

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

**REPLY BRIEF OF PETITIONER-APPELLANT
DERRICK GARDNER**

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INTRODUCTION

Derrick Gardner’s attorneys failed him when they did not tell him about the *Simmons* rule, which would have allowed him to stipulate to possession of the gun for the purposes of the suppression motion without admitting guilt. *Simmons v. United States*, 390 U.S. 377 (1968). They failed him again when, apparently laboring under a misunderstanding of the law, they refused to file a suppression motion on Gardner’s behalf—something they should have done even without securing a stipulation to possession.

Their first blunder was neglecting to inform Gardner of the *Simmons* rule. See Point I.A, *infra*. The government now distances itself from virtually every basis upon which the district court rejected Gardner’s claim that his attorneys’ performance was constitutionally deficient. The government:

- recognizes that trial counsel never informed Gardner of the *Simmons* rule, Gov’t Br. 24-25;
- accepts that the district court’s characterization of Gardner’s § 2255 affidavit as “self-serving” provides no basis for disregarding it, *id.* at 25;
- disavows the “estoppel” argument that it advanced below and concedes that Gardner’s prior protestations of innocence did not preclude him from admitting possession for § 2255 purposes, *id.* at 25-26; and
- does not dispute that the district court’s *post hoc* rationalizations for why trial counsel might have had strategic reasons for not filing a suppression motion have no basis in the record, *id.* at 25.

With these concessions having been made, the government's defense of Gardner's attorneys' failure to inform him of the *Simmons* rule rests entirely on the notion that Gardner's initial refusal to stipulate to possession (in, *e.g.*, his *pro se* suppression motion) means that competent counsel would not have recognized that *Simmons* could be relevant. Gov't Br. 23-24. Not so.

First, the record abundantly justifies the inference that Gardner's attorneys did *not* credulously accept Gardner's refusal to admit that he possessed the gun as meaning that he did not, in fact, possess it. Under these circumstances, any competent lawyer would have recognized that a likely explanation for Gardner's resistance was his belief that admitting possession for purposes of a suppression motion was tantamount to admitting guilt. Instead of addressing Gardner's understandable misconception and explaining that the *Simmons* rule was designed to rescue defendants from this precise dilemma, Gardner's attorneys left him untutored about this important and unobvious-to-a-layperson rule. *See* Point I.A.1, *infra*.

Second, to endorse the government's blanket rule that counsel is always justified in taking at face value the defendant's denial of possession would drain all vitality out of *Simmons*. The entire point of the *Simmons* rule is that "a *defendant*" who believes "that his testimony may be admissible against him at trial" might "be deterred from presenting . . . testimonial proof" of possession. *Simmons*, 390 U.S. at 392-93 (emphasis added). *Counsel*,

however, is expected to know better. Even if Gardner’s attorneys indeed accepted at face value Gardner’s initial refusal to stipulate to possession—and, as discussed above, the record is to the contrary—that would in itself be deficient performance. A moment’s reflection would have made clear that the “there was no gun” narrative was implausible, which should have brought to mind the need to investigate further and inform Gardner about the *Simmons* rule. See Point I.A.2, *infra*.

The performance of Gardner’s attorneys was constitutionally deficient in a second, independent respect. See Point I.B, *infra*. Even if Gardner steadfastly refused to admit possession of the gun, they should have filed a suppression motion anyway, because Gardner had standing to raise a challenge to his unlawful pat-down search on account of his reasonable expectation of privacy in the contents of his pocket.

The government acknowledges that Gardner’s attorneys refused to pursue a suppression motion because they believed that it would have been hopeless as long as Gardner “claimed the firearm was not found on him.” Gov’t Br. 25. But their belief rested on a misunderstanding of Fourth Amendment doctrine—a misunderstanding shared by the district court. Tellingly, the government again declines to defend the central rationale underlying the ruling below. The district court thought that Gardner could not contest his search without admitting possession, construing *Soldal v. Cook County*, 506 U.S. 56

(1992), to mean that the Fourth Amendment does not protect an individuals' privacy interest in his own *person*, unless an interest in *property* is also asserted. A4. As the government now admits, “[i]t is undisputed that [Gardner] had a reasonable expectation of privacy in his person.” Gov’t Br. 31. With “standing” properly off the table, the government’s argumentative cupboard is bare.

The government instead advances a procedural argument about the scope of the Certificate of Appealability (COA) that circuit precedent forecloses. *See* Point I.B.1, *infra*. When, as here, the COA identifies ineffective assistance of counsel as a substantial issue, that is sufficient to bring up all of trial counsel’s actions for review. In any event, the government’s reading of the COA is impossibly strained and ungrammatical. The government’s merits arguments fare no better. *See* Point I.B.2, *infra*. It unleashes a veritable school of red herrings. But none of them squarely addresses our principal contention, which is that competent counsel should have moved to suppress the gun *and* the arresting officers’ statements about it as “fruits” of Gardner’s unlawful search—a motion that could have studiously avoided taking a position on whether the gun was recovered on Gardner’s person.

