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An Uneven Playing Field: The Government Extended Rights Denied to Defendants on Appeal*

by Breyana Fleming

I. INTRODUCTION

Many people find themselves in the crosshairs of the criminal justice system as defendants. In preparing to defend themselves against the charges being brought by the government, these defendants cannot predict whether the outcome of a criminal proceeding will result in a finding of innocence or guilt. Defendants can, however, generally depend on uniformity in the law as it pertains to appellate procedure. Still, there are times where this uniformity will be sacrificed, and further, when it will be done in an unjust manner. For instance, when an appellate court allows the federal government to maintain an argument against a defendant it never raised on appeal, uniformity in appellate procedure is sacrificed unjustly. In *United States v. Campbell*,¹ this kind of injustice took place.² In this case, the United States Court of Appeals for the Eleventh Circuit applied the good-faith reliance exception to an officer's actions of unlawfully prolonging a traffic stop through unrelated inquiry because the officer was relying in good-faith on *United States v. Griffin*,³ the binding precedent at the time.⁴ Significantly, the court exercised its discretion in hearing the issue despite the government's failure to properly raise the issue in any oral argument, initial brief, or any other supplemental filing to the

*I would like to thank Professor Timothy Floyd for serving as my faculty advisor and his continuing support. I would also like to thank Maria Middlebrooks, Reginald Middlebrooks, and Dutch for all of their love and encouragement.

1. 912 F.3d 1340 (11th Cir. 2019).

2. *See id.*

3. 696 F.3d 1354 (11th Cir. 2010).

4. *Campbell*, 912 F.3d at 1355–1356.

court.⁵ An in-depth analysis of the majority opinion will show, however, that this decision unfairly prejudiced Campbell in order to provide protection to the federal government.

II. FACTUAL BACKGROUND

Deputy Sheriff Robert McCannon was patrolling the interstate at night when he noticed that a Nissan Maxima crossed the fog line. Upon seeing this, McCannon activated the camera on his dashboard, at which point he noticed the vehicle cross over the fog line again, and further, that the vehicle had a signal light which was blinking at an unusually rapid pace. As a result of these infractions, the officer pulled the vehicle over and came upon Erickson Campbell, whom he asked for his driver's license and registration. After explaining to Campbell the reasons why he was stopped, McCannon determined that he would issue him a warning for failure to adhere to two Georgia traffic violations: (1) failing to maintain signal lights in a good working condition,⁶ and (2) failing to maintain his own lane.⁷ While writing the ticket, McCannon began to question Campbell about the purpose of his travels. McCannon learned that Campbell was on his way to Augusta in order to see his family, that he held a job, had previously been arrested over sixteen years ago for a DUI, and that he was not traveling with a firearm.⁸

Further, during the time that McCannon continued writing out the warning ticket for Campbell, Deputy Patrick Paquette arrived on the

5. *Id.*

6. O.C.G.A. § 40–8–26 (2018). The statute states in pertinent part:

(a) Any motor vehicle may be equipped . . . with the following signal lights or devices:

. . . .

(2) A light or lights or mechanical signal device capable of clearly indicating any intention to turn either to the right or to the left and which shall be visible from both the front and the rear.

(b) Every . . . signal light or lights indicating intention to turn shall be visible and understandable during daytime and nighttime from a distance of 300 feet from both the front and the rear. . . . [S]uch light or lights shall at all times be maintained in good working condition.

7. O.C.G.A. § 40–6–48 (2018). The statute states in pertinent part:

Whenever any roadway has been divided into two or more clearly marked lanes for traffic, the following rules, in addition to all others consistent with this Code section, shall apply:

(1) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

8. *Campbell*, 912 F.3d at 1344–1345.

scene.⁹ At this point, McCannon asked Campbell more questions on the following topics:

McCannon: Any counterfeit merchandise that you're taking to your relatives in Augusta? And what I mean by that is—any purses? Shoes? Shirts? Any counterfeit or bootleg CDs or DVDs? Anything like that? Any illegal alcohol? Any marijuana? Any cocaine? Methamphetamine? Any heroin? Any ecstasy? Nothing like that? You don't have any dead bodies in your car?" Campbell shakes his head or otherwise responds in the negative to each question.¹⁰

This particular line of questioning lasted for twenty-five seconds.¹¹ When Campbell stated that he did not have any of those items, McCannon requested to search his vehicle to confirm the truthfulness of his statements to him, to which Campbell obliged. As such, McCannon had Campbell sign the ticket and then he and Paquette begin to search Campbell's vehicle. Their search revealed a 9mm semi-automatic pistol, 9mm ammunition, a black stocking cap, and a face mask in a bag hidden under the carpet in Campbell's trunk. Once McCannon and Paquette found the gun, Campbell admitted that he had lied about having it because he was a convicted felon.¹²

