No. 21-_____

IN THE
Supreme Court of the United States

ORTAZ SHARP,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a court of appeals violates the principle of party presentation announced in *United States v. Sineneng-Smith*, 140 S. Ct. 1575 (2020), by permitting the government to raise an issue on appeal which it abandoned at the sentencing hearing?

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Pages

Cases

Statutes

PETITION FOR A WRIT OF CERTIORARI

Mr. Ortaz Sharp petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION & ORDERS BELOW

The published opinion of the Eleventh Circuit is included in the appendix. Pet. App. 1a. The district court did not issue an order on the question presented.

JURISDICTION

On December 28, 2021, the Eleventh Circuit vacated Mr. Sharp's sentence and remanded to the district court to impose a higher sentence. The original deadline to file this petition was May 23, 2022, *see* Supreme Court Rules 13(3) and 13.1, but Justice Thomas extended the deadline to June 22, 2022. Therefore, this petition is timely. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The **Armed Career Criminal Act**, set forth **in 18 U.S.C. § 924(e)**, states in part:

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).—

(2)(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

The version of the **Georgia terroristic threats conviction** in effect at the time of Mr. Sharp's own

convictions, **O.C.G.A. § 16-11-37(a),** provides the following:

A person commits the offense of a terroristic threat when he or she threatens to commit any crime of violence, to release any hazardous substance, as such term is defined in Code Section 12-8-92, or to burn or damage property with the purpose of terrorizing another or of causing the evacuation of a building, place of assembly, or facility of public transportation or otherwise causing serious public inconvenience or in reckless disregard of the risk of causing such terror or inconvenience. No person shall be convicted under this subsection on the uncorroborated testimony of the party to whom the threat is communicated.

INTRODUCTION

In *United States v. Sineneng-Smith*, 140 S. Ct. 1575 (2020), this Court reaffirmed a foundational tenet of the American adversary system: the principle of party presentation. Under that principle, absent extraordinary circumstances, courts decide the issues framed by the parties. Under the party presentation-principle courts do not permit parties to take a second-bite of the apple, when they refused to take a first bite.

In *Sineneng-Smith*, the Court upheld the party-presentation principle, reversing the Ninth Circuit for raising an issue sua sponte and ruling for a criminal defendant on a ground which the defendant had not previously raised. Here, the Eleventh Circuit abandoned the principle of party presentation by allowing the government to argue an issue on appeal that it refused to pursue at Mr. Sharp's sentencing hearing, and then ruling in favor of the government on that issue.

Accordingly, the Court should grant the petition for a writ of certiorari for several reasons:

First, the actions of the Eleventh Circuit are not isolated to Mr. Sharp's case. In *United States v. Campbell*, 26 F.4th 860 (11th Cir. 2022) (en banc), the Eleventh Circuit abandoned the party-presentation rule by *sua sponte* raising an issue on behalf of the government, and then ruling for the government on that issue. The decision in *Campbell* is currently before this Court on a petition for writ of certiorari. *See Campbell* v. *United States*, No. 21-1468. The Court should grant Mr. Sharp's petition because of the Eleventh Circuit's unsettling pattern of allowing the

government to avail itself of issues that it abandoned in earlier stages of a case.

Second, the Eleventh Circuit created an entirely new rule of appellate law in Mr. Sharp's case. This new rule incorrectly relies on existing case law. In a matter of first impression, the Eleventh Circuit held that a defendant can be re-sentenced under the Armed Career Criminal ("ACCA") statute if a prior conviction becomes a qualifying predicate during the government's time to file an appeal. The defendant is at the mercy of this new rule, even if the government refused to argue at the defendant's sentencing hearing that the prior conviction constituted a qualifying predicate and elected not to preserve an objection to then-binding case law.

Third, this case is a strong vehicle for the Court to answer the question presented. The facts are undisputed. The government refused to argue at Mr. Sharp's sentencing hearing that his prior terroristic threats conviction was an ACCA predicate. It only did so after an intervening change in the law. First filing a motion for reconsideration with the district court, which was denied, and then on direct appeal. Under the party-presentation rule, the government was not allowed to make such an argument on appeal. As such, the petition for a writ of certiorari should be granted.

