No. 21-5047

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL CARTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that the district court did not abuse its discretion in declining to reduce petitioner's sentence under Section 404(b) of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5222.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. La.):

United States v. Carter, No. 05-cr-229 (Sept. 14, 2007)

United States Court of Appeals (5th Cir.):

United States v. Carter, No. 20-30305 (Feb. 3, 2021)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is not published in the Federal Reporter but is reprinted at 834 Fed. Appx. 959. The order of the district court is not published in the Federal Supplement but is available at 2020 WL 2037196.

JURISDICTION

The judgment of the court of appeals was entered on February 3, 2021. The petition for a writ of certiorari was filed on July 6, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 2007, following a guilty plea in the United States District Court for the Eastern District of Louisiana, petitioner was convicted of one count of distributing 50 grams or more of cocaine base (crack cocaine), in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) (2006), and three counts of distributing five or more grams of cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B) (2006). Judgment 1. The district court sentenced petitioner to 262 months of imprisonment, to be followed by ten years of supervised release. Judgment 2-3. Petitioner did not appeal.

In 2009 and again in 2015, the district court denied a motion to reduce petitioner's sentence under 18 U.S.C. 3582(c)(2), and petitioner did not appeal either decision. C.A. ROA 102, 109. In 2017, the district court denied petitioner's motion to vacate his sentence under 28 U.S.C. 2255 and declined to issue a certificate of appealability. Id. at 141-143.

After the enactment of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, petitioner moved for a sentence reduction under Section 404 of that Act, 132 Stat. 5222. C.A. ROA 145-153. The district court denied petitioner's motion, id. at 183-191, and the court of appeals affirmed, Pet. App. 1-2.

1. In March 2005, based on a tip from a confidential source, federal agents began an investigation into petitioner's suspected drug-trafficking activities in Metairie, Louisiana. Presentence

Investigation Report (PSR) ¶¶ 11-12. Between April 4, 2005, and July 7, 2005, petitioner sold crack cocaine four times to the same confidential source in transactions monitored covertly by law enforcement. See PSR ¶¶ 12-19. All told, petitioner sold the source a total of 146.8 grams of crack cocaine. PSR ¶ 26.

A grand jury in the Eastern District of Louisiana charged petitioner with three counts of distributing five or more grams of crack cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B) (2006), and one count of distributing 50 or more grams of crack cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) (2006). Indictment 1-2. The government filed a notice under 21 U.S.C. 851 that petitioner was subject to an enhanced sentence of "not * * * less than 20 years and not more than life imprisonment" for the Section 841(b)(1)(A) violation, and of "not * * * less than 10 years and not more than life imprisonment" for the Section 841(b)(1)(B) violations, due to a prior state conviction for possessing cocaine with intent to distribute. 21 U.S.C. 841(b)(1)(A) and (B) (2006); see C.A. ROA 71.

In 2007, petitioner pleaded guilty to the indictment. Judgment 1. The Probation Office determined that he qualified as a career offender under the Sentencing Guidelines and calculated his advisory Guidelines range to be 262 to 327 months. PSR ¶¶ 34, 71. The district court adopted that calculation at sentencing. C.A. ROA 198. The court then sentenced petitioner to 262 months

of imprisonment, to be followed by ten years of supervised release. Judgment 2-3. Petitioner did not appeal.

2. In 2007, after petitioner's sentencing, the U.S. Sentencing Commission amended the Sentencing Guidelines to reduce the base offense level for certain drug offenses involving crack cocaine. Sentencing Guidelines App. C Supp., Amend. 706 (Nov. 1, 2007). The Commission later made those changes retroactive. See id. Amend. 713 (Mar. 3, 2008). Under 18 U.S.C. 3582(c)(2), a district court may modify a previously imposed term of imprisonment "in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." In 2009, the district court in petitioner's case sua sponte considered whether to reduce his sentence under Section 3582(c)(2) in light of Amendment 706 and declined to do so. C.A. ROA 102. The court's order stated that petitioner was "ineligible for a reduction since he is a career offender," ibid., whose guidelines range would be unaffected by the retroactive change.