Consequently, Campbell was arrested and indicted under 18 U.S.C. § 922(g)(1),¹³ for being in possession of a firearm as a convicted felon. In his defense, Campbell filed a motion to suppress the evidence.¹⁴ However, the district court denied Campbell's motion to suppress, convicting him of possession of a firearm by a convicted felon.¹⁵ First, the district court determined that McCannon had reasonable suspicion to make a traffic stop under Georgia's statute, as his rapidly blinking turning signal was not in good working condition. Second, the district court addressed whether the traffic stop became an unreasonable seizure under the Fourth Amendment¹⁶ when McCannon prolonged it with his unrelated inquiry. The district court determined that McCannon's inquiry in reference to whether Campbell had contraband, drugs, or dead bodies in the vehicle, lasting for about twenty-five seconds, was unrelated to the purpose of the stop because they did not

9. *Id.* at 1345.

10. *Id.* at 1347.

11. *Id.*

12. *Id.* at 1345.

13. 18 U.S.C. § 922(g)(1) (2015).

14. *Campbell*, 912 F.3d at 1345.

15. *Id.* at 1347–1348.

16. U.S. CONST. AMEND. IV.

relate to road safety concerns. Following the precedent set in *United States v. Griffin*,¹⁷ however, the district court held that McCannon had not unlawfully prolonged the stop because the overall length of prolongation was reasonable, and he had acted diligently in issuing his warning ticket. The district court declined to address whether the good-faith reliance exception to the exclusionary rule applied.¹⁸

The United States Court of Appeals for the Eleventh Circuit stated that it agreed with the district court that the precedent set in *Griffin* was controlling.¹⁹ The Eleventh Circuit, however, did address the good-faith reliance exception to the exclusionary rule, deciding that it would hear the issue despite the government's failure to preserve the issue on appeal.²⁰ Thus, in applying its discretionary authority to hear an issue first raised on appeal, the Eleventh Circuit held that because McCannon relied in good-faith on the binding precedent in *Griffin*, the subsequent ruling in *Rodriguez v. United States*,²¹ did not make the prolongation of the traffic stop through his unrelated inquiry turn into an unreasonable seizure under the Fourth Amendment.²²

III. LEGAL BACKGROUND

A. The Fourth Amendment: Protection Against Unreasonable Searches and Seizures

1. The Clause

As determined in *Mapp v. Ohio*,²³ The Constitution's Fourth Amendment Clause protects peoples' right to privacy from being infringed upon by searches and seizures which are not founded on a basis of reasonable suspicion.²⁴ The Fourth Amendment states, in pertinent part, "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."²⁵ Because security of one's privacy against intrusion by the police is a liberty guaranteed by the principles

17. 696 F.3d 1354 (11th Cir. 2010).

18. *Campbell*, 912 F.3d at 1349.

19. *Id.* at 1355.

20. *Id.* at 1355–1356.

21. 135 S.Ct. 1609 (2015).

22. *Campbell*, 912 F.3d. at 1356.

23. 367 U.S. 643 (1961).

24. *Id.* at 646–647.

25. U.S. CONST. AMEND. IV.

of the Due Process Clause of the Fourteenth Amendment,²⁶ the Fourth Amendment is enforceable against the states to ensure that there is no arbitrary denial of life, liberty, and property by the government.²⁷

2. The Subsequent Adoption of the Exclusionary Rule

Though the Fourth Amendment itself does not explicitly prohibit the entering of evidence in violation of its clause, the United States Supreme Court created the exclusionary rule.²⁸ The exclusionary rule, a prudential doctrine, prohibits evidence obtained by searches and seizures in violation of the Fourth Amendment from being used in a criminal proceeding.²⁹ Because the Fourth Amendment is enforceable against both the states and the federal government, the exclusionary rule is also enforceable against these actors.³⁰ As such, evidence unlawfully obtained by law enforcement will be suppressed under the exclusionary rule.³¹

However, the application of the exclusionary rule is not without limitations.³² As with any other judicially created remedial device, the application of the rule is restricted to those areas where its remedial objectives are best served.³³ The exclusionary rule is designed to safeguard constitutional rights, meaning that it is not concerned with the personal constitutional rights of the aggrieved party.³⁴ Hence, because the exclusionary rule's sole purpose is to deter unlawful conduct which is in contention with the Fourth Amendment, the rule will not apply in the case that suppression fails to yield appreciable deterrence, making exclusion unnecessary.³⁵

3. An Exception to the Exclusionary Rule: Good-Faith Reliance on Binding Precedent

In *United States v. Leon*,³⁶ the Court carved out the good-faith reliance exception to the exclusionary rule, finding that the costs of excluding evidence outweighs its deterrent value when an officer

26. U.S. CONST. AMEND. XIV.

27. *Mapp*, 367 U.S. at 655.