The decision below should be reversed with directions that the district court hold an evidentiary hearing on the issue of whether Gardner’s attorneys’ deficient performance in these two respects prejudiced him. *See* Point

II, *infra*. If Gardner’s allegations are true, a suppression motion would have been granted, which would have excluded the crucial pieces of evidence on which Gardner was convicted, and Gardner would not now be serving a 15-year mandatory-minimum sentence. The government concedes that if Gardner can show deficient performance, an evidentiary hearing is necessary on the issue of prejudice. Gov’t Br. 33-34.

ARGUMENT

I. The Performance Of Gardner’s Trial Counsel Was Constitutionally Deficient

The representation that Gardner received from his attorneys fell below an “objective standard of reasonableness.” *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Gardner’s trial counsel provided deficient performance in two distinct, but related, respects. First, competent counsel would have advised Gardner that, under *Simmons*, he could admit to possession for purposes of a motion to suppress without having the admission used against him at trial to prove his guilt. Second, competent trial counsel would have filed a motion to suppress regardless of whether Gardner was willing to stipulate to possession.

The government’s answering brief often blurs together these two aspects of ineffective assistance, asserting, for example, that as long as Gardner refused to stipulate to possession of the gun, “the only suppression motion

that could have been filed is one which said nothing about possession.” Gov’t Br. 19; *see also* Gov’t Br. 13, 15, 24. But what of it? Gardner’s first subclaim is not about the viability of a suppression motion that is silent on the subject of possession,¹ but rather whether Gardner’s attorneys unreasonably failed to tell him about the *Simmons* rule. If they had done so, Gardner would have stipulated to possession, and it is a suppression motion taking *that* as a starting point that competent counsel ultimately would have filed.

A. Trial counsel should have informed Gardner about the *Simmons* rule

Gardner’s trial counsel failed to explain that, under *Simmons*, any testimony he provided at a suppression hearing could not later be used against him at trial. That was a grave lapse of professional diligence.

The government’s concessions on appeal significantly narrow the issues now in dispute. The government admits that Gardner’s attorneys never told him about the *Simmons* rule. Gov’t Br. 14; *see also* SA219, 202. The government does not contest Gardner’s sworn statement in his § 2255 affidavit that, if he had known about the *Simmons* rule, he could have truthfully admitted possession of the gun for the purposes of the suppression hearing. SA202; *see also* SA189. The government does not take issue with our argument that

¹ As Section I.B makes clear, such a motion would have been meritorious and resulted in suppression of the unlawful fruits of the search, regardless of whether Gardner admitted possession.

there is no record evidence that Gardner’s trial counsel had strategic reasons for not pursuing a motion to suppress. Gov’t Br. 25. And in recognizing that an evidentiary hearing would be necessary on the issue of prejudice were the Court to find deficient performance, the government concedes that there is at least a reasonable probability that a motion to suppress in which Gardner *admitted* possession and then told *his* version of what happened at the “*Terry* stop” would have been granted by the district court. Gov’t Br. 33-34.²

So the government’s case on appeal boils down to the contention that, in the “absence of an allegation by [Gardner] that he told [trial] counsel he possessed the gun,” Gardner’s attorneys “were under no obligation to advise him regarding *Simmons*.” Gov’t Br. 23. To be sure, Gardner’s *pro se* § 2255 papers do not contain such an allegation. But as in *United States v. Ryan*, 657 F.3d 604 (7th Cir. 2011), the supposed “gaps the government identifies in [Gardner’s] allegations . . . show only that further proceedings would be help-

² The government tepidly suggests that there were “tactical” considerations that made a motion to suppress in which Gardner admitted possession “not a sure-fire winner.” Gov’t Br. 18. Yet the government has offered no evidence of trial counsel’s thinking at the time—and, moreover, there could not have been any legitimate strategic reasons for not telling Gardner about the *Simmons* rule in the first place. See Opening Br. 34-36; *Osagiede v. United States*, 543 F.3d 399, 412 (7th Cir. 2008) (ineffective assistance of counsel claims “generally require an evidentiary hearing if the record contains insufficient facts to explain counsel’s actions as tactical”); *cf.* Gov’t Br. 25. In any event, the relevant question is not whether the motion was a “sure-fire winner,” but rather whether “there is a *reasonable probability* that . . . the result of the proceeding would have been different.” *Johnson v. United States*, 604 F.3d 1016, 1019 (7th Cir. 2010) (quotation marks omitted; emphasis added).

ful, not that [Gardner] has conclusively pleaded himself out of court.” *Id.* at 607. Nothing in the record is inconsistent with the notion that Gardner might in confidence have told his attorneys that he was willing to entertain the possibility of admitting to possession. *See also infra* note 3.

