No. 23-27

In the Supreme Court of the United States

MICHAEL HARPER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred in denying petitioner's motion for a discretionary sentence reduction under Section 404 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5222, where petitioner was sentenced under a Sentencing Guideline applicable to first-degree murder in light of his role as the getaway driver in a murder.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

United States v. *Harper*, No. 08-cv-21622 (Sept. 15, 2011)

United States v. *Harper*, No. 14-cv-21254 (Aug. 27, 2014)

United States v. *Harper*, No. 14-cv-22895 (Sept. 17, 2014)

United States Court of Appeals (11th Cir.):

United States v. *Harper*, No. 11-15472 (May 4, 2012)

United States v. *Harper*, No. 14-14788 (Dec. 18, 2015)

United States v. *Harper*, No. 14-14791 (Feb. 18, 2015)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, and guidelines:

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No. 23-27

MICHAEL HARPER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the Federal Reporter but is available at 2023 WL 3166351. A prior opinion of the court of appeals (Pet. App. 6a-11a) is not published in the Federal Reporter but is reprinted at 855 Fed. Appx. 564. The order of the district court (Pet. App. 19a-22a) denying petitioner's motion for a reduced sentence is not published in the Federal Supplement but is available at 2019 WL 8348957. The order of the district court (Pet. App. 12a-18a) denying petitioner's motion for reconsideration is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 2023. The petition for a writ of certiorari was filed on July 6, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiring to possess more than five kilograms of cocaine and more than 50 grams of cocaine base (crack cocaine) with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 846. Pet. App. 7a. The district court sentenced petitioner to a term of life imprisonment. *Ibid.* The court of appeals affirmed, 432 F.3d 1189, and this Court denied a petition for a writ of certiorari, 551 U.S. 1125. Petitioner unsuccessfully sought collateral review of his sentence under 28 U.S.C. 2255 on three occasions. See S.D. Fla. 08-cv-21622, Order (Sept. 15. 2011); S.D. Fla. 14-cv-21254, Order (Aug. 27, 2014); S.D. Fla. 14-cv-22895, Order (Sept. 17, 2014).

Following the enactment of the First Step Act of 2018 (First Step Act), Pub. L. No. 115-391, 132 Stat. 5194, petitioner moved for a sentence reduction under Section 404 of that Act. Pet. App. 19a-20a. The district court denied the motion, *id.* at 19a-22a, and the court of appeals affirmed, *id.* at 6a-11a. This Court granted petitioner's petition for a writ of certiorari, vacated the judgment, and remanded to the court of appeals in light of *Concepcion* v. *United States*, 142 S. Ct. 2389 (2022). Pet. App. 5a. The court of appeals again affirmed. *Id.* at 1a-4a.

1. In the 1990s, petitioner participated in a drug-distribution operation, in which he cooked cocaine to sell as crack and sold multiple kilograms of cocaine. See Presentence Investigation Report (PSR) ¶¶ 46-51. Petitioner also drove the getaway car in the murder of a man whom he believed to have shot his co-conspirators. PSR ¶¶ 89-91.

In 2000, following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiring to possess more than five kilograms of cocaine and more than 50 grams of crack cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 846. Pet. App. 13a; see 432 F.3d at 1202. The Probation Office assessed that petitioner was responsible for more than 1.5 kilograms (1500 grams) of crack cocaine. PSR ¶ 112; see Pet. App. 13a. And it determined that the applicable statutory penalty range for petitioner's offense was ten years to life imprisonment under 21 U.S.C. 841(b)(1)(A)(iii) (Supp. IV 1986), which at the time applied to offenses involving more than 5000 grams of powder cocaine and more than 50 grams of crack cocaine. See PSR ¶ 158.

At sentencing, the district court adopted the Probation Office's determinations, crediting the witnesses who testified about petitioner's responsibility for the drug offense and his role as the getaway driver in the murder. Judgment 6; see 432 F.3d at 1253-1255. The court then turned to the Sentencing Guidelines, which were then viewed as mandatory. See 432 F.3d at 1255 & n.69. It looked first to Sentencing Guideline § 2D1.1(d)(1) (1998), which governed punishment of drug-distribution offenses. Pet. App. 13a. Sentencing Guideline § 2D1.1(d)(1) instructed, however, that "if a victim was killed under circumstances that would constitute murder under 18 U.S.C. 1111," then Sentencing Guideline § 2A1.1—applicable to "federal first-degree murder convictions"—would apply. 432 F.3d at 1253. And at the time, Guideline § 2A1.1 "mandated a life sentence." *Ibid.* (bracket and citation omitted); see Sentencing Guideline § 2A1.1 (1998). Accordingly, the court sentenced petitioner to life imprisonment. Pet. App. 7a.