STATEMENT OF THE CASE

A. The Party-Presentation Principle

The Nation's adversarial system follows the principle of party presentation. *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020), "[I]n both civil and criminal cases...,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." *Id.* (quoting *Greenlaw v. United* States, 554 U.S. 237, 243 (2008). Our judicial system "is designed around the premise that [parties represented by competent counsel] know what is best for them, and are responsible for advancing the facts and argument entitling them to relief." *Id.* (quoting *Castro v. United States*, 540 U.S. 375, 386) (Scalia, J., concurring in part and concurring in judgment). "[C]ourts are essentially passive instruments of government." *Id.* (quoting *United States v. Samuels*, 808 F.2d 1298, 1301 (8th Cir. 1987) (Arnold, J., concurring in denial of reh′g en banc). Courts "do not, or should not, sally forth each day looking for wrongs to right. [They] wait for cases to come to [them], and when [cases arise, courts] normally decide only questions presented by the parties." *Id.*

The party-presentation principle is "not ironclad," but the Court has excused departures from it only in "extraordinary circumstances." *Id.* "In criminal cases, departures from the party presentation principle have usually occurred to protect a pro se litigant's rights." *Id.* at 1579 (internal quotation marks omitted); *see, e.g., Castro*, 540 U.S. at 381-83 (endorsing judicial authority to reframe pro se litigants' motion for post-conviction relief to "avoid

an unnecessary dismissal" or "inappropriately stringent application of formal labeling requirements").

B. Factual Background

Mr. Sharp sold two firearms to a confidential informant. He was later stopped by local law enforcement for public intoxication. During his arrest for this offense, a firearm was discovered on his person. At the time he sold the two firearms and possessed the third, Mr. Sharp was a convicted felon. Of note, Mr. Sharp was previously convicted in the State of Georgia of robbery by force, aggravated assault, burglary, aggravated battery, and terroristic threats.

On December 16, 2019, Mr. Sharp pled guilty pursuant to a criminal information charging him with being a felon-in-possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Of note, when Mr. Sharp pled guilty, the Eleventh Circuit had recently held that a Georgia terroristic threats conviction was not an ACCA predicate. *United States v. Oliver*, 946 F.3d 1276, 1284-85 (11th Cir. 2020) (*Oliver I*). Meanwhile, on March 12, 2020, the United States Attorney's Office in the Southern District of Georgia filed a petition for panel rehearing, seeking to overturn *Oliver I. United States v. Oliver*, No. 17-15565 (11th Cir.) (petition filed March 12, 2020).

At his sentencing on June 8, 2020, the government argued that Mr. Sharp should be subject to a 15-year mandatory minimum sentence because his prior convictions were qualifying predicates under 18 U.S.C. § 924(e)(1), the Armed Career Criminal Act ("ACCA"). Specifically, the government argued that Mr. Sharp's prior

Georgia robbery by force, burglary, and aggravated battery convictions constituted the three qualifying predicate convictions, which triggered the ACCA. The government chose not argue, due to then-binding case law (*Oliver I*), that Mr. Sharp's prior terroristic threats conviction was a qualifying ACCA predicate.

Mr. Sharp argued that he was not an Armed Career Criminal because his prior Georgia robbery conviction was not a violent felony pursuant to the categorical approach. Hewing to those steps detailed in *Mathis v United States,* 579 U.S. 500 (2016), Mr. Sharp explained that the text of the Georgia robbery statute, Georgia decisional law, and the Georgia jury instructions established that a violation of the Georgia robbery statute did not constitute a violent felony under the ACCA.

The district court agreed with Mr. Sharp, holding that his Georgia robbery conviction was not an ACCA predicate under the categorical approach. The district court sentenced Mr. Sharp to 110-months imprisonment.

On June 18, 2020, ten days after Mr. Sharp was sentenced, the Eleventh Circuit held that a Georgia terroristic threats conviction was an ACCA predicate. *United States v. Oliver*, 962 F.3d 1311, 1321 (2020) (*Oliver II*). As a result of the decision in *Oliver II*, the government first filed a motion to reconsider with the district court, which it denied. Following the denial, the government filed an appeal.