In any event, the “gap” hardly has the significance that the government attributes to it, because even assuming *arguendo* that Gardner never outright told his attorneys that he possessed the gun, they both knew—and at minimum should have known—that there was a significant likelihood that Gardner *in fact* possessed the gun. And, contrary to the government’s contention, that knowledge or constructive knowledge would have made any competent lawyer appreciate the relevance of the *Simmons* rule. *Cf.* Gov’t Br. 15-16. A wealth of record evidence supports the inference that Gardner’s attorneys believed that Gardner possessed the gun. They therefore had every reason to tell him about the *Simmons* rule so as to alleviate his palpable concerns about whether stipulating to possession in the context of a suppression motion would bind him at trial. And even if Gardner’s attorneys somehow took Gardner’s asserted denials of possession at face value, they did so unreasonably because that belief was not based on an adequate investigation, with due cognizance to the *Simmons* rule.

1. The government contends that Gardner’s attorneys understood his refusal to stipulate to possession to be a “specific version of [an] actual in-

nocence” claim. Gov’t Br. 16.³ But one cannot possibly peruse this record and be left with the sense that trial counsel trustingly supposed that there *really* was no gun or that Gardner *really* had been framed. *See* Gov’t Br. 23 (acknowledging that “[n]o doubt [trial counsel] did” “consider[] the possibility that [Gardner] might be guilty”). That contention defies common sense.

To begin with, as the opening brief sets out, Gardner was desperate to have the gun and the officers’ testimony that they recovered it from him suppressed. Opening Br. 7-8, 32. Both of Gardner’s attorneys—first, Sergio Fidel Rodriguez and, later, Gerald J. Collins—clashed with Gardner over that possibility because of Gardner’s refusal to stipulate to possession. Rodriguez refused to file a suppression motion “without a factual affidavit to assert standing [*i.e.*, possession] by [Gardner].” SA53. Collins, too, tried to get Gardner to so stipulate as a condition of filing a motion to suppress. SA72; *see also* SA70,

³ The government cites nothing in the record showing that Gardner insisted to his attorneys that he was actually innocent of possession, so its contention that defense counsel have no obligation to “advise their clients to change their stories in order to take advantage of *Simmons*, Gov’t Br. 18, is a straw-man. In particular, Gardner’s *pro se* suppression motion did not contain an unequivocal denial that he possessed the gun; rather, it merely avoided an admission of guilt. Opening Br. 27-28. And Gardner’s other statements in open court merely denied *owning* the weapon or that the weapon *belonged* to him, which is different from *possessing* it. Opening Br. 28 & n.5 (citing, *inter alia*, SA79, 124-126). At most, Gardner’s *pro se* statements have “muddie[d] the waters.” *Ryan*, 657 F.3d at 607. Even “seemingly contradictory” statements do not, however, “conclusively show that [Gardner] is entitled to no relief.” *Id.* at 606-07 (quotation marks omitted). In any event, the deficient performance of Gardner’s first lawyer necessarily began *before* Gardner’s *pro se* advocacy, since it was that lawyer’s refusal to file a suppression motion that precipitated his motion to withdraw and prompted Gardner’s *pro se* efforts. Opening Br. 32-33.

146. This unrelenting insistence is inexplicable—not to mention a significant breach of professional ethics, *see* Model Rules of Prof'l Conduct R. 3.3(a)(3), 3.4(b)—unless Gardner's attorneys had reason to believe that it was *possible* for Gardner to truthfully stipulate to possession of the gun. Any competent attorney would have recognized the potential and, indeed, "obvious" relevance of the *Simmons* rule in demanding such an admission from Gardner. *See* 390 U.S. at 392. Gardner needed to be informed about his privilege of admitting possession for the limited purposes of the suppression motion.

The conclusion that Gardner's attorneys should have known that *Simmons* was relevant is bolstered by Collins's government-sponsored affidavit submitted in opposition to Gardner's § 2255 petition. Collins stated in his affidavit that 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 (emphasis added). The government says "[h]ow [Gardner] received this warning . . . is not in the record," Gov't Br. 24, but there is no possible interpretation of Collins's statement that clouds what should have been clear indications to Collins that *Simmons* was relevant. If Gardner were entertaining notions of testifying at a suppression hearing and admitting that he possessed the gun,⁴ *Simmons*

⁴ Collins reported that Gardner had told him that he "ha[d] no intention" to testify at trial, SA76, but the record is silent as to whether Gardner communicated those

would obviously have been relevant, because it would mean that his testimony at the suppression hearing (true or false) could not be introduced against him at trial. If Gardner were planning to testify falsely at trial (presumably by denying that he possessed the gun), then the statement would be false only because he *actually* did possess the gun. In that case it would be relevant to tell Gardner that he could admit possession for the purposes of a suppression hearing under the *Simmons* rule. Either way, competent counsel should have told Gardner about *Simmons*.