2. While petitioner's direct appeal was pending, this Court held in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. Invoking *Apprendi*, petitioner argued to the court of appeals that "the district court erred when it found him responsible for cocaine base in excess of 50 grams because * * * that determination should have been made by a jury." 432 F.3d at 1255.

The court of appeals rejected petitioner's argument, holding that "any error" under *Apprendi* "would necessarily be harmless" because "[t]he district court properly sentenced [petitioner] under U.S.S.G. §§ 2D1.1(d)(1) and 2A1.1, which mandates a life sentence regardless of the quantity of drugs involved." 432 F.3d at 1255. And the court added that "there is nothing in the record that would indicate that the sentencing judge would have imposed a lesser sentence on [petitioner] had the Guidelines been only advisory" at the time of his sentencing. *Id.* at 1255 n.69; see *United States* v. *Booker,* 543 U.S. 220 (2005) (applying *Apprendi* to the Sentencing Guidelines and invalidating the statutory provision that made them binding). This Court denied a petition for a writ of certiorari. 551 U.S. 1125.

3. Congress subsequently enacted the Fair Sentencing Act of 2010 (Fair Sentencing Act), Pub. L. No. 111-220, 124 Stat. 2372, which altered the statutory penalties for certain crack-cocaine offenses. Before those amendments, a non-recidivist defendant convicted of trafficking 50 grams or more of crack cocaine, without an enhancement for a resulting death or serious bodily injury, faced a minimum term of ten years of

imprisonment and a maximum term of life imprisonment. 21 U.S.C. 841(b)(1)(A)(iii) (2006). A non-recidivist defendant convicted of trafficking five grams or more of crack cocaine, without an enhancement for a resulting death or serious bodily injury, faced a minimum term of five years of imprisonment and a maximum term of 40 years of imprisonment. 21 U.S.C. 841(b)(1)(B)(iii) (2006). For powder-cocaine offenses, Congress had set the threshold amounts necessary to trigger the same penalties significantly higher. 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 21 U.S.C. 841(b)(1)(A) from 50 grams to 280 grams, and in 21 U.S.C. 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. See *Terry* v. *United States*, 141 S. Ct. 1858, 1861 (2021).

In 2018, Congress enacted Section 404 of the First Step Act, which allows a defendant sentenced for a "'covered offense,'" defined in Section 404(a) 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 * * * , that was committed before August 3, 2010," to seek a reduced sentence. 132 Stat. 5222. Under Section 404(b), a district court that "imposed a sentence for a covered offense may, on motion of the defendant, * * * impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act * * * were

in effect at the time the covered offense was committed." *Ibid.*

3. After his conviction and sentence became final, petitioner filed three separate motions to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. 2255, all of which were denied. See S.D. Fla. 08-cv-21622, Order (Sept. 15. 2011); S.D. Fla. 14-cv-21254, Order (Aug. 27, 2014); S.D. Fla. 14-cv-22895, Order (Sept. 17, 2014).

In 2019, petitioner filed a pro se motion for a sentence reduction under Section 404 of the First Step Act. Pet. App. 14a. The district court, however, deemed petitioner "ineligible" for such a reduction because regardless of "his conduct involving cocaine base," Sentencing Guideline § 2A1.1 would have subjected him to a sentence of life imprisonment based on his role in the murder. Pet. App. 21a.

After retaining counsel, petitioner moved for reconsideration, and while that motion was pending, the Eleventh Circuit decided *United States* v. *Jones*, 962 F.3d 1290 (2020), cert. granted, judgment vacated *sub nom. Jackson* v. *United States*, 143 S. Ct. 72 (2022), and opinion reinstated on reconsideration *sub nom. United States* v. *Jackson*, 58 F.4th 1331 (11th Cir. 2023). In *Jones*, the Eleventh Circuit explained that "[a] movant's offense is a covered offense if section two or three of the Fair Sentencing Act modified its statutory penalties." *Id.* at 1298. The court further stated that even for a defendant with a covered offense, Section 404(b) "does not permit reducing a movant's sentence if he received the lowest statutory penalty that also would be available to him under the Fair Sentencing Act." *Id.* at 1303. And the court added that "in determining what a movant's statutory penalty would be under the Fair

Sentencing Act, the district court is bound by a previous finding of drug quantity that could have been used to determine the movant's statutory penalty at the time of sentencing." *Ibid.*

Following *Jones*, the district court denied petitioner's motion for reconsideration. Pet. App. 12a-18a. The court recognized that petitioner "was convicted [of] and sentenced [for] a covered offense." *Id.* at 16a. But the court determined that under *Jones*, it was "bound by its prior finding as to drug quantity attributable to [petitioner]." *Ibid.* "As such," the court continued, "if the Fair Sentencing Act were in effect at the time that [petitioner] was sentenced, [petitioner] would be subject to the same guidelines." *Id.* at 16a-17a. The court further found that "[e]ven if the life sentence provided in § 2A1.1 is not mandatory," a "downward departure would be inappropriate." *Id.* at 17a.