In its brief, the government argued that: one, Mr. Sharp now qualified as an Armed Career Criminal, given that his terroristic threats conviction was now an ACCA predicate;

and, two, the Georgia robbery statute was an ACCA predicate under the modified categorical approach. Mr. Sharp argued in his response that: one, the government waived any argument that his terroristic threats conviction was an ACCA predicate because it chose not to make such an argument at sentencing; and, two, the district court correctly held that a Georgia robbery conviction was a non-ACCA predicate under the categorical approach. The Eleventh Circuit held that:

> "[T]he government did not waive its argument that Sharp's conviction qualified as a predicate crime of violence under the ACCA, where, as here, the argument was foreclosed by binding precedent at the time of sentencing and the change in law occurred within the time to file a notice of appeal. Because we find that the government did not waive this argument, we need not address whether the Georgia robbery statute constitutes an ACCA predicate offense. Based on the foregoing, Sharp's sentence is vacated, and the case is remanded for resentencing consistent with this opinion."

United States v. Sharp, 21 F.4th 1282, 1288 (11th Cir. 2021). The Eleventh Circuit based this holding on its prior decision in *Tribue v. United States,* 929 F.3d 1326 (11th Cir. 2019). *Id.* at 1286-87. Specifically, the Eleventh found:

> "[T]he same underlying concerns presented in *Tribue* are reflected here. The government is not required to exhaustively address whether each conviction in the PSI qualifies as an ACCA predicate in order to preserve the argument and guard against

> an intervening change in the law. While, unlike *Tribue*, Sharp objected to the ACCA enhancement at sentencing, at that time, the terroristic threats conviction did not qualify as a 'violent felony' under the ACCA. It follows, then, that the government had no alternative grounds on which to rest its argument that Sharp qualified as an Armed Career Criminal, other than those it presented to the district court. Just as Sharp could not have expected that we would later hold that his terroristic threats conviction qualified as a violent felony, neither could the government."

Id. at 1287. Following the decision, Mr. Sharp filed a Petition for a Rehearing En Banc, but that Petition was denied.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit violated the party-presentation principle this Court reaffirmed in *Sineneng-Smith*, by granting relief to the government on an issue the government willfully abandoned at Mr. Sharp's sentencing hearing. The holding in *Sharp* contravenes fundamental precepts of our adversarial system by rescuing the government from its own litigation decisions. Accordingly, this Court should grant certiorari and reverse for three reasons. First, the Eleventh Circuit's decision in *Sharp* is wrong. This decision follows the Circuit's holding in *Campbell,* representing a trend of wrongfully allowing the government to avail itself of issues the government abandoned in previous hearings. Second, Mr. Sharp's case is an excellent vehicle for the Court to answer the question presented, allowing the Court to definitively reaffirm its decision in *Sineneng-Smith* and, thus, ensuring the viability of the party-presentation principle.

Only this Court can ensure a uniform application of the party-presentation principle. Review should be granted to ensure that this basic principle in the adversary system remains intact.

A. The Eleventh Circuit's Decision In *Sharp* Is Wrong

The Eleventh Circuit's decision in *Sharp* departs from the party-presentation principle that this Court reaffirmed in *Sineneng-Smith*. "In our adversarial system," this Court explained, "we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the par-ties present." *Sineneng-Smith*, 140 S. Ct. at 1579 (quoting *Greenlaw*, 554 U.S. at 243). While the party-presentation principle is "not ironclad," and courts may consider forfeited issues in "extraordinary circumstances," courts remain "essentially passive instruments of government"—they "do not, or should not, sally forth each day looking for wrongs to right. They wait for cases to come to them, and when cases arise, courts normally decide only questions presented by the parties." *Id.* at 1579, 1581 (alterations omitted)

By considering an issue that government abandoned on appeal, the Eleventh Circuit violated the party-presentation principle. First, the Eleventh Circuit's decision in *Sharp* is at odds with this Court's holding in *Sineneng-Smith*. Second, the Eleventh Circuit's decision in *Sharp* follows its holding in *United States v. Campbell*, 26 F.4th 860 (11th Cir. 2022) (en banc). These two holdings represent an unsettling trend within the Eleventh Circuit, namely the court's intervention in allowing the government to seek relief on issues it had previously abandoned. And third, the Eleventh Circuit's decisions in *Sharp* and *Campbell* stand in stark contrast with other Circuits, which have upheld the party-presentation principle.

