

The Principle of Party Presentation and *United States v. Askins* (Part I)

There is a lot to unpack in *United States v. Askins*. The Army TJAG certified a question concerning ACCA's finding that some of the accused's convictions were multiplicitous.¹ The Appellee/Cross-Appellant (Accused) has cross-petitioned CAAF to review ACCA's holding that the United States was in a "time of war" such that the statute of limitations were tolled under Article 43(f), UCMJ. CAAF has not yet acted on the Accused's cross-petition. But there's another issue lurking in the record. It was raised in the Accused's supplemental brief after oral argument, but the Accused has not asked CAAF to consider it as a separate assignment of error. Did ACCA violate the principle of party presentation?

The Supreme Court has referred to the principle of party presentation as a mainstay of the American adversarial system. "In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Greenlaw v. United States*, 554 U.S. 237 (2008) (reversing the court of appeals for "acting on its own initiative" in ordering a lengthier sentence for the defendant where the Government did not pursue a cross-appeal).² Then-judge Scalia explained, "[t]he premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.); *see also Hankins v. Lyght*, 441 F.3d 96 (2d Cir. 2006) (Sotomayor, J., dissenting) (arguing the majority violated "a cardinal principle of judicial restraint by reaching" an explicitly waived argument).

In *Askins*, the Accused pleaded guilty to stealing multiple C4 blocks for personal use. The larceny occurred between February and December 2016, and the special court-martial convening authority received the charges on or about March 7, 2022. Article 43(b)(1), UCMJ, provides that—aside from certain exceptions—the statute of limitations for most offenses is five years. Accused challenged the providency of the plea because the military judge did not instruct the Accused on how the statute of limitations had run. On appeal, the Government conceded that the statute of limitations had run before charges were received by the special court-martial convening authority. Brief of Appellee at 7-8, *United States v. Askins* (No. ARMY 20230303). The first subheading of the Government's brief declared, "**The statute of limitations for Specification 1 of**

¹ Whether the Army Court erred in finding Appellant's separate convictions under Articles 128b(1) and 128b(5), UCMJ, multiplicitous.

² "The specific question presented: May a United States Court of Appeals, acting on its own initiative, order an increase in a defendant's sentence?" *Greenlaw*, 554 U.S. at 239.

Charge I ran before on or about 7 March 2017.” *Id.* at 7.³ ACCA noted how charges were received more than 5 years after the latest date the Accused indicated the C4 could have stolen. *United States v. Askins*, *slip op.* at 3.

Regardless, when the parties arrived at oral argument, the panel was not prepared to accept the Government’s concession. ACCA asked the Accused and Government counsel about the application of a case that had not been briefed or cited by either party: *United States v. Rivaschivas*, 74 M.J. 758 (Army Court Crim. App. 2015). *Rivaschivas* followed older CMA cases in holding that the United States could be in a de facto war for the purposes of Article 43(f)’s “in time of war” tolling of statute of limitations. Of course, courts frequently rely on cases not cited by the parties. *See Elder v. Holloway*, 510 U.S. 510, 511–14 (1994). Far less common is where an appellate court resurrects an argument expressly waived by a party. Indeed, the Court has been taking a more rigid approach to appellate courts reaching arguments contrary to, or not raised by, the parties. *See United States v. Sineneng-Smith*, 590 U.S. 371 (2020); *see also Clark v. Sweeney*, ___ U.S. ___ (2025) (per curiam).⁴ In both cases, the Supreme Court held that the lower court’s resolution of a criminal case on arguments not raised by the parties “departed so drastically from the principle of party presentation as to constitute an abuse of discretion.” *Sweeney*, *slip op.* at 3 (quoting *Sineneng-Smith*, 590 U.S. at 380, 375).

The facts of *Sineneng-Smith* are instructive. There, the appellant challenged her conviction on three separate grounds: one statutory, two constitutional. *Sineneng-Smith*, 590 U.S. at ___. Appellant’s constitutional challenges were purely directed towards how an immigration statute affected her rather than whether it imposed a First Amendment burden on others. *Id.* After briefing, the Ninth Circuit called for further briefing—not from the parties—but from third parties not previously involved in the litigation. *Id.* The panel specifically identified three new issues to address, the first of which the appellant had never argued before: whether the statute infringed on the lawful speech of *others*. *Id.* The parties were allowed, but not required, to file supplemental briefs on the three identified issues. *Id.* The panel ultimately resolved the case for the appellant because it viewed the statute as facially overbroad—the first issue it had asked amici to address. *Id.*

In *Askins*, as in *Sineneng-Smith*, the Government changed its tune on the statute of limitations expiring after the panel browbeat Government’s counsel over her concession. “How could she do otherwise? Understandably, she rode with an argument suggested by the panel. In the panel’s adjudication, her own arguments, differently

³ It appears the Government measured the running of the statute of limitations backwards from the date sworn charges were received by the special court-martial authority rather than forwards from the date of the offense.