In 2015, petitioner moved for a sentence reduction under Section 3582(c)(2) in light of Amendment 782 to the Sentencing Guidelines. C.A. ROA 103-105. In Amendment 782, the Commission reduced by two the base offense level for all crack-cocaine offenses in the drug-quantity table. Sentencing Guidelines App. C Supp., Amend. 782 (Nov. 1, 2014). The Commission later made that amendment retroactive. See id. Amend. 788 (Nov. 1, 2014).

The district court denied petitioner's motion, finding him "ineligible for a reduction because he is a career offender," C.A. ROA 109, whose guidelines range had not been determined by the drug-quantity table.

In 2016, within one year of this Court's decision in Johnson v. United States, 576 U.S. 591 (2015), petitioner filed a motion to set aside his sentence under 28 U.S.C. 2255 on theory that definition of a "crime of violence" in the career-offender guideline was unconstitutionally vague. C.A. ROA 110-122. The district court denied petitioner's motion in light of Beckles v. United States, 137 S. Ct. 886 (2017), which held that "the advisory Sentencing Guidelines are not subject to a vagueness challenge under the Due Process Clause," id. at 895. See C.A. ROA 141-143. The court declined to issue a certificate of appealability, id. at 143, and petitioner did not seek one from the court of appeals.

3. In 2019, petitioner filed a motion for a reduction of his sentence under Section 404 of the First Step Act. The district court denied the motion, C.A. ROA 183-191, and the court of appeals affirmed, Pet. App. 1-2.

a. Section 404 of the First Step Act allows certain defendants to benefit retroactively from sentencing changes Congress made in the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372.

Before the Fair Sentencing Act, a defendant convicted of trafficking 50 grams or more of crack cocaine faced a minimum term

of imprisonment of ten years, a maximum term of imprisonment of life, and a minimum term of supervised release of five years -- with additional enhancements for recidivists (such as petitioner) or offenses resulting in death or serious bodily injury. 21 U.S.C. 841(b)(1)(A)(iii) (2006). A defendant convicted of trafficking five grams or more of crack cocaine faced a minimum term of imprisonment of five years, a maximum term of imprisonment of 40 years, and a minimum term of supervised release of four years -- again with additional enhancements for recidivists or offenses resulting in death or serious bodily injury. 21 U.S.C. 841(b)(1)(B)(iii) (2006). For powder-cocaine offenses, Congress had set the threshold drug-quantity amounts necessary to trigger the same penalties higher, at 5000 and 500 grams respectively. See 21 U.S.C. 841(b)(1)(A)(ii) and (B)(ii) (2006).

The Fair Sentencing Act reduced that disparity in the treatment of crack and powder cocaine by increasing the amount of crack cocaine necessary to trigger the penalties described above. Specifically, Section 2(a) of the Fair Sentencing Act increased the threshold quantities of crack cocaine necessary to trigger the statutory penalties set forth in Section 841(b)(1)(A) from 50 grams to 280 grams, and in Section 841(b)(1)(B) from five grams to 28 grams. 124 Stat. 2372. Those changes applied only to offenses for which a defendant was sentenced after the Fair Sentencing Act's effective date of August 3, 2010. See Dorsey v. United States, 567 U.S. 260, 273 (2012).

In 2018, Congress enacted Section 404 of the First Step Act to create a mechanism for certain defendants sentenced before the effective date of the Fair Sentencing Act to seek sentence reductions based on that Act's changes. The mechanism is available if a defendant was sentenced for a "covered offense," which Section 404(a) defines as "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372), that was committed before August 3, 2010." 132 Stat. 5222; see Terry v. United States, 141 S. Ct. 1858, 1862 (2021).