The government attempts to distinguish this case from *Johnson* and *Owens v. United States*, 387 F.3d 607 (7th Cir. 2004), in which this Court held that attorneys render deficient performance by disregarding the *Simmons* rule. Gov't Br. 15-18. As the opening brief explained, the relevance of these cases does not depend on whether Gardner's attorneys were *themselves* ignorant of *Simmons*. Opening Br. 22-24. Their error was not telling *Gardner* about that rule. After all, the very rationale of *Simmons* is that a lay defendant, believing "that his testimony may be admissible against him at trial," will "sometimes be deterred from presenting the testimonial proof of standing necessary to assert a Fourth Amendment claim." 390 U.S. at 392-93. The immunity that *Simmons* confers as to later use of such statements has mean-

intentions before or after receiving Collins's warning about the possibility of a sentencing enhancement.

ing only if the defendant is informed about the rule, and thus is no longer “deterred” from making them in the first instance.

The government asserts that *Johnson* is distinguishable because Gardner’s attorneys ostensibly “were correct in their advice that a motion to suppress the firearm could not succeed while petitioner denied possessing the firearm.” Gov’t Br. 15. As it turns out, Gardner’s attorneys’ advice was incorrect. See Opening Br. 36-53; *infra* pages 20-25. But more importantly, the government’s purported distinction is a total *non sequitur*. The salience of *Johnson* is that if Gardner’s attorneys had told him about *Simmons*, he would no longer have been “deterred” from stipulating to possession, and trial counsel could have filed an undisputedly viable suppression motion *that so stipulated*. As to *Owens*, the government asserts that the deficiency of counsel there lay in “failing to recognize that it was futile to deny ownership” and that *Owens* does not say that the defendant told his lawyer that the house was his. Gov’t Br. 17. These factual quibbles are minor indeed.⁵ At any rate, *Owens* stands unambiguously for the legal proposition that “[t]he 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,” which includes being

⁵ It might well have been equally “futile” for Gardner to deny ownership. Gardner was up against the testimony of two police officers who testified not only that they found the gun in his possession, but that Gardner himself reportedly stated at the scene that he found the gun in some nearby bushes. SA93.

“familiar with the *Simmons* rule.” 387 F.3d at 609-10. If Gardner had “been learned in the law[,] he would have admitted” possession of the gun and “got-ten the evidence . . . suppressed.” *Id.* at 610. This is not just speculation: Gardner told the district court these “essential fact[s],” *Osagiede v. United States*, 543 F.3d 399, 406 (7th Cir. 2008), and is entitled, at the very least, to further develop them at an evidentiary hearing, *Ryan*, 657 F.3d at 606. See SA194, 202. As to this argument, the government has no response.

The *Simmons* rule rescues the defendant from the “intolerable” dilemma “that one constitutional right [*i.e.*, the right against self-incrimination] should have to be surrendered in order to assert another [*i.e.*, the Fourth Amendment right against unlawful searches and seizures].” 390 U.S. at 394. It is “obvious,” the Supreme Court reasoned, “that a defendant who knows that his testimony may be admissible against him at trial” might be “de-terred” from admitting possession in order to get evidence excluded. *Id.* at 392. It is just as “obvious” that a defendant who *thinks* that his testimony will be treated as admission of guilt at trial will be equally “deterred.” Fourth Amendment law is filled with many such “nuance[s]” that are “significant to skilled criminal law practitioners, but not to laymen.” See *Nell v. James*, 811 F.2d 100, 105 (2d Cir. 1987).

If *Simmons* means anything at all, it must be that when (as here) coun-
sel has reason to believe that a client hesitates to stipulate to possession for

purposes of a suppression motion (perhaps out of the fear that this admission would be used against him or her at trial), competent counsel will inform the client about the *Simmons* rule. It was objectively unreasonable for Gardner's attorneys not to do so.

2. Even assuming *arguendo* that Gardner had initially unequivocally denied to his attorneys that he possessed the gun, they were not entitled to accept that statement at face value. Opening Br. 33. Gardner's simultaneous refusal to admit that he possessed the gun and his equally adamant desire to suppress it should have tipped them off that something was potentially amiss. Moreover, there was some evidence that Gardner's story had shifted after his initial arrest. See SA93 (testimony by one of the officers that Gardner "said he got [the gun in the bushes]"). And the record suggests that trial counsel had concerns about Gardner's veracity. SA224.