4. The court of appeals affirmed. Pet. App. 6a-11a. The court agreed with petitioner that he was eligible for a reduction because he had been convicted of an offense punishable under the since-modified Section 841(b)(1)(A). *Id.* at 8a. But the court rejected petitioner's contention that the district court had failed to consider the 18 U.S.C. 3553(a) factors when denying his Section 404 motion, finding that even assuming that the court "was required to look at" those factors, "the record reflects that [it] took [them] into account." *Id.* at 9a-10a; see *id.* at 8a. The court of appeals also found that the district court did not "err[] in its ultimate decision to deny relief," concluding that in light of "the considerable discretion [district] courts receive," the court did not "abuse[] its discretion in determining that a below-Guidelines sentence would be inappropriate." *Id.* at 10a.

This Court then granted petitioner's petition for a writ of certiorari, vacated the judgment, and remanded the case to the court of appeals in light of *Concepcion* v. *United States*, 142 S. Ct. 2389 (2022). Pet. App. 5a. *Concepcion* held that "the First Step Act allows district courts to consider intervening changes of law or fact in exercising their discretion to reduce a sentence." 142 S. Ct. at 2404. It also explained that "[a] district court cannot, however, recalculate a movant's benchmark Guidelines range in any way other than to reflect the retroactive application of the Fair Sentencing Act." *Id.* at 2402 n.6.

On remand, the court of appeals again affirmed. Pet. App. 1a-4a. Petitioner argued that *Concepcion* confirms that district courts in Section 404 proceedings must "disregard[] any drug-quantity finding not made by a jury when calculating the movant's new statutory penalties" under the Fair Sentencing Act. *Id.* at 3a. But the court of appeals deemed that argument "foreclosed" by its post-*Concepcion* decision in *United States* v. *Jackson*, *supra*, which "held that *Concepcion* did not abrogate the reasoning in *Jones*." *Ibid.*

The court of appeals then concluded that the district court "correctly determined that [petitioner's] statutory sentencing range would still be ten years to life in prison under the Fair Sentencing Act, based on the court's finding at sentencing that his offense involved 1.5 kilograms of crack cocaine, and his Guidelines sentence would still be life in prison." Pet. App. 4a. And the court of appeals upheld the district court's "determin[ation] that a reduction in [petitioner's] sentence below the advisory Guidelines sentence of life in prison would not be appropriate," concluding that the

determination "was within the broad discretion afforded to district courts." *Ibid.*

ARGUMENT

The government agrees with petitioner that the Eleventh Circuit erred in concluding that the district court was bound by a prior drug-quantity finding that, inconsistent with *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), was made by a judge by a preponderance of the evidence and used to determine a defendant's statutory sentencing range. See U.S. Br. at 40 n*, *Concepcion* v. *United States*, 142 S. Ct. 2389 (2022) (No. 20-1650). Nonetheless, this Court's review is unwarranted because the conflict in the circuits is shallow and lopsided, and the questions presented are of limited and declining importance. In any event, this case would be an unsuitable vehicle in which to consider those questions. The petition should be denied.[1]

1. a. Section 404 permits a district court to reduce a previously imposed sentence for a "'covered offense,'" which the statute 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, that was committed before August 3, 2010." First Step Act § 404(a), 132 Stat. 5222 (citation omitted). Under Section 404(b), the district court that "imposed a sentence" for such a covered offense "may * * * impose a reduced sentence as if sections 2 and 3 of the Fair

[1] A similar question is presented in the pending petitions for writs of certiorari to review decisions of the Eleventh Circuit in *Jackson* v. *United States*, No. 22-7728 (filed June 5, 2023); *Clowers* v. *United States*, No. 22-7783 (filed June 12, 2023); *Perez* v. *United States*, No. 22-7794 (filed June 12, 2023); *Williams* v. *United States*, No. 23-5014 (filed June 20, 2023); and *Ingram* v. *United States*, No. 23-341 (filed July 7, 2023).

Sentencing Act of 2010 were in effect at the time the covered offense was committed." § 404(b), 132 Stat. 5222 (citation omitted). Before imposing such a reduced sentence, a district court must recalculate the applicable penalty range "as if" Sections 2 and 3 of the Fair Sentencing Act had been in effect at the time of the covered offense. *Concepcion*, 142 S. Ct. at 2402 & n.6. It may then "select[] or reject[] an appropriate sentence" within that range. *Id.* at 2402 n.6.