Under Section 404(b), a district court that "imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 were in effect at the time the covered offense was committed." First Step Act § 404(b), 132 Stat. 5222 (citation omitted). Section 404(c) states that "[n]othing in this section shall be construed to require a court to reduce any sentence pursuant to this section." 132 Stat. 5222.

b. The Eastern District of Louisiana has established a screening committee to identify defendants who are potentially eligible for a reduction of sentence under Section 404 of the First Step Act. See E.D. La. General Order 1-2 (Jan. 29, 2019). The screening committee identified petitioner as potentially eligible,

and petitioner requested a reduction of his sentence to 202 months or time served. C.A. ROA 151, 174.

The government agreed that petitioner was sentenced for a "covered offense" as defined in Section 404(a) of the First Step Act but urged the district court to exercise its discretion to decline to grant any reduction. C.A. ROA 156. The government stated that "[i]n deciding whether to reduce a sentence, the [c]ourt should assess the ordinary, pertinent sentencing factors stated in 18 U.S.C. § 3553(a)," and that the court "may consider post-offense conduct, either positive or negative." Id. at 160. The government observed, however, that petitioner's advisory guidelines range would not have been different at the time of his sentencing had the Fair Sentencing Act been in effect. Id. at 162. And while acknowledging petitioner's "apparent overall good conduct while in prison," ibid., the government nonetheless urged the court not to reduce its previous, within-Guidelines sentence, see id. at 163.

The district court, in a nine-page written order, declined to reduce petitioner's sentence. C.A. ROA 183-191. The court acknowledged that petitioner was eligible for a reduction, but determined that a reduction would not be "a sound use of [its] discretion" based on "the totality of the facts." Id. at 187, 188. The court observed that petitioner "was originally sentenced to a term of imprisonment within his guideline range, and this range has not changed." Id. at 188. The court also observed that

petitioner also "still faces a statutory maximum sentence of life imprisonment -- even after application of the First Step Act." Id. at 189. And the court determined that "other Section 3553(a) factors * * * militate against a reduction," noting that petitioner "has multiple controlled-substance convictions" and committed the offenses underlying his sentence while "on parole for a conviction of possession with intent to distribute cocaine." Ibid.

The district court also explained that while it was not obligated under circuit precedent to "consider a defendant's post-conviction conduct," C.A. ROA 190 (citing United States v. Jackson, 945 F.3d 315, 321 (5th Cir. 2019), cert. denied, 140 S. Ct. 2699 (2020)), "[i]n any event," petitioner's arguments focusing on his disciplinary record and educational achievements in prison must "be weighed against the other circumstances of [petitioner] and his offense conduct," ibid. "Considering that here," the court determined that petitioner's "conduct does not warrant a sentencing reduction." Ibid.

c. The court of appeals affirmed in an unpublished, per curiam decision. Pet. App. 1-2. Petitioner contended, inter alia, that the district court "failed to properly consider all the statutory sentencing factors" and failed to "provide a sufficient explanation of its reasons for denying his motion." Ibid. Citing circuit precedent, the court of appeals rejected those contentions. Id. at 2 (citing United States v. Batiste, 980 F.3d

466, 477-479 (5th Cir. 2020)). And it found that, in this case, petitioner "has not shown that the district court abused its discretion." Ibid.

ARGUMENT

Petitioner contends (Pet. 15-17) that, in exercising its discretion to decline to reduce his sentence under Section 404(b) of the First Step Act, the district court failed to give full consideration to the sentencing factors in 18 U.S.C. 3553(a) and did not provide an adequate explanation of its reasoning. Those contentions do not warrant this Court's review. The district court expressly considered the Section 3553(a) factors and explained its reasoning in a nine-page written order. The unpublished decision below, which found no abuse of discretion in the district court's order, is correct and does not conflict with any decision of this Court or another court of appeals. And no sound reason exists to hold the petition for a writ of certiorari in this case pending the Court's decision in Concepcion v. United States, No. 20-1650. The petition should therefore be denied.[1]

1. a. "'A judgment of conviction that includes a sentence of imprisonment constitutes a final judgment' and may not be modified by a district court except in limited circumstances."