1. Here, the government chose not to argue at Mr. Sharp's sentencing hearing that his prior terroristic threats conviction was an ACCA predicate. At the time Mr. Sharp pled guilty on December 16, 2019, his terroristic threats conviction was a not ACCA predicate under *United States v. Oliver*, 946 F.3d 1276, 1284-85 (11th Cir. 2020) (*Oliver I*). However, on March 12, 2020, the United States Attorney's Office in the Southern District of Georgia sought to overturn this decision, filing a petition for panel rehearing. *US v. Oliver*, No. 17-15565 (11th Cir.) (petition filed March 12, 2020). Consequently, at Mr. Sharp's sentencing hearing on June 8, 2020, the government knew or should have known that the non-ACCA designation of his terroristic threats conviction was being actively litigated within the Eleventh Circuit. Due to this fact, the government was responsible for objecting to Mr. Sharp's terroristic threats conviction being a non-ACCA predicate at his sentencing hearing. The government could have easily made by this objection at the sentencing hearing, in their sentencing memorandum, or when they filed their objections to the initial Presentence Report. However, the government did none of these things. Instead, the government chose to remain silent – focusing exclusively on a single issue at the sentencing hearing: whether Mr. Sharp's robbery conviction was an ACCA predicate.

It was only when the Eleventh Circuit on June 18, 2020, vacated its earlier panel opinion in *United States v. Oliver*, 962 F.3d 1311, 1321 (2020) (*Oliver II*), that the government decided to argue that Mr. Sharp's terroristic threats conviction should be an ACCA predicate. However, when the government raised on appeal the issue of Mr. Sharp's terroristic threats conviction being an ACCA predicate, the Eleventh Circuit should have rejected the government's

argument under the party-presentation principle articulated in *Sineneng-Smith*. As this Court held: "[I]n both civil and criminal cases...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." *Sineneng-Smith*, 140 S. Ct. at 1579 (quoting 554 U.S. at 243. Our judicial system "is designed around the premise that [parties represented by competent counsel] know what is best for them, and are responsible for advancing the facts and argument entitling them to relief." *Id.* (quoting *Castro* 540 U.S. at 386 (2003) (Scalia, J., concurring in part and concurring in judgment).

Pursuant to the party-presentation principle, the government could not argue that Mr. Sharp's terroristic threats conviction was an ACCA predicate because it chose not to make this argument at the sentencing hearing. Accordingly, the Eleventh Circuit should not have intervened and allowed the government to pursue an issue it had previously chosen to abandon.

2. The Eleventh Circuit's decision to violate the party-presentation principle is not isolated to Mr. Sharp's case. Rather, it is also present in the Circuit's en banc decision in *Campbell* 26 F.4th at 860 (11th Cir. 2022). There the government failed to argue in its appeal that the good-faith exception to the exclusionary rule applied to an unlawful traffic stop. *Id.* at 869-870. Recognizing the government waived this issue on appeal, the Eleventh Circuit *sua sponte*, raised, considered, and then decided the good-faith issue in the government's favor – reasoning that: "[t]o clarify our caselaw, we hold 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." *Id.* at 873.

Ultimately, the Eleventh Circuit found that the extraordinary circumstance, one which excused the government's forfeiture of the good-faith exception issue, to be the following:

> "(The) Court has an extraordinary interest in protecting the public and encouraging good police work by ensuring that evidence obtained in good faith reliance on binding appellate precedent is not excluded the policy. And since the focus of the exclusionary rule is solely on deterring police misconduct, there is little sense in excluding evidence based on Government counsel's mistakes. Standing alone, the strong policy considerations underlying the exclusionary rule may well be sufficient to justify exercising our discretion to excuse the Government's forfeiture and address the merits."

Id. at 878. The Eleventh Circuit also found that because there were no material factual disputes surrounding the traffic stop underlying the controversy, "the question of whether the good-faith exception applies has become a pure question of law in which the policy considerations behind the exclusionary rule lay starkly before us. And just as trial courts are particularly well-suited to making findings of fact, appellate courts are particularly well-suited to answering questions of law." *Id.* at 879. Finally, the Eleventh Circuit found the case to be extraordinary "because Campbell's own arguments to the panel placed the good-faith exception squarely before us,

even though neither he nor the Government directly addressed the issue."