28. *See Weeks v. United States*, 232 U.S. 383, 398 (1914).

29. *Herring v. U.S.*, 555 U.S. 135, 139–140 (2009).

30. *Mapp*, 367 U.S. at 655.

31. *Herring*, 555 U.S. at 139–140.

32. *United States v. Calandra*, 414 U.S. 338, 348 (1974).

33. *Id.*

34. *Id.*

35. *Id.*

36. 468 U.S. 897 (1984).

objectively relies on binding precedent.³⁷ The court determined that the good-faith reliance exception applied to an officer's acts in obtaining a warrant from a magistrate who found that there was probable cause for its issuance.³⁸ In this particular case, upon receiving an affidavit of observed drug-trafficking activities, an officer requested the issuance of warrants of the defendants' home and vehicles, which was subsequently issued by the magistrate court. The search produced drugs and the defendants were indicted on drug offenses, all moving to have the evidence suppressed. The district court granted the motions in part, finding that the affidavit lacked sufficient evidence of probable cause and that it would not consider the good-faith reliance exception to the officer's actions. The Court of Appeals for the Ninth Circuit affirmed.³⁹

The Supreme Court of the United States disagreed with the findings below, holding that the good-faith reliance exception to the exclusionary rule should be recognized because the officer reasonably relied in good-faith on the validity of the warrant issued by the magistrate, who made its own probable-cause determination and judgment that the warrant was in the appropriate technical form.⁴⁰ Further, the Court concluded that the evidence should not be suppressed under the exclusionary rule because there is no deterrence effect on punishing the officer's lawful acts in this case.⁴¹ Consequently, the Court held that because the officer acted in objectively reasonable reliance on the magistrate's finding for probable cause, the benefits of the suppression of the evidence were outweighed by the substantial costs of exclusion.⁴² As such, the Court reversed the court of appeals findings.⁴³

B. Traffic Stops and the Fourth Amendment: The Reasonable Suspicion Requirement

When there is a temporary detention of an individual during a stop of their automobile by the police, even if for only a brief period and when geared towards a limited purpose, there is a "seizure" of the "persons" within the meaning prescribed in the Fourth Amendment.⁴⁴ As such, a traffic stop constitutes a seizure under the Fourth Amendment.⁴⁵ To

37. *See id.* at 920–921.

38. *Id.* at 925–926.

39. *Id.* at 902–904.

40. *Id.* at 926.

41. *Id.* at 920–921.

42. *Id.* at 926.

43. *Id.* at 927.

44. *Whren v. United States*, 517 U.S. 806, 809–810 (1996).

45. *Id.*

ensure that a traffic stop does not become unreasonable, an officer must have reasonable suspicion to make the initial stop.⁴⁶ An officer has a reasonable suspicion to make a stop when there is a "particularized and objective" basis for suspecting that the person is violating some law.⁴⁷ Hence, a traffic stop in compliance with the Fourth Amendment must have some rational basis.⁴⁸

C. Historical Background: Does the Fourth Amendment Require the Exclusion of Evidence Obtained from a Stop Unlawfully Prolonged by Unrelated Inquiry?

1. Preceding Supreme Court Cases: Unrelated Inquiry Permissible if No Time Added to the Stop

In *Illinois v. Caballes*,⁴⁹ the Supreme Court of the United States found that officers had not unlawfully prolonged a traffic stop by making use of a narcotics-detection dog.⁵⁰ In this particular case, the original officer stopped the defendant for speeding on the highway and proceeded to radio dispatch to report it, causing another officer to come to the place of incident with a narcotics-detection dog. While the original officer was issuing the warning ticket, the second officer took the dog around the defendant's car, which alerted the dog to marijuana in the trunk.⁵¹ Based on these facts, the Court determined that the original officer had reasonable suspicion in making the original stop due to the defendant's speeding.⁵²

In addition, the Court determined that the stop did not constitute an unreasonable seizure under the Fourth Amendment.⁵³ Though the dog sniff served as unrelated inquiry, the Court concluded that it did not make the stop unlawful because while one officer was issuing the warning ticket, therefore carrying out the general purpose of the traffic stop, the other officer conducted the dog sniff without adding time to the stop.⁵⁴ Consequently, the Court held that the traffic stop was not unlawful.⁵⁵

46. See *United States v. Cortez*, 449 U.S. 411, 417–418 (1981).

47. *Id.* at 418.