[1] The same questions are presented in the pending petition for a writ of certiorari in Bates v. United States, No. 21-5348 (filed Aug. 10, 2021). The first question is presented in several pending petitions, including Houston v. United States, No. 20-1479 (filed Apr. 19, 2021), and Moyhernandez v. United States, No. 21-6009 (filed Oct. 15, 2021).

Dillon v. United States, 560 U.S. 817, 824 (2010) (quoting 18 U.S.C. 3582(b)) (brackets omitted); see 18 U.S.C. 3582(c). Section 3582(c)(1)(B) creates an exception to that general rule of finality by authorizing a court to modify a previously imposed term of imprisonment "to the extent otherwise expressly permitted by statute." 18 U.S.C. 3582(c)(1)(B). Section 404 of the First Step Act, in turn, expressly permits a court that previously imposed a sentence for a "covered offense," as defined in the Act, to "impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 were in effect at the time the covered offense was committed." First Step Act § 404(b), 132 Stat. 5222 (citation omitted). Section 404 does not expressly permit the court to make any other changes to the previously imposed sentence, and it does not require a reduced sentence in any case. To the contrary, Section 404(b) states that the court "may" impose a reduced sentence for a covered offense, and Section 404(c) states that "[n]othing in this section shall be construed to require a court to reduce any sentence pursuant to this section." 132 Stat. 5222.

As the court of appeals correctly recognized, Pet. App. 2, the district court did not abuse its discretion in denying a Section 404 sentence reduction here. The district court acknowledged that petitioner has a "covered offense" as defined in Section 404(a) because he was previously sentenced for possessing with intent to distribute 50 grams or more of crack cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) (2006); his offense

was committed before August 3, 2010; and Section 2 of the Fair Sentencing Act modified the statutory penalties for that offense by raising the amount of crack cocaine necessary to trigger Section 841(b)(1)(A) from 50 grams to 280 grams. See C.A. ROA 186; see also First Step Act § 404(a), 132 Stat. 5222; Terry v. United States, 141 S. Ct. 1858, 1862-1863 (2021). Having determined that petitioner has a covered offense, the court then considered whether to exercise its discretion under Section 404(b) to reduce his sentence and declined to do so. C.A. ROA 187-191.

The district court considered the "totality of the facts" in reaching that decision, C.A. ROA 188, focusing especially on petitioner's "'history and characteristics'" as a career offender with a lengthy criminal record, including "multiple controlled-substance convictions," id. at 189 (quoting 18 U.S.C. 3553(a)(1)). Indeed, the court observed that petitioner committed the offenses giving rise to the sentence while "on parole for a conviction of possession with intent to distribute cocaine." Ibid. In light of that criminal history, the court determined that his "current sentence is needed 'to protect the public from further crimes.'" Id. at 190 (quoting 18 U.S.C. 3553(a)(2)(C)). And although it indicated that it was not required to do so, ibid. (citing United States v. Jackson, 945 F.3d 315, 321 (5th Cir. 2019), cert. denied, 140 S. Ct. 2699 (2020)), the court also considered the evidence petitioner had submitted about his post-sentencing conduct, including "maintaining prison employment," "completing educational

courses," and "payment of his special assessment fees." Ibid. But the court "weighed" that evidence "against the other circumstances" and the "offense conduct" and ultimately determined that petitioner's case "does not warrant a sentencing reduction" under Section 404(b). Ibid.

b. Petitioner contends (Pet. 15) that the district court failed to adhere to this Court's precedents requiring a sentencing court to give "full" and "individualized" consideration to the factors set forth in Section 3553(a). Cf. Pet. 6-8 (calling the district court's order "perfunctory" and criticizing the court for using similar language in other orders). Those precedents addressed the role of the Section 3553(a) factors in the context of a plenary sentencing proceeding, rather than in the context of considering a discretionary sentence reduction under Section 404. See Gall v. United States, 552 U.S. 38, 43-44 (2007); Koon v. United States, 518 U.S. 81, 88-91 (1996); see also 18 U.S.C. 3553(a) (specifying factors "to be considered in imposing a sentence") (capitalization and emphasis omitted). And whether required to do so or not, the court did give individualized consideration to the Section 3553(a) factors before declining to grant petitioner's motion. See pp. 8-9, supra. Petitioner's dissatisfaction with the court's weighing of those factors in this particular case does not warrant further review. See Sup. Ct. R. 10.

