal. The district court did not merely deny his *pro se* suppression motion, but struck it from the docket (SA60); and it rejected his motion for new trial on multiple procedural grounds, including that it had been filed *pro se*, had been unsigned, and had not been served on the government (SA144–47). Those decisions could not have been reversed on appeal, as they fell within the "district court's wide discretion to reject *pro se* submissions by defendants represented by counsel."

United States v. Patterson, 576 F.3d 431, 437 (7th Cir. 2009).⁹ Gardner’s trial attorneys had one chance to exclude this evidence, and they “fumbled” it. *Owens*, 387 F.3d at 607.

In any case, Gardner’s appointed attorney failed to raise any such argument in his initial appeal, and Gardner could not have raised it himself after the remand for resentencing. *See United States v. Swanson*, 483 F.3d 509, 515 (7th Cir. 2007). Below, Gardner raised a claim of ineffective appellate assistance, which this Court did not include in the COA. Because the trial counsel’s errors were beyond correction on appeal, Gardner does not seek to amend the COA. But if the government were right that those errors could have been corrected, then Gardner’s appellate counsel was necessarily ineffective. Gardner’s Fourth Amendment claims had the potential to free him outright, which made them “clearly stronger” than the arguments for resentencing that appellate counsel did present; the Fourth Amendment issue had dominated trial proceedings and was “significant and obvious”; and assuming that his arguments could have been raised, there would have been well more than a “reasonable probability” that Gardner would have secured a vacatur and a suppression hearing. *Stallings v. United States*, 536 F.3d 624, 627 (7th Cir. 2008) (internal quotation marks omitted).

⁹ Gardner’s post-trial motion was also flawed because any suppression motions were due before trial. Fed. R. Crim. P. 12(b)(3)(C); *see Acox*, 595 F.3d at 730.

B. As it was, the errors of Gardner’s trial counsel deprived Gardner of his only “opportunity to present his Fourth Amendment defense at his trial”—a defense that was potentially dispositive. *Owens*, 387 F.3d at 609. The only evidence that Gardner possessed a gun was the gun itself and the statements of the police; “[t]he record does not reflect what evidence could have been used to convict” Gardner had the gun and those statements been excluded. *Gentry*, 597 F.3d at 852.¹⁰ On this record, “[i]t is clear that a successful motion to suppress would have destroyed the case against” Gardner. *Johnson*, 604 F.3d at 1022.

C. Whether Gardner was prejudiced thus depends on “whether [his] motion would have been successful.” *Johnson*, 604 F.3d at 1022. Because this issue depends on contested facts, Gardner is entitled to an evidentiary hearing.

A § 2255 petitioner is entitled to an evidentiary hearing “[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.” § 2255(b). Claims of ineffective assistance “often require evidentiary hearings because they allege facts that the record does

¹⁰ A motion to suppress the testimony and the gun would also have suppressed the officers’ account of Gardner’s alleged post-search statements, after being confronted with the gun, that he had found it in the bushes. *See* SA93; *see also United States v. Fields*, 371 F.3d 910, 916 (7th Cir. 2004) (“A confession that . . . was influenced by unlawfully seized evidence, must be suppressed unless intervening events demonstrate that the illegality did not cause the confession.” (internal quotation marks omitted)).

not show” (*Sandoval*, 574 F.3d at 851)—for instance, “if the record contains insufficient facts to explain counsel’s actions as tactical, or if further factual development might demonstrate prejudice” (*Osagiede*, 543 F.3d at 408 (citation omitted)).

Here, the police justified their stop and search of Gardner on the ground that Gardner told them he had come from Apartment 407. “At this stage of the process,” a court “cannot assume that” Gardner actually made such a statement. *Johnson*, 604 F.3d at 1022. Gardner “asserts that he did not * * *, and an evidentiary hearing is necessary to resolve that issue.” *Id.* At such a hearing, Gardner could rebut the officers’ statements on the stand, and could corroborate his account by calling the residents of Apartment 407. *Cf. Kimmelman*, 477 U.S. at 390 (approving a remand for an evidentiary hearing where none “ha[d] ever been held on the merits of respondent’s Fourth Amendment claim”).

Below, the government suggested that Gardner could not obtain a hearing on the merits of his Fourth Amendment claim until after his § 2255 motion were granted. *See* SA221. But Gardner’s Sixth Amendment claim has merit only if his Fourth Amendment claim does (*see Gentry*, 597 F.3d at 851; *see also Kimmelman*, 477 U.S. at 375), and the hearing must therefore take place before, not after, a decision on his § 2255 motion.

Because an evidentiary hearing is “necessary to resolve the factual issues that are critical to the analysis of the ineffective assistance claim” (*Johnson*, 604 F.3d at 1022), the district court should not have dismissed Gardner’s § 2255 motion without one.

CONCLUSION

The judgment of the district should be vacated and the case remanded for an evidentiary hearing.

Dated: May 13, 2011

Respectfully submitted,

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ORAL ARGUMENT REQUEST

Pursuant to Circuit Rule 34(f), Gardner respectfully requests oral argument, which will assist the Court in reviewing the judgment below.

STATUTORY ADDENDUM

28 U.S.C. § 2253 provides as follows:

§ 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

* * *

28 U.S.C. § 2255 provides as follows:

§ 2255. Federal custody; remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or

that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(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. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, 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.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the

Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

**CERTIFICATE OF COMPLIANCE—
TYPE-VOLUME LIMITATION**

I certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) and Circuit Rule 32(b) for a brief produced with a proportionally spaced font. This brief was prepared using Microsoft Word 2007 in Century Schoolbook 13-point font (except for footnotes, which are in 12-point font). The length of this brief is 13,969 words, excluding the parts of the brief exempted under Fed. R. App. P. 32(a)(7)(B)(iii).

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**CERTIFICATE OF COMPLIANCE—
APPENDIX MATERIALS**

I certify under Circuit Rule 30(d) that the Required Short Appendix and the Separate Appendix include all materials required by Circuit Rules 30(a) and 30(b).

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CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(d), that on May 13, 2011, this Brief and Required Short Appendix was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

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