48. See *id.*

49. 543 U.S. 405 (2005).

50. *Id.* at 409–410.

51. *Id.* at 406.

52. *Id.* at 407.

53. *Id.* at 410.

54. *Id.* at 409.

55. *Id.* at 410.

Four years later, in *Arizona v. Johnson*,⁵⁶ the Supreme Court of the United States considered the same question. In this particular case, detectives of Arizona's gang task force pulled over a vehicle with multiple passengers because the vehicles' registration was expired. After stopping the vehicle, while one of the detectives dealt with the ordinary inquiries of the traffic violation, the other detective began to question the defendant about his possible gang affiliation. Based on her concerns of his possible gang affiliation, the detective had the defendant get out of the vehicle and patted him down, revealing a gun. The defendant was then arrested.⁵⁷

The Court held that the traffic stop did not constitute an unreasonable seizure under the Fourth Amendment.⁵⁸ The Court concluded that its finding was proper for two reasons.⁵⁹ First, the defendant was lawfully detained incident to a legitimate traffic stop.⁶⁰ Second, although the detective's inquiry regarding the defendant's gang affiliation was unrelated to the matter of the stop, because the other detective was following up on the issuance of the ticket, no time had been added to it.⁶¹ Thus, the Court held that the stop was lawful.⁶²

2. The Eleventh Circuit Weighs In: Unrelated Inquiry Permitted if Satisfying an "Overall Reasonableness" Standard

In *United States v. Griffin*,⁶³ the Eleventh Circuit considered an issue regarding the prolongation of traffic stops.⁶⁴ Here, the officer apprehended the defendant in regard to his possibly committing a theft, so he stopped and frisked him. During the frisk, the officer asked the defendant if he had batteries in his pocket and if he had ever been to prison. Upon learning that the defendant had shotgun shells in his pocket and had previously been to prison, the officer arrested the defendant because it is illegal for felons to have ammunition on their person.⁶⁵

56. *Arizona v. Johnson*, 555 U.S. 323 (2009).

57. *Id.* at 327–328.

58. *See id.* at 333–334.

59. *See id.* at 333.

60. *Id.* at 332.

61. *See id.* at 333.

62. *See id.* at 334.

63. 696 F.3d 1354 (11th Cir. 2010).

64. *Id.* at 1357.

65. *Id.*

The Eleventh Circuit held that this traffic stop had not become an unreasonable seizure under the Fourth Amendment.⁶⁶ The court determined that there was reasonable suspicion in stopping and frisking the defendant for theft.⁶⁷ Additionally, the court determined that the unrelated inquiry regarding the contents in the defendant's pockets and his criminal history, lasting for about thirty seconds, did not make the stop unlawful because the officer had yet to complete his investigation into the theft and acted diligently in pursuing his investigation.⁶⁸ Thus, the Eleventh Circuit denied "to adopt a bright-line 'no-prolongation' rule,"⁶⁹ instead adopting an overall reasonableness standard.⁷⁰

3. The Tables Finally Turn: *Rodriguez v. United States*⁷¹

In *Rodriguez*, the Supreme Court rejected its earlier approaches in regard to the prolongation of a traffic stop.⁷² In this particular case, the officer stopped the defendant for driving on the shoulder of the highway. After the officer checked the defendant's driver license and issued the warning ticket, and the defendant refused to allow a dog sniff around his vehicle, the officer detained him and waited for another officer to get to the traffic stop. Once the second officer arrived, the original officer completed the dog sniff and found meth in the vehicle, this unrelated inquiry lasting for seven to eight minutes.⁷³

66. *Id.* at 1363.

67. *Id.* at 1359–1360.

68. *Id.* at 1362.

69. The "no-prolongation" rule finds that an officer must complete his traffic-based inquiries in an amount of time which is reasonably required to complete the stop's mission, and if the traffic stop is extended beyond that time, then it becomes unlawful. *Rodriguez v. United States*, 135 S.Ct. 1609, 1616 (2015). For a general discussion on the development of the no-prolongation rule in each circuit after the *Rodriguez* decision, see Elizabeth Williams, *Permissibility Under Fourth Amendment of Detention of Motorist by Police, Following Lawful Stop for Traffic Offense, to Investigate with Canine Matters Not Related to Offense—Federal Cases Post Rodriguez v. U.S.*, 39 A.L.R. Fed. 3d Art. 6 (2019). The no-prolongation rule may be differentiated from the "overall reasonableness" standard. In applying the overall reasonableness standard to the issue of the prolongation of a traffic stop, judges, "[D]o not simply look at the interval of prolongation in isolation, but rather assess the length of the stop as a whole, including any extension of the encounter, by undertaking a fact-bound, context-dependent analysis of all of the circumstances concerning the stop and the unrelated questions." *Griffin*, 696 F.3d at 1362.