Petitioner also contends (Pet. 16-17) that the district court failed to adequately explain its exercise of discretion. But the court issued a nine-page written decision discussing petitioner's eligibility under Section 404(a) and the reasons the court found especially persuasive for declining to reduce his sentence under Section 404(b). C.A. ROA 183-191. Petitioner does not show that more was required under the circumstances. Even at a plenary sentencing proceeding, a district court is not required to pen a lengthy exegesis or to mechanically recite and reject each argument put forward by a defendant. See Rita v. United States, 551 U.S. 338, 357, 359 (2007) (explaining that "[s]ometimes the circumstances will call for a brief explanation," and that a judge need not "write more extensively" in those cases). And a court's obligations in a sentence-reduction proceeding like this one are, if anything, less exacting. See Chavez-Meza v. United States, 138 S. Ct. 1959, 1963-1968 (2018). Here, the court considered "the totality of the facts," C.A. ROA 188, including petitioner's arguments about his post-conviction conduct, see id. at 190, and reasonably explained why it was declining to grant any reduction. No more was required.

2. Petitioner asserts (Pet. 10-12) that the decision below implicates a division of authority within the courts of appeals on whether district courts are required or merely permitted to consider the Section 3553(a) factors when evaluating whether to grant a Section 404(b) sentence-reduction motion. That issue does

not warrant the Court's review for the reasons stated in the government's brief in opposition in Houston v. United States, No. 20-1479 (filed July 21, 2021). See Br. in Opp. at 12-14, Houston, supra.[2] And, in any event, the issue is not actually implicated here. As already explained, the district court expressly considered the Section 3553(a) factors, as both parties requested that it do. See pp. 8-9, supra. The process and result in this case would therefore have been no different in a circuit in which district courts are required to consider the Section 3553(a) factors in the context of a Section 404 motion. The district court already did what those circuits would have required it to do, and the Fifth Circuit reviewed the record and found no abuse of discretion. Pet. App. 2.

Furthermore, as petitioner acknowledges (Pet. 11 n.7), the Fifth Circuit has previously declined to resolve whether a district court is required to consider the Section 3553(a) factors in the context of a Section 404 motion. See United States v. Whitehead, 986 F.3d 547, 551 n.4 (2021) ("While consideration of the pertinent § 3553(a) factors certainly seems appropriate in the [First Step Act] resentencing context, we have left open whether district courts must undertake the analysis.") (emphasis omitted); see also Jackson, 945 F.3d at 322 n.8 (reserving the question). And contrary to petitioner's suggestion (Pet. 11), the court of

[2] We have served petitioner with a copy of the government's brief in opposition in Houston.

appeals' decision in this case did not itself resolve that issue. The decision did not directly address the issue -- nor did it have reason to, because the issue is academic in this case, due to the district court's actual consideration of the Section 3553(a) factors. In any event, the decision below is unpublished and would not bind a future panel.

3. Petitioner also asserts (Pet. 12) that the decision below conflicts with decisions of the Fourth and Sixth Circuits regarding the "degree of explanation required for Section 404 rulings." That contention lacks merit. Petitioner fails to demonstrate any conflict on that issue, let alone a conflict that would warrant this Court's review. Even setting aside that the unpublished decision below did not purport to establish any general rule about the degree of explanation a district court must give, the Fourth and Sixth Circuit decisions that petitioner cites do not show that those circuits would have required elaboration beyond the nine-page written order here.