Id. at 879-880. However, as Judge Newsom and Judge Jordan convincingly argued in the dissent, the majority's decision in *Campbell* cannot be reconciled with *Sineneng-Smith*. Specially, the *sua sponte* consideration of the good-faith issue conflicted with the party-presentation rule in *Sineneng-Smith* because there were no extraordinary circumstances in Campbell's case justifying an exception to the party-presentation rule. *Id.* at 911-17. As Judges Newsom and Jordan argued:

> "[The majority has offered no persuasive justification for insinuating itself into a criminal prosecution to save the United States—the quintessential sophisticated, repeat-player litigant—from what are, at best, its litigation failures." *Id.* at 909. Rather, "even while mouthing the words," the majority has "completely failed to come to grips with the 'extraordinary circumstances' standard that the Supreme Court has prescribed for forfeiture situations like the one that (on the majority's premise) this case presents."

Id. at 918. Judges Newsom and Jordan's dissent – joined by four other judges – and the reasoning underlying also applies to the Eleventh Circuit's failings in *Sharp*. In both instances, the Eleventh Circuit is giving relief to the government for an issue that the government abandoned in a previous hearing. Here, like in *Campbell*, it is not up the courts of appeals to save the government from itself. Accordingly, the Court should grant the petition in order to stop this troubling pattern of the Eleventh Circuit

intervening on behalf of the government. As this Court surmised: "Counsel almost always know a great deal more about their cases than we do, and this must be particularly true of counsel for the United States, *the richest, most powerful, and best represented litigant to appear before us.*" *Greenlaw* 554 U.S. at 244 (emphasis added). The government must be held to account for the decisions they make. The Eleventh Circuit is simply not doing so.

3. The Eleventh Circuit's decision in *Sharp* does not only run afoul of *Sineneng-Smith*, but other Circuits as well. Specifically, the Third Circuit and the Ninth Circuit have upheld the party-presentation in cases similar to Mr. Sharp's.

a. In *United States v. Dupree*, 617 F.3d 724, 728 (3rd Cir. 2010), the Third Circuit held that an issue is waived on appeal if the government chooses not to argue the issue to the district court. "This raise-or-waive rule is essential to the proper functioning of our adversary system because even the most learned judges are not clairvoyant." *Id.* "[A] party 'must unequivocally put its position before the trial court at a point and in a manner that permits the court to consider its merits.' " *Id.* (quoting *Shell Petroleum, Inc. v. United States*, 182 F.3d 212, 218 (3d Cir.1999)).

In *Dupree*, a police officer grabbed defendant Dupree, as he rode his bicycle due to Dupree matching the description of a suspected shooter. *Id.* at 726. Dupree freed himself from the officer, possibly assaulting him, and a chase ensued. *Id.* During the chase, Dupree discarded a revolver in a flowerpot and was arrested, shortly thereafter. *Id.* Charged with possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1), Dupree moved to

suppress the gun, contending that the officer never had reasonable suspicion to stop him, and the revolver was, thus, fruit of an unlawful seizure. *Id.* The government argued the under *California v. Hodari D.*, 499 U.S. 621 (1991), Dupree was not seized until after the chase, when he was subdued. *Id.* The district court rejected the government's argument. *Id.* at 726-27. Following this, the government filed a motion for reconsideration, which was denied by the district court. *Id.* at 727.

The government then appealed the district court's order granting Dupree's motion to suppress and denying its motion for reconsideration. On appeal, the government argued for the first time that the exclusionary rule did not require suppression of evidence voluntarily discarded by a fleeing defendant; and Dupree's alleged assault of the officer provided probable cause to arrest, thereby purging the taint of any unlawful arrest. *Id.*

The Third Court found that the government waived the above arguments because it chose not to present these arguments to the district court. *Id.* at 732-33. As the Third Circuit reasoned:

> Irrespective of the merits of the Government's argument, it suffers from a fatal defect: it was never presented to the District Court. It neither appears in the Government's briefs, nor was raised at the suppression hearing. Indeed, when initially opposing Dupree's suppression motion in the District Court, the Government argued only that suppression was not required because (the officer's) initial grab of Dupree did not constitute an unlawful seizure. Whether for strategic reasons or through

> inadvertence, the Government did not argue that even if (the officer's) grab of Dupree was an unlawful seizure, the fruit-of-the-poisonous-tree doctrine did not apply."