In the face of these inconsistencies and doubts, any "reasonably competent attorney" would have "attempt[ed] to learn all of the facts of the case" by conducting a reasonable investigation. *Julian v. Bartley*, 495 F.3d 487, 495 (7th Cir. 2007); *Phillips v. Woodford*, 267 F.3d 966, 978 (9th Cir. 2001) (trial counsel "ineffective for accepting [the defendant's] implausible story rather than conducting a further investigation"); cf. *Rompilla v. Beard*, 545 U.S. 374, 391 (2005) (trial counsel ineffective because further investigation would have "destroyed the benign conception of [the defendant's] upbringing and

mental capacity defense counsel had formed from talking with [the defendant] himself”).⁶

Given the “nuances” and complexities of Fourth Amendment law, “any lawyer worth his or her salt” would have “inquire[d] into the *facts* underlying,” *see Nell*, 811 F.2d at 105 & n.2, any asserted denial of possession on Gardner’s part.⁷ In other words, competent counsel would not have been content to rest on a bare denial of possession. The Supreme Court recognized that a defendant who believes “that his testimony may be admissible against him at trial” might “be deterred from presenting . . . testimonial proof” of possession. *Simmons*, 390 U.S. at 392. It is not asking much to expect competent

⁶ This Court has repeatedly held that a failure to adequately investigate the facts of the case can constitute ineffective assistance of counsel. *See, e.g., Raygoza v. Hulick*, 474 F.3d 958, 965 (7th Cir. 2007) (failure to conduct any meaningful investigation fell short of “constitutionally adequate representation”); *Adams v. Bertrand*, 453 F.3d 428, 436 (7th Cir. 2006) (“[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.”) (internal quotation marks omitted); *Washington v. Smith*, 219 F.3d 620, 629-32 (7th Cir. 2000); *Williams v. Washington*, 59 F.3d 673, 679 (7th Cir. 1995).

⁷ In *Nell*, the defendant’s lawyer had failed to argue that the defendant had a “property or possessory interest in the apartment” that was searched. *Id.* at 103. Recognizing that “standing is an elusive concept for laymen to grasp,” *id.* at 105 n.2, the Second Circuit held that the defendant had set forth a viable ineffective assistance of counsel claim on the basis of allegations that his attorney “did not consult with him concerning the facts of the search prior to moving for suppression of the identification testimony and failed to investigate” the facts pertaining to “standing to challenge the search.” *Id.* at 106. The court remanded for an evidentiary hearing even though “trial counsel . . . stated that he had consulted with [the defendant] before the suppression hearing.” *Id.*

counsel to anticipate the “deterrent” or “inhibit[ory]” effect, *see id.* at 393, of a lay defendant’s ignorance of *Simmons*.

A defendant who does not know the *Simmons* rule cannot take advantage of it. Like most defendants, Gardner was not “learned in the law,” *Owens*, 387 F.3d at 610, which is why the Constitution entitled him to an attorney who was. But neither of his attorneys at trial provided him with crucial information about the *Simmons* rule. Their performance fell below prevailing professional norms and, accordingly, was constitutionally deficient.

B. Trial counsel should have filed a suppression motion, regardless of Gardner’s denial of possession

It also was objectively unreasonable for Gardner’s attorneys to refuse to file a suppression motion because of their erroneous belief that they could not do so unless Gardner stipulated to possession. The government concedes, as it must, that Gardner had a “reasonable expectation of privacy in his person,” Gov’t Br. 31, and therefore had “standing” in the Fourth Amendment sense, quite apart from a possessory interest in any seized property—something that Gardner’s attorneys and the trial court failed to appreciate. See SA53 (Rodriguez: insisting on “a factual affidavit to assert standing”); SA72 (Gardner: Collins was “trying to get [him] to stipulate to certain things,” such as “[t]hat I had a weapon”); SA70 (trial court: “two attorneys” had told Gardner that “you cannot file a motion to suppress . . . while . . . denying that the item

was taken from you”), SA147 (“defendant’s prior counsel and his present counsel have refused to file this motion because . . . he lacks standing”).

The government nonetheless insists that Gardner is not entitled to relief on this aspect of his ineffective-assistance-of-counsel claim. Its arguments are without merit.

1. *The government’s assertion that the COA does not cover this issue is wrong as a matter of law and rests on a misreading of the COA*

As a threshold matter, the government contends that this issue is outside the scope of the COA. That argument, however, is foreclosed by this Court’s decision in *Stevens v. McBride*, 489 F.3d 883 (7th Cir. 2007).