In United States v. McDonald, 986 F.3d 402 (2021), the Fourth Circuit considered three appeals by defendants who had moved for reductions of their respective sentences under Section 404. Id. at 412. All three defendants had, "despite lengthy prison terms, * * * utilized the resources and programming they could access in prison to work toward rehabilitation." Ibid. In each case, the district court used a pre-printed standard form, in which the district court "checked the box for 'granted'" and "reduced [the

defendant's] term of supervised release * * * by one year." Id. at 403-404. But, in each case, the district court declined to alter the defendant's term of imprisonment, without "provid[ing] any reasoning for its decision." Id. at 404 (emphasis added); see also id. at 412. In those circumstances, the Fourth Circuit took the view that it could not "provide a meaningful review of the district court's order." Ibid. It accordingly "vacate[d] the orders of the district court and remand[ed] [the] cases with instructions to provide explanations for the re-sentencings." Ibid.

In United States v. Williams, 972 F.3d 815 (6th Cir. 2020), a district court declined, in its discretion, to reduce a defendant's term of imprisonment under Section 404. Id. at 816. In its order, the court had expressly "considered the 18 U.S.C. § 3553(a) sentencing factors" and had determined that the defendant's within-Guidelines sentence "'remain[ed] sufficient and necessary to protect the public from future crimes of the defendant, to provide just punishment, and to provide deterrence.'" Ibid. But the court had not "address[ed] [the defendant's] argument about his post-conviction conduct" -- i.e., that "his good conduct in prison warranted a reduced sentence." Ibid. On appeal, a divided panel of the Sixth Circuit recognized that "[t]he district court need not respond to every sentencing argument," id. at 817, but vacated the district court's order and "remand[ed] the case for further consideration of [the

defendant's] good-conduct argument," noting that the district court had failed to "mention[] [his] argument regarding his post-conviction conduct" and the record did not otherwise shed light on the court's reasoning on that argument. Ibid.

In contrast to the orders at issue in McDonald and Williams, the district court in this case expressly acknowledged and discussed petitioner's arguments about his purported rehabilitation in prison, including by citation to the portion of petitioner's brief advancing those arguments. See C.A. ROA 190 & n.31 (noting that petitioner "points to his good conduct in prison -- including maintaining prison employment and completing educational courses -- his payment of his special assessment fees, and his family's continued support of him"). The court then explained that "these circumstances must be weighed against the other circumstances," including petitioner's "offense conduct." Ibid. After considering that whole picture, the court determined that petitioner's post-conviction conduct "does not warrant a sentencing reduction." Ibid. Nothing in McDonald or Williams suggests that the Fourth or Sixth Circuit, respectively, would have remanded for additional explanation here.

4. On September 30, 2021, after the petition for a writ of certiorari was filed in this matter, this Court granted certiorari in Concepcion v. United States, No. 20-1650. The petition in that case framed the question presented as "[w]hether, when deciding if it should 'impose a reduced sentence' on an individual under

Section 404(b) of the First Step Act of 2018, 21 U.S.C. § 841 note, a district court must or may consider intervening legal and factual developments." Pet. at I, Concepcion, supra (No. 20-650) (Concepcion Pet.). Resolution of that question would not affect the disposition of this case, and the Court should accordingly deny the petition here without awaiting the decision in Concepcion.

To the extent that the Court's decision in Concepcion might bear on either of the questions presented here, it would make no difference to the result. As discussed above, the district court considered the Section 3553(a) factors, and its explanation of its decision was more than adequate. And to the extent that petitioner's conduct in prison since his original sentence might be considered an "intervening * * * factual development[]" (Concepcion Pet. I) implicated by Concepcion, the district court here expressly considered it irrespective of whether the court was required to do so, and found it insufficient, "weighed against the other circumstances," to justify a favorable exercise of the court's discretion, C.A. ROA 190. No further review of the court's discretionary determination is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2021