⁴ Scotusblog recently published a [piece](#) on *Sweeney* and the principle of party presentation.

directed, fell by the wayside, for they did not mesh with the panel's ... theory of the case." *Id.* at ___. After oral argument, the panel asked for supplemental briefing on the application of *Rivaschivas*. Naturally, the Government abandoned its concession and adopted the panel's view of the applicable precedent. The panel affirmed the providency of the guilty plea because, in its view, the holding of *Rivaschivas* meant the statute of limitations was tolled while the United States was "in time of war" in Iraq and Afghanistan.

Of course, neither CAAF nor the CCAs are bound by concessions. *United States v. Budka*, 74 M.J. 219 (C.A.A.F. 2015) (summary disposition) (listing cases) (holding the CCA did not violate the principle of party presentation by affirming convictions where the Government conceded the factual predicate for the offense was not met). In *Budka*, the Government conceded a "factual predicate" for the offense appellant pled guilty to was not met. *Id.* The CCA nevertheless affirmed the conviction. *Id.* There, CAAF held that the principle of party presentation, citing *Greenlaw*, was not violated because of the unique statutory authority of a CCA to "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses" *Id.* (quoting Article 66, UCMJ). The summary disposition turned its resolution on the unique factfinding authority of the CCAs. *Id.* In other words, the Government could claim that the factual predicate for an offense was not met, but the CCA was obligated to undergo its own factual review of the record (under the prior version of Article 66(c), UCMJ).

Unlike *Budka*, ACCA's affirmance here was on a *legal* ground that the Government expressly disavowed. The CCA's unique factfinding authority under Article 66, UCMJ, cannot shield the panel's actions here.⁵

Neither does the cross-appeal doctrine protect the ACCA panel's self-directed legal research. In *Greenlaw*, the Supreme Court held a court of appeals abused its discretion in ordering a sentencing hike where the Government did not challenge a plain error by the district court. *Greenlaw*, 554 U.S. at 240.⁶ The Supreme Court's analysis noted how the "cross-appeal rule, pivotal in this case, is both informed by, and illustrative of, the party presentation principle." *Id.* at 244. The related principles allow a defense of the judgment below but plain errors may only be noticed on behalf of

⁵ *Day v. McDonough*, 547 U.S. 198 (2006) is also inapposite here. In *Day*, the Supreme Court held a district court did not abuse its discretion in dismissing a habeas petition for being untimely when the Government conceded the petition was timely due to a computation error. *Id.* at 201. Unlike here, *Day* was informed by a host of precedent allowing district courts to sua sponte notice procedural defaults in habeas petitions, *Id.* at 205-06 (listing cases), and "considerations of comity, finality, and the expeditious handling of habeas proceedings that motivated [the Anti-Terrorism Effective Death Penalty Act, which governs how federal courts handle habeas petitions]..." *Id.* at 208.

⁶ "This case concerns the role of courts in our adversarial system. The specific question presented: May a United States Court of Appeals, acting on its own initiative, order an increase in a defendant's sentence?" *Greenlaw*, 554 U.S. at 240.

appealing party. “This Court has indeed noticed, and ordered correction of, plain errors not raised by defendants, but we have done so only to benefit a defendant who had himself petitioned the Court for review on other grounds. In no case have we applied plain-error doctrine to the detriment of a petitioning party.” *Id.* at 247 (citation omitted). “[I]t is likewise settled that *the appellee* may, with out taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.” *United States v. Am. Ry. Exp. Co.*, 265 U.S. 425, 435 (1924) (emphasis added); *see also United States v. Steen*, 81 M.J. 261 (Maggs, J., dissenting). As the Supreme Court and CAAF recognize, the cross-appeal doctrine allows the non-appealing party to defend the judgment below. Noticeably missing from the doctrine though is a sua sponte authority of courts to defend the judgment below on grounds *not* raised—let alone expressly disavowed—by the non-appealing party.

So what’s the bottom-line? In *Greenlaw*, *Sineneng-Smith*, and *Clark v. Sweeney*, the Supreme Court “remand[ed] the case for reconsideration shorn [of the issue] interjected by the appellate panel and bearing a fair resemblance to the case shaped by the parties.” *Sineneng-Smith*, 590 U.S. at 380. Here, the Accused did not petition CAAF for review on whether ACCA violated the party presentation principle (it was raised in the Accused’s supplemental brief to ACCA). Does that mean CAAF cannot address it? If the Court were interested, it could specify the issue. This would not be dissimilar from how the Supreme Court handles plenty of cases. *See Zachary B. Pohlman, The Sineneng-Smith Doctrine*, 14 Fed. Cts. L. Rev. 106, 157 (2022). Most ironically is *Sineneng-Smith* itself. *Id.*