Id. at 729. Like in *Dupree*, the government in *Sharp* chose not to argue an issue before the district court; thereby waiving it on appeal. While the government, here, did argue that Mr. Sharp's terroristic threats conviction was an ACCA predicate in its motion to reconsider, the Third Circuit was concerned about the arguments the government made to the district court before it had ruled on Dupree's motion to suppress – focusing its attention on the "Government's briefs" and the "suppression hearing." *See supra* at 18. Accordingly, the Eleventh Circuit in allowing the government to argue on appeal an issue it chose not to argue to the district court runs afoul of the Third Circuit. *Dupree* upholds the party-presentation principle as articulated in *Sineneng-Smith*, while *Sharp* undermines it.

b. In *United States v. Felix*, 561 F.3d 1036, 1040 (9th Cir. 2009), the Ninth Circuit held that the government's decision to not raise an issue at a defendant's change of plea hearing and sentencing constituted waiver of that issue for purposes of appeal. In *Felix*, the government and defendant, Felix, entered into a plea agreement, where Felix agreed to waive his appellate rights. *Id.* At the guilty plea, Felix was apprised by the magistrate judge that he would be waiving his right to appeal the sentence imposed and Felix initialed each page of the plea agreement, including the page containing the appellate waiver. *Id.* At the sentencing hearing, the district court, on two occasions, told Felix that he could appeal his sentence. *Id.* at 1041.

On both of these occasions, the government chose to remain silent. *Id.*

Subsequent to the sentencing hearing, Felix filed an appeal contending the district court erred in assigning him criminal history points. *Id.* at 1041-42. The government sought to dismiss this appeal, citing the appellate waiver described *supra*. *Id.* at 1040. The Ninth Circuit ruled that the government had waived its ability to enforce the plea agreement's appellate waiver because it chose to remain silent at the sentencing hearing. *Id.* at 1040-41. The Ninth Circuit held that: "[S]uch a waiver of the right to appeal will only be enforced if the government immediately objects to the court's advisement of a right to appeal and the sentencing judge acknowledges the presence of the waiver."

Here, the government, like its counterparts in *Felix*, chose to remain silent at Mr. Sharp's sentencing hearing. If the government wanted to preserve its objection to Mr. Sharp's terroristic threats conviction being an ACCA predicate, then it should have voiced this objection to the district court. The government's willful silence in *Sharp* is analogous to the government's willful silence in *Felix*. Under the party-presentation rule, the government is required to introduce and argue issues those issue they deem relevant to the district court. A decision to do otherwise constitutes a waiver for appellate purposes. And under, *Sineneng-Smith,* courts of appeal cannot intervene to save the government from the choices they make before a district court.

B. This Question Is Of National Importance And This Case Is An Excellent Vehicle For The Court To Answer It.

The petition merits the Court's review because the Eleventh Circuit has created a new jurisprudential landscape, where the government is free from the party-presentation rule. In *Sharp* and *Campbell*, the Eleventh Circuit has turned its back on hallmark of this country's adversarial system. The principle of party presentation requires that judges be "neutral arbiter[s] of matters the parties present." *Sineneng-Smith,* 140 S. Ct. at 1579 (quotation omitted). Due to this, violations of the party-presentation principle implicate values of judicial restraint, neutrality, and fundamental fairness. This Court is the only institution that can protect these foundational tenets.

Further, in *Sharp*, the Eleventh Circuit created a rule that has the potential to unfairly affect thousands of defendants being prosecuted under 18 U.S.C. § 922(g)(1), felon-in-possession of a firearm. In *Sharp,* the Eleventh Circuit held that a defendant, who was not an Armed Career Criminal at sentencing, could be re-sentenced as such, so long as two conditions were met: (1) that after sentencing, a defendant's prior conviction became an ACCA predicate due to a change in the law; and (2) this change in the law occurred during the government's time to file a notice of appeal. The government can avail itself of this new rule, whether or not they argued at sentencing that the defendant's prior conviction constituted an ACCA predicate. The Eleventh Circuit, with this new rule, denigrates the party-presentation principle by rewarding the government's willful silence.

Whether a defendant qualifies as an Armed Career Criminal is an issue that district courts grapple with on a daily basis all over the country. In order to make an informed and correct decision, the courts rely upon the arguments chosen by the government and the defense. With *Sharp*, the Eleventh Circuit relieves the government of their duty to articulate why a defendant should be sentenced under the ACCA, hindering the ability of the district court to sentence a defendant appropriately. Accordingly, the Court's intervention is necessary to correct the Eleventh Circuit's error in *Sharp*, prevent the promulgation of this error to other courts of appeal, and restore the party-presentation principle upheld in *Sineneng-Smith*.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully Submitted,

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