

# To Waive or to Forfeit, That Is the Question (On Appeal)

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Seldom in the law is there a last word on any topic, but the Eleventh Circuit's latest word in *United States v. Campbell* on appellate forfeiture and waiver principles by the en banc court is comprehensive and important. Coming in at 132 pages of majority, concurring, and dissenting reasoning, practitioners would do well to review this primer. Although *Campbell* is better described as collecting and reconciling existing authority rather than breaking new ground, the decision is critical in clarifying the terminology and legal tenets that will govern preservation issues on appeal in the Eleventh Circuit going forward.

## The Case

Erickson Campbell, the defendant, moved before trial to suppress certain evidence as violative of the Fourth Amendment. The district court requested supplemental briefing on the question whether, even if a Fourth Amendment violation had occurred, the evidence nevertheless was admissible under the Supreme Court's "good-faith exception" to the exclusionary rule. The government argued no Fourth Amendment violation occurred and the exception would in any event apply. The district court ruled there was no Fourth Amendment violation and thus did not reach the good-faith exception argument of the government. On appeal, Campbell argued the Fourth Amendment was violated. In response, the government only argued there was no Fourth Amendment violation. It did not assert, as it had below, that in all events, the good-faith exception applied. The panel held that, contrary to the district court's ruling, there had been a Fourth Amendment violation. But then, without asking for supplemental briefing or even raising the issue at oral argument, a divided panel issued an opinion holding that the good-faith exception applied and affirmed the district court's denial of the motion to suppress on that basis. Thereafter, on its own motion, the panel vacated its opinion and issued a new majority opinion elaborating on its reasons for considering and applying the good-faith exception issue, despite assuming the government had "waived" that issue by failing to include it in its appellate briefs. The Eleventh Circuit then granted Campbell's petition for rehearing en banc and vacated the panel's amended opinion. Thereafter, in a sharply divided decision, the en banc court affirmed the defendant's conviction, based on the good-faith exception.

## The Majority Opinion

The majority opinion, authored by Judge Tjoflat, determined that the government forfeited, but did not waive, the argument about the good-faith exception and affirmed the district court on that basis. In doing so, it clarified the oft-overlooked distinction between waiver and forfeiture of points on appeal. The majority explained that with forfeitures, as opposed to waivers, the court has the discretion to overlook the forfeiture in extraordinary circumstances. The majority recognized that issues not raised in a party's brief on appeal generally "are considered abandoned." But, the court explained, "that rule is not ironclad, and we may exercise our discretion to consider issues not raised by the parties on appeal." The court extensively discussed principles of abandonment, waiver, and forfeiture, and then addressed the determinative question: when should issues not briefed on appeal be deemed waived, a determination that is fatal to the party and cannot be overlooked by the court, or deemed forfeited, a determination that may be overlooked by the court when extraordinary circumstances are present. Although appellate courts "often use the words interchangeably," the court explained that they are actually quite different: "forfeiture is the failure to make the timely assertion of a right; waiver is the intentional relinquishment or abandonment of a known right." To assure "the principle of party presentation basic to our adversary system, it is an abuse of discretion for a court to override a party's deliberate waiver." But appellate courts "do have the ability to resurrect forfeited issues *sua sponte* in extraordinary circumstances." This "extraordinary circumstances" discretion, the court declared in a footnote, can apply to forfeitures on appeal, not just those in the district court. The court identified five situations in which it may exercise discretion to consider a forfeited issue: "(1) the issue involves a pure question of law and refusal to consider it would result in a miscarriage of justice; (2) the party lacked an opportunity to raise the issue at the district court level; (3) the interest of substantial justice is at stake; (4) the proper resolution is beyond any doubt; or (5) the issue presents significant questions of general impact or of great public concern." The court then held that "the mere failure to raise an issue in an initial brief on direct appeal should be treated as a forfeiture of the issue, and therefore the issue may be raised by the court *sua sponte* in extraordinary circumstances after finding that one" of those five situations applies. Waiver, on the other hand, is a "question of intent" and, on appeal, a party can only waive a right "through a clear, affirmative statement" because appellate courts, unlike trial courts, are "unable to conduct an evidentiary investigation into an ambiguous indication of intent."

## **The Dissent**

Five judges disagreed in a lengthy dissent co-authored by Judges Newsom and Jordan. The dissenting judges would have decided that the government actually waived the issue. Saying this was "a case about judicial power and its limits," the dissent explained why waived issues cannot be considered by the court on appeal. It framed the issue before the en banc court as whether an appellate court can "affirm a criminal defendant's conviction on a ground that, although argued to the district court, the government concedes it 'consciously' decided not to present on appeal." The dissent declared the court's decision "fails to meaningfully limit the circumstances in which appellate courts can engage in what commentators have called judicial issue creation."

## **Tips and Takeaways**

- Waiver and forfeiture are distinct concepts. When an issue is waived on appeal, the court has no jurisdiction to revive the issue by overlooking the waiver. When an issue is forfeited on appeal, the court may overlook the forfeiture if extraordinary circumstances are present, but the party has no right to demand the exercise of that discretion.
- The court has often affirmed on a “right for any reason” basis, but typically does so only when the alternative basis is expressly raised and preserved in the answer brief. [“Although an appellee may urge us to affirm on any basis supported by the record, it still abandons any position that it fails to list or otherwise state ... as an issue on appeal.”](#)
- Although the court maintains discretion to sua sponte consider issues that have been forfeited by the parties, there must be extraordinary circumstances present to warrant the exercise of that discretion. Over decades, the court has routinely refused to consider issues that have been forfeited by the parties, and its cases [“are replete with the rule that we do not have a duty to raise and decide issues — even constitutional ones — not mentioned by the parties.”](#)
- An appellate practitioner should carefully evaluate the possible need, and wisdom, of including all potential arguments that you could advance for your position, especially if some of them are interrelated, as in *Campbell*, as well as the possible need to address unpreserved arguments by the other side.

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