70. *See Griffin*, 696 F.3d at 1362.

71. 135 S.Ct. 1609 (2015).

72. *Id.* at 1616.

73. *Id.* at 1612–1613.

In *Rodriguez*, the Court held that any traffic stop that is extended beyond the amount of time reasonably required to complete the stop's mission, is unlawful under the Fourth Amendment.⁷⁴ The Court concluded that if the officer added time to the stop by diverting from the stop's purpose after he had already completed his traffic-based inquiry by way of the dog sniff, the traffic stop, then, turned into an unreasonable seizure because of his attempt to investigate other crimes.⁷⁵ Thus, the Court denied to adopt a *de minimus* intrusion or overall reasonableness standard.⁷⁶

D. The Eleventh Circuit on the Preservation of Issue Requirement on Appeal

1. The Dean Witter Reynolds Decision: The Preservation of Issue Requirement as a "Mere Rule of Practice"

In *Dean Witter Reynolds, Inc. v. Fernandez*,⁷⁷ a brokerage firm filed a suit against a Cuban entity on the basis that it had made conflicting claims to the funds and securities on its books. The district court determined that it had jurisdiction over the claim and ordered the complainant to pay the Cuban entity because they had been defrauded of credit proceeds, despite the fact that the Cuban entity never got the license required by the Cuban Assets Control Regulations,⁷⁸ which required Cuban Nationals to get licensed if they desired to make any transactions in the United States. The complainant appealed the district court's decision on the basis that the Cuban entity never obtained a license prior to initiating the suit. In its appellate brief, however, the appellant never challenged the court's jurisdiction at the district court level to hear the case prior to the issuance of the appropriate license.⁷⁹

Despite the appellant's failure to challenge the district court's jurisdiction at the district court level, the Eleventh Circuit concluded that it would hear the issue.⁸⁰ The court stated that an appellate court generally will not hear a legal issue or theory unless it was presented to the trial court, but made clear that this was merely a rule of practice

74. *Id.* at 1616.

75. *Id.* at 1616–1617.

76. *See id.* at 1616.

77. 741 F.2d 355 (11th Cir. 1984).

78. 31 C.F.R. §§ 515.101–515.901 (2019).

79. *Dean Witter Reynolds Inc.*, 741 F.2d at 357–359.

80. *Id.* at 361.

and not a jurisdictional limitation.⁸¹ The court considered several exceptional circumstances for which a court may use its discretion and deviate from the preservation of issue requirement, one of which being when the issue presents a significant question of general impact or "great public concern."⁸² In the case at bar, the court held that the great public concern exception applied because the purpose of the Cuban Assets Control Regulations was to deny access to American dollars without a license.⁸³ Therefore, the Eleventh Circuit did not follow the preservation of issue requirement.⁸⁴

2. Later Cases Declining to Deviate from the Preservation of Issue Requirement

Almost twenty years later, in *United States v. Jernigan*,⁸⁵ the Eleventh Circuit refused to use its discretionary authority to hear an issue not preserved for appeal.⁸⁶ In this case, the defendant and his passenger were pulled over because of an expired license plate. Upon being pulled over, the officer determined that the defendant was a convicted felon and proceeded to search his vehicle, finding a semi-automatic pistol. The defendant was charged with possession of a firearm by a convicted felon and the state moved to introduce evidence under Federal Rule of Evidence 404(b),⁸⁷ of the defendant's past crimes.⁸⁸ At the district court, the defendant properly raised an issue in regard to the introduction of his past crimes under Rule 404(b). However, on appeal, the defendant made four passing references to the evidence admitted under Rule 404(b) in his briefs to the appellate court.⁸⁹

Because of this mistake, the court held that the defendant had waived his 404(b) claim that he had properly preserved at trial, as a party seeking to raise a claim on appeal must plainly and prominently so indicate the issue or it will be considered as abandoned.⁹⁰ As such, because the defendant did not devote a discrete section of his appellate brief to claims regarding the evidence of his past crimes, the court

81. *Id.* at 360.