The COA that Judge Posner granted in this case states that “Gardner has made a substantial showing of the denial 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. Under *Stevens*, “a certificate identifying ineffective assistance of counsel brings up *all of counsel’s actions*,” because it is “the overall deficient performance [by a defendant’s attorney], rather than a specific failing, that constitutes the ground of relief.” 489 F.3d at 894 (emphasis added; quotation marks omitted); *see also McGee v. Bartow*, 593 F.3d 556, 566 (7th Cir. 2010) (because “the second element [of the claim] [was] part of the same

due process challenge,” even the lack of “direct reference to it in the request” for a COA did not require expansion of the COA). In short, Gardner advances a single, unitary “claim” of ineffective assistance of counsel, and the COA brings up all the specific respects in which trial counsel failed Gardner. Accordingly, the government’s attempt to read the COA as excluding particular ways in which trial counsel was ineffective is a non-starter.

Even as a purely textual matter, however, the government is wrong to say that the Gardner has somehow “misread[]” the scope of the COA. Gov’t Br. 27. The COA’s plain text sets forth two distinct bases of ineffective performance: Gardner’s “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 (emphasis added). The government’s reading of the COA, which limits it to the *Simmons* issue, leaves the first part of this phrase superfluous. *Cf. United States v. Berkos*, 543 F.3d 392, 396 (7th Cir. 2008) (“We avoid interpreting a statute in a way that renders a word or phrase redundant or meaningless.”).⁸ Perhaps the government’s argument would have some traction if the COA actually read something like “whether Gardner received ineffective assistance when

⁸ The government has unambiguously acknowledged that the *Simmons* issue is within the COA’s scope and briefed it on the merits. Having done so, “the government has now waived waiver.” *United States v. Leichtnam*, 948 F.2d 370, 375 (7th Cir. 1991). *See also* Opening Br. 25 n.4.

his trial counsel did not explain to Gardner the *Simmons* rule and so failed to file a motion to suppress on his behalf in which he admitted possession of the gun.” Unfortunately for the government, it does not.⁹

Finally, as this Court has recognized, “quibbling” over the COA once “the case has progressed to briefing on the merits” hardly “serve[s] the [COA requirement’s] purpose of conserving judicial and prosecutorial resources.” *United States v. Marcello*, 212 F.3d 1005, 1007 (7th Cir. 2000). Although unnecessary given *Stevens* and the clear meaning of the COA, were there any doubt on this score, the COA could be retroactively expanded on the basis of the briefing in this Court. *Ouska v. Cahill-Masching*, 246 F.3d 1036, 1045 (7th Cir. 2001).¹⁰

⁹ The government suggests that the Court would have placed a comma immediately before the “and did not explain” clause if it had intended to recognize the refusal of Gardner’s attorneys to file a suppression motion as an independent basis for concluding that their performance was deficient. Gov’t Br. 27. But that would be ungrammatical, since compound elements separated by a coordinating conjunction are not further separated by a comma. See Diana Hacker, *RULES FOR WRITERS* 285 (6th ed. 2009); NASA, *Grammar, Punctuation, and Capitalization: A Handbook for Technical Writers* § 3.5.1 (1998) (“Do not separate compound predicates with a comma unless they are long and require a comma for clarity.”).

¹⁰ Citing *Rodriguez v. United States*, 286 F.3d 972 (7th Cir. 2002), the government contends that expansion of the COA is unwarranted. Gov’t Br. 27. *Rodriguez*, however, turned on waiver, which not even the government asserts is at issue here. There, the court declined to expand the COA because the defendant “did not raise the . . . claim in his original § 2255 application.” 286 F.3d at 979. Gardner, on the other hand, has consistently raised the refusal-to-file claim. *E.g.*, SA 194.

2. *Even if Gardner had refused to stipulate to possession, a viable suppression motion could have been filed*

Gardner's attorneys believed that there was no basis for filing a motion to suppress as long as Gardner refused to stipulate to possession. Opening Br. 37; *see also* SA70, 147. The government agrees that this belief was why they refused to file a suppression motion. Gov't Br. 25. In backing away from the misguided "standing" rationale upon which their belief was premised, Gov't Br. 31, the government all but concedes that their refusal to file a motion could not possibly have been the result of a reasoned, strategic choice.¹¹ Yet the government insists that Gardner's attorneys still ended up being "correct in their advice that a motion to suppress the firearm could not succeed while [Gardner] denied possessing the firearm." Gov't Br. 15.

a. The government's argument is in large part premised on a sleight of hand: it attacks the viability of Gardner's inartfully drafted *pro se* suppression motion, rather than the suppression motion that *competent counsel* could have put together on Gardner's behalf. For instance, the government asserts that Gardner "did not take alternative positions in the criminal proceedings," but rather "took one position that failed to state a claim on which the relief he sought could be granted." Gov't Br. 32; *see also* Gov't Br. 13-14 (arguing

¹¹ "[I]t is not the role of a reviewing court to engage in a post hoc rationalization for an attorney's actions by constructing strategic defenses that counsel does not offer." *Goodman v. Bertrand*, 467 F.3d 1022, 1029 (7th Cir. 2006) (quoting *Brown v. Sternes*, 304 F.3d 677, 691 (7th Cir. 2002)).

that the “*pro se* motion [Gardner] did file,” and the “facts [Gardner] chose to allege,” would not have entitled him to relief).¹² But nobody has ever suggested that Gardner’s attorneys should simply have filed Gardner’s *pro se* motion as-is. The issue is whether there were viable legal arguments that *trial counsel* could have advanced, while avoiding any need for Gardner to stipulate to, or even take an affirmative position on, possession. There were, and it was the failure of Gardner’s attorneys to marshal them—because they were unaware of their existence—that made counsel ineffective.

b. On the merits, the government fails to grapple with the argument that the *gun* was not the only fruit of the search and that competent counsel could have sought suppression of the officers’ *testimony*. As the opening brief explains, their testimony that they took the gun from Gardner was equally a “fruit” of the search of Gardner’s person. Opening Br. 45-47; *Wong Sun v. United States*, 371 U.S. 471, 485 (1963) (“verbal evidence” derived immediately from an unlawful stop “is no less the ‘fruit’ of official illegality than the more common tangible fruits”); *United States v. Acox*, 595 F.3d 729,

¹² Furthermore, in dwelling on what the government characterizes as Gardner’s “affirmative[] den[ial]” of possession—a characterization that we dispute, *see* Opening Br. 27-33—the government again overlooks that Rodriguez’s deficient performance predated the filing of Gardner’s *pro se* suppression motion. *See supra* note 3. Had Rodriguez not been laboring under a misapprehension of standing doctrine and instead filed a suppression motion on Gardner’s behalf, Gardner’s *pro se* advocacy (with all of its attendant infelicities) would never have gotten off the ground.

733 (7th Cir. 2010) (“in-court testimony representing the ‘fruits’ of earlier events” may be the “subject of a motion to suppress”).

The government’s only response is the *non sequitur* that Gardner “never alleged that *he* made any statements.” Gov’t Br. 32 (emphasis added). That is neither here nor there—if Gardner’s stop-and-frisk were unlawful, then the *officers’* statements about what they “observed during [that] unlawful invasion” would be fruits subject to suppression. *Wong Sun*, 371 U.S. at 485. Whether Gardner took a position on the *truth* of their statements is irrelevant.¹³ With that testimony excluded, there would have been no foundation for tying the gun to Gardner. *See* Opening Br. 47 (no fingerprints found on gun). Thus, “based on a misapprehension of the applicable law, [Gardner’s] attorney chose not to file a motion that could have been dispositive of the case.” *Johnson*, 604 F.3d at 1020.

c. Moreover, the gun itself could *directly* have been excluded as a fruit of the search even without testimony from Gardner asserting a posses-

¹³ An example may help to illustrate the point. If officers unlawfully raided a house without a warrant, and then claimed that they saw the defendant flushing drugs down the toilet, there would be no tangible fruits to exclude. But nobody could seriously doubt that the unlawful entry would be grounds to prohibit the introduction of the officers’ testimony about what they claim they saw. There is no reason why their testimony should be more permissible when the defendant *also* asserts that the officers had made up the entire story about whether there were drugs in the first place. A defendant can challenge the testimonial fruits of an unlawful search even when there are no tangible fruits at all; likewise, a defendant can challenge testimonial fruits even without taking a position on the tangible fruits.

sory interest in it.¹⁴ Once Gardner showed that the search was unlawful (and there is no doubt that he has “standing” to challenge the legality of a search of his person), he need only have demonstrated that the gun was a “fruit” of the search in order to get it suppressed. A properly counseled suppression motion could have strategically bracketed whether *Gardner himself* admitted that the gun was in his pocket, and instead relied on the *government’s* evidence (*e.g.*, the arresting officers’ reports) to show that the gun was retrieved during the course of his search.

As the opening brief explained, Opening Br. 48-51, this possibility of relying on the government’s evidence to establish a Fourth Amendment claim is described in a standard treatise. *See* 6 Wayne R. LaFare, Search and Seizure § 11.2(b) n.57 (4th ed. 2011). And it is recognized in a number of judicial decisions. *See, e.g., United States v. Zermeno*, 66 F.3d 1058, 1062 (9th Cir. 1995) (recognizing that although the government’s litigating positions are not evidence, it nonetheless was open to the defendant to “point to specific evidence in the record which the government presented”); *United States v. Singleton*,

¹⁴ The district court held that Gardner could not pursue a motion to suppress the firearm while affirmatively denying that he possessed the firearm under *United States v. Colon Osorio*, 360 F.3d 48 (1st Cir. 2004). But as the opening brief explains, the First Circuit did not address the defendant’s Fourth Amendment claim on the merits. Opening Br. 42-43. The government agrees. Gov’t Br. 29.