82. *Id.* at 360–361.

83. *Id.* at 360.

84. *Id.*

85. 341 F.3d 1273 (11th Cir. 2003).

86. *Id.* at 1284 n.8.

87. FED. R. EVID. 404(B).

88. *Id.* at 1276–1277.

89. *Id.* at 1284 n.8.

90. *Id.*

would not consider the argument.⁹¹ Thus, the Eleventh Circuit concluded that the defendant abandoned the issue on appeal.⁹²

A year later, in *Access Now, Inc. v. Southwest Airlines*,⁹³ the Eleventh Circuit decided once again that it would not hear an issue being raised for the first time on appeal.⁹⁴ Here, a complainant brought suit against Southwest Airlines under the American Disabilities Act,⁹⁵ because the website was virtually inaccessible to those with serious vision problems. In making this claim, the complainant originally stated that Southwest Airlines was a public accommodation, but the district court denied this claim.⁹⁶ On appeal, however, the appellant argued for the first time that Southwest.com was a "travel service" and not a public accommodation.⁹⁷ Despite the appellant's instantaneous change of argument, the court declined to use its discretion to hear the issue being raised for the first time on appeal.⁹⁸ The court reasoned that they would not hear this new argument because the complainant's brief did not "contain, under appropriate headings and in the order indicated . . . a statement of the issues presented for review."⁹⁹ Thus, the Eleventh Circuit declined to consider the complainant's new claim on appeal that Southwest.com was a travel service.¹⁰⁰

IV. COURT'S RATIONALE

In *United States v. Campbell*,¹⁰¹ the Eleventh Circuit held that the good-faith reliance exception applied to the Fourth Amendment's exclusionary rule where the officer reasonably relied on the binding precedent in *Griffin*.¹⁰² In so holding, the court relied on an argument which was never raised on appeal, failing to adhere to the preservation of issue requirement.¹⁰³

In coming to its decision, the court first affirmed the district court's holding that McCannon did have reasonable suspicion in stopping

91. *Id.*

92. *Id.* at 1284 n.5.

93. 385 F.3d 1324 (11th Cir. 2004).

94. *Id.* at 1335.

95. 42 U.S.C. §§ 12101–12213 (2019).

96. *Id.* at 1326.

97. *Id.* at 1328.

98. *Id.* at 1335.

99. *Id.* at 1330 (quoting FED. R. APP. P. 28(A)(5)).

100. *Id.* at 1335.

101. 912 F.3d 1340 (11th Cir. 2019).

102. *Id.* at 1355–1356.

103. *Id.*

Campbell for being in violation of Georgia law because his signal light was not in good working condition.¹⁰⁴ Because the court determined that McCannon was justified in stopping Campbell for this traffic offense, it did not address the validity of the claim that Campbell failed to maintain his lane.¹⁰⁵

Next, the court considered whether McCannon's unrelated inquiry as to the existence of contraband, drugs, or dead bodies in the car, lasting for twenty-five seconds, turned the traffic stop into an unreasonable seizure.¹⁰⁶ In so doing, the court first considered precedent cases from the Supreme Court of the United States on the issue that determined that unrelated inquiry was permitted so long as there was only a *de minimis* intrusion.¹⁰⁷ The court found support for this standard in *Caballes*, where the Supreme Court of the United States held that the unrelated inquiry of a narcotics-detection dog did not turn a traffic stop into an unreasonable seizure under the Fourth Amendment because no more time was added than necessary to complete it.¹⁰⁸ Further, the court looked to *Johnson*, where the Supreme Court of the United States held that an officers unrelated inquiry regarding a defendant's gang affiliation did not turn a stop into an unreasonable seizure under the Fourth Amendment because no more time was added than necessary to handle the traffic stop for expired tags.¹⁰⁹

Next, the court considered one of its earlier decisions in *Griffin*, which is significant because it was the controlling law at time of Campbell's arrest.¹¹⁰ As decided by the court, the officer's unrelated inquiry in *Griffin* was not in violation of the Fourth Amendment because the officer had yet to complete his investigation and was acting diligently in attempting to resolve a theft when he inquired about the items in the defendants pocket and his prior criminal history.¹¹¹ As such, the court stated that the court in *Griffin* adopted an overall reasonableness standard.¹¹²

Finally, the court considered *Rodriguez*, where the Supreme Court of the United States disrupted the law as it was in regard to the

104. *Id.* at 1350–1351.

105. *See id.*

106. *Id.* at 1354–1355.

107. *See id.* at 1351–1352.

108. *Id.* at 1351.

109. *Id.*

110. *Id.* at 1352.

111. *Id.* at 1352–1353.

112. *Id.* at 1352.

prolongation of a traffic stop.¹¹³ As stated by the Court, after *Rodriguez*, all traffic stops that are prolonged after the completion of their mission through unrelated inquiry are unlawful and in violation of the Fourth Amendment.¹¹⁴ Despite the holding in *Rodriguez*, the court decided that *Griffin* applied because it was the law at the time of Campbell's arrest.¹¹⁵ As such, because McCannon had yet to complete his investigation of the traffic stop and was acting diligently in issuing the warning ticket for Campbell's traffic violation when he inquired about contraband, drugs, and dead bodies, his unrelated inquiry was not in violation of the Fourth Amendment under *Griffin*.¹¹⁶

Further, the court stated that even though McCannon's actions would be deemed as unlawful under the subsequent ruling in *Rodriguez*, because McCannon relied in good-faith on the precedent set in *Griffin* that would have made his acts lawful, the good-faith reliance exception applied.¹¹⁷ The court concluded that because the exclusionary rule is meant to deter unlawful conduct by the police, application of it in this instance would result in a miscarriage of justice because the police officer's conduct was lawful at the time he acted.¹¹⁸

In applying the good-faith reliance exception, the court rejected to follow the preservation of issue requirement on the basis that it was a mere rule of practice that may be deviated from in exceptional circumstances.¹¹⁹ The court reasoned that the preservation of issue requirement was a prudential doctrine which the court had discretionary authority in ignoring in "exceptional circumstances."¹²⁰ The court failed to, however, explicitly state which one of these exceptional circumstances that it was applying to justify their deviation from the preservation of issue requirement.¹²¹ Still, the court stated

113. *Id.* at 1353.

114. *Id.*

115. *Id.* at 1355.

116. *Id.*

117. *Id.* at 1356.

118. *Id.* at 1355–1356.

119. *Id.* at 1355.

120. *Id.*

121. *See id.* at 1355–1356. For a list of the five exceptions for which a court will generally deviate from the preservation of issue requirement, see *Dean Witter Reynolds Inc. v. Fernandez*, 741 F.2d 355, 360–361 (11th Cir. 1984). Of these exceptions, the court could have concluded that the "great public concern" exception applied. Being that the central purpose of the exclusionary rule is to deter unlawful conduct, because McCannon's conduct was not unlawful under the binding precedent in place at the time of Campbell's arrest, there could be great public concern in applying the exclusionary rule to his lawful acts. The court, however, failed to address the applicability this exception. This is because the argument ultimately fails, as the court's decision to deviate from the preservation of

that it would not strictly adhere to the doctrine and found in favor of the government on the basis of the good-faith reliance exception.¹²²

Concurring in part and dissenting in part with the majority opinion, Judge Martin agreed with the court that *Griffin* was controlling.¹²³ Most notably, however, Judge Martin rejected the court's contention that the good-faith reliance exception should be heard because the government never preserved the issue for appeal.¹²⁴ Judge Martin stated that the government did not argue the good-faith exception in its initial brief, at oral arguments, or in any supplemental filing, but merely submitted it during briefing to the district court, despite the general law requiring a legal issue to be prominently and plainly raised on appeal if it is to be heard.¹²⁵ Further, Judge Martin found issue with the fact that the court only seemed to strictly adhere to the preservation of issue requirement when barring arguments made by criminal defendants and pro se litigants.¹²⁶ Judge Martin referenced several cases where appellate courts refused to hear arguments made by criminal defendants and pro se litigants which were not properly preserved for appeal.¹²⁷ Thus, Judge Martin stated that the court extended a courtesy to the government which it rarely does to criminal defendants and pro se litigants.¹²⁸

IV. IMPLICATIONS

One direct implication of the Eleventh Circuit's decision in *Campbell*, is that it sets a precedent which allows the government to be unfairly advantaged in a scenario where defendants are never extended

issue requirement for the government but to strictly adhere to it when concerning defendants, causes there to be concern as to whether laws are being applied equitably. Thus, the court should not apply the great public concern exception to the instant case because its holding would, in effect, create great public concern where the ideal is to avoid it.

122. *Id.* at 1356.

123. *Id.* at 1356 (Martin, J., concurring in part and dissenting in part).

124. *Id.*

125. *Id.* at 1356.

126. *Id.* at 1358.