987 F.2d 1444 (9th Cir. 1993).¹⁵ The district court could have decided, after examining “all of the evidence presented”—including the “government’s evidence,” *see Singleton*, 987 F.2d at 1449—that the gun was objectively a fruit of the search. Thus, Gardner was not estopped from seeking suppression of the gun even if he refused to stipulate to possession.

The government does not take issue with any of the above as a matter of legal doctrine; in fact, its brief does not cite, much less try to counter the reasoning of, *Singleton* and the LaFave treatise. Instead, the government apparently contends that, on the facts of this case, an attempt to rely on the government’s evidence would have been unavailing—in other words, that the district court would have found that “there was no fruit [*i.e.*, gun] from a poisonous tree [*i.e.*, Gardner’s search] at all.” Gov’t Br. 30. This argument hinges on what the government characterizes as Gardner’s “den[ials] that evidence was recovered” and “claim[s] that the police acquired *no* evidence from his person.” Gov’t Br. 29-30; *see also* Gov’t Br. 31-32 (“[Gardner] was not silent on the question of [possession] He affirmatively denied it.”).

¹⁵ The Ninth Circuit in *Singleton* specifically observed that a motion to suppress can be based on alternative positions. Opening Br. 49. There, the defendant denied any connection to the house where drugs were found, but also argued that, even if the government’s evidence succeeded in proving such a connection, the search of the house was unlawful. To conclude that an alternative denial would estop Gardner from challenging the lawfulness of the search of his person would needlessly create a conflict between the circuits.

With respect, this misses the point. The asserted “denials” to which the government points surfaced as the result of Gardner’s *pro se* efforts to pursue a suppression motion *after* Gardner’s attorneys refused to file one on his behalf because they were mistaken about the law. Competent counsel could have styled a suppression motion that avoided these supposed pitfalls—*i.e.*, the motion need not have contained any statement of Gardner’s, sworn or unsworn, about the gun’s origins. *See also supra* note 12.

d. Finally, and rather startlingly, the government is untroubled by the fact that the position it presses would, if accepted, make innocent defendants worse off than the guilty.¹⁶ The government asserts that even if the “police truly planted . . . incriminating evidence,” and “even if the government conceded the illegality” of the search, an innocent defendant who claimed that *all* of the evidence was fabricated could not get it suppressed. Gov’t Br. 33. On the other hand, a guilty defendant—*i.e.*, one who could admit (and safely so, given the *Simmons* rule) to possessing even *one piece* of incriminating evidence—could get *all* of it suppressed. Gov’t Br. 32. The government offers no principled explanation for why Fourth Amendment doctrine should require this perverse result.

¹⁶ The government misunderstands our five-gun hypothetical, Opening Br. 52, which is that, *on the government’s theory*, a defendant who claims that four of five guns were planted in the course of an illegal search could seek exclusion only of the *single gun* that he admits possessing, not the *four others* that were planted. *Cf.* Gov’t Br. 32.

* * *

The only reason that Gardner's attorneys refused to file a motion to suppress was that they believed Gardner had to stipulate to possession. They were wrong as a matter of law. Both the testimonial fruits of Gardner's unlawful search and the gun itself were potentially subject to suppression without any need for Gardner to take an affirmative position about possession. Gardner's attorneys refused to file this potentially dispositive motion because they got the law wrong, which makes their performance constitutionally deficient.

II. Gardner Is Entitled To An Evidentiary Hearing On The Issue Of Whether Trial Counsel's Deficient Performance Prejudiced Him

The government agrees that "if this Court finds deficient performance, it should remand the case for an evidentiary hearing on the question of prejudice." Gov't Br. 33. Because whether Gardner was prejudiced depends on whether a suppression "motion would have been successful," *Johnson*, 604 F.3d at 1022, and because that issue in turn depends on contested fact issues and questions of credibility, an in-person evidentiary hearing with live witnesses is necessary, *see Owens v. Frank*, 394 F.3d 490, 498 (7th Cir. 2005) ("When the issue is one of credibility, resolution on the basis of affidavits can rarely be conclusive."). The precise scope of such a hearing should be left open for the district court to determine in the first instance.

CONCLUSION

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

Dated: November 9, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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 6877 words, excluding the parts of the brief exempted under Fed. R. App. P. 32(a)(7)(B)(iii).

s/ Kevin S. Ranlett

Kevin S. Ranlett

Dated: November 9, 2011

CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Kevin S. Ranlett
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Dated: November 9, 2011