127. *Id.* at 1357; *See, e.g.*, *Hall v. Thomas*, 611 F.3d 1259 (11th Cir. 2010) (holding a juvenile sentenced to life imprisonment waived certain arguments raised in his habeas petition by failing to reassert them on appeal); *Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008) (per curiam) ("While we read briefs filed by pro se litigants liberally, issues not briefed on appeal by a pro se litigant are deemed abandoned." (citation omitted)).

128. *See Campbell*, 912 F.3d at 1358 (Martin, J., concurring in part and dissenting in part).

leeway.¹²⁹ The law is clear that the preservation of issue requirement is merely a rule of practice which may be deviated from at the discretion of the court.¹³⁰ However, the justification behind such deviation is lost when the court appears to deviate from the rule of practice for the purpose of unfairly extending a benefit to one of its counterparts, the government.¹³¹ This acts as a severe form of injustice. This is so because an overly sophisticated party, the government, is given a courtesy which is generally denied to defendants.¹³² This very case provides evidence of this inequity.¹³³ As stated in Martin's dissenting opinion:

Both the government and the panel of judges suggested that Campbell waived his fruit-of-the-poisonous tree argument because, although plainly mentioned in his opening brief, the issue was not separately listed as a claim in Campbell's "Statement of Issues". See Oral Arg. At 11:36-11:44 ("We have a hard-and-fast rule in this circuit. It's pretty punitive, really. That if you don't put it in the brief as an issue, we don't consider it. (comment of Judge Tjoflat)), 13:40-14:20 (government arguing that Court should deem waived issues not prominently raised in a brief, because "[w]hen we're coming before this court it's important that we know as the responding party, as the appellee, what issues the appellant believes are germane").¹³⁴

This excerpt from oral arguments serves as evidence that the court sought to unfairly benefit the government over the defendant.¹³⁵ Judge Tjoflat is cited in the oral argument saying that the preservation of issue requirement is a hard-and-fast rule in the Eleventh Circuit when it concerns an issue not properly raised by the criminal defendant on

129. *See id.*

130. *Dean Witter Reynolds, Inc.*, 741 F.2d at 360.

131. *See Campbell*, 912 F.3d at 1358 (Martin, J., concurring in part and dissenting in part).

132. *See id.* at 1357. It may be argued, however, that defendants have a courtesy extended to them which is denied to the government: the ability to appeal a lower court's findings when they aren't acquitted. On this basis, the government could contend that the court was correct in extending a courtesy to them by deviating from the preservation of issue requirement because they are unable to appeal their losses. However, the Constitution's Fifth Amendment "double jeopardy" clause provides reasoning behind this difference. U.S. CONST. AMEND. V. The Fifth Amendment states in relevant part, "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." *Id.* Thus, the Fifth Amendment's double jeopardy clause protects people from multiple prosecutions for the same offense, and therefore, justifies a courtesy being denied to the government on that basis. *See id.*

133. *See Campbell*, 912 F.3d at 1357-1358 (Martin, J., concurring in part and dissenting in part).

134. *Id.* at 1357.

135. *See id.*

appeal.¹³⁶ Shockingly, Judge Tjoflat says the exact opposite in the majority opinion, suggesting a much more relaxed standard as it pertains to the preservation of issue requirement when it applies to the government, deeming it a mere rule of practice.¹³⁷ Further, in the explanation of its deviation from the preservation of issue requirement, the majority failed to identify one exceptional circumstance which would justify its course of action.¹³⁸ The court fails to name any exception justifying its deviation because there is not one which applies to this case; the court solely sought to prejudice the defendant.

More broadly, beyond standing to destroy uniformity in appellate procedural law, the court's decision will cause people to lose confidence and trust in approaching the legal system. These ramifications are serious and long-lasting. In making this holding, the Eleventh Circuit makes it so unsophisticated parties, such as criminal defendants, will not be properly notified of the arguments to be made against them, and will therefore, be given no opportunity to respond to them.¹³⁹ This implication significantly moves to undermine the adversarial nature of the courts, being that an appellee will not be aware of the scope of the issues appealed.¹⁴⁰ This has a detrimental effect, as people will not believe that they can properly defend themselves when courts can determine on the fly when they are willing to deviate from hard-and-fast rules of the court and who they are willing to do it for.¹⁴¹ Thus, the majority's holding creates an uneven playing field that defendants will never win on.

136. *Id.*

137. *Id.* at 1355 (majority opinion).

138. *See id.* at 1355–1356.

139. *Pignons S.A. de Mecanique v. Polaroid Corp.*, 701 F.2d 1, 3 (1983).

140. *See id.*

141. *See Campbell*, 912 F.3d. at 1358 (Martin, J., concurring in part and dissenting in part).