Congress drafted Section 404 "against the backdrop of existing law" in the sentencing context. *Parker Drilling Mgmt. Servs., Ltd.* v. *Newton*, 139 S. Ct. 1881, 1890 (2019) (citation omitted); see, *e.g.*, *McQuiggin* v. *Perkins*, 569 U.S. 383, 398 n.3 (2013) ("Congress legislates against the backdrop of existing law."). And existing constitutional sentencing law in both 2018 (when Congress enacted the First Step Act) and 2010 (when it enacted the Fair Sentencing Act) included the rule from *Apprendi* that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum" must be found by a jury "beyond a reasonable doubt." 530 U.S. at 490. That bedrock "constitutional protection[]" is "of surpassing importance" and was well established by the time both sentencing statutes at issue here were enacted. *Id.* at 476.

Accordingly, when authorizing district courts to "impose a reduced sentence," First Step Act § 404(b), 132 Stat. 5222, Congress envisioned that courts would do so in a manner consistent with *Apprendi*. It did not expect courts to instead follow constitutionally flawed sentencing regimes that had long ago been corrected by this Court. Thus, in recalculating a defendant's penalty range "as if sections 2 and 3 of the Fair Sentencing Act * * * were in effect," § 404(b), 132 Stat. 5222, district

courts may not rely on previous judicial drug-quantity findings that violated *Apprendi*. Instead, district courts must recalculate the penalty range consistent with *Apprendi* by using the drug quantity found by the jury or admitted by the defendant in a plea agreement.

b. The Eleventh Circuit has erroneously held to the contrary. In *United States* v. *Jones*, 962 F.3d 1290 (2020), cert. granted, judgment vacated *sub nom. Jackson* v. *United States*, 143 S. Ct. 72 (2022), and opinion reinstated on reconsideration *sub nom. United States* v. *Jackson*, 58 F.4th 1331 (11th Cir. 2023), the court held that even if a defendant has been convicted of a covered offense, Section 404(b) "does not permit reducing a movant's sentence if he received the lowest statutory penalty that also would be available to him under the Fair Sentencing Act." *Id.* at 1303.

The Eleventh Circuit stated in *Jones* that "in determining what a movant's statutory penalty would be under the Fair Sentencing Act, the district court is bound by a previous [judicial] finding of drug quantity that could have been used to determine the movant's statutory penalty at the time of sentencing." 962 F.3d at 1303. And in *Jackson*, the Eleventh Circuit reaffirmed that view following this Court's decision in *Concepcion*. 58 F.4th at 1336.

The Eleventh Circuit's rule fails to take proper account of Congress having legislated against existing constitutional sentencing requirements when providing for First Step Act sentence-reduction proceedings. And its reliance on *Concepcion*'s statement that a district court may not "recalculate a movant's benchmark Guidelines range in any way other than to reflect the retroactive application of the Fair Sentencing Act," *Jackson*, 58 F.4th at 1337 (quoting *Concepcion*, 142

S. Ct. at 2402 n.6), simply begs the question of how Congress understood "retroactive application of the Fair Sentencing Act"—itself a post-*Apprendi* decision—to operate.

2. Notwithstanding the Eleventh Circuit's erroneous interpretation of the First Step Act, the questions presented do not warrant this Court's review. Petitioner identifies no other court of appeals that has adopted the Eleventh Circuit's outlier interpretation. And petitioner identifies (Pet. 5-6, 22-23) only three published decisions involving pre-*Apprendi* defendants in which courts of appeals have squarely resolved the issues here differently from the Eleventh Circuit. See *United States* v. *Robinson*, 9 F.4th 954, 959 (8th Cir. 2021) (per curiam); *United States* v. *White*, 984 F.3d 76, 87-88 (D.C. Cir. 2020); *United States* v. *Ware*, 964 F.3d 482, 488-489 (6th Cir. 2020).[2] The practical significance of that limited and lopsided conflict is minimal. As a threshold matter, those three courts all recognize that while a district court may not rely on a "sentencing court's drug quantity finding * * * to determine [a

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[2] Petitioner cites (Pet. 21) other decisions stating that whether a defendant was originally sentenced for a covered offense under Section 404(a) "turns on the statute of conviction alone." *United States* v. *Boulding*, 960 F.3d 774, 781 (6th Cir. 2020). But the Eleventh Circuit has similarly stated that the Section 404(a) covered-offense determination turns on "the offense for which the district court imposed a sentence," without "considering the specific quantity of crack cocaine involved in the movant's violation." *Jones*, 962 F.3d at 1300-1301. And here, the Eleventh Circuit correctly found that petitioner "was eligible for a sentence reduction under the First Step Act because he was sentenced for a 'covered offense.'" Pet. App. 4a. The court's error rested not in its interpretation of "covered offense" under Section 404(a), but in its interpretation of Section 404(b).

defendant's] applicable statutory sentencing range," a district court may take "the sentencing court's drug quantity finding[] into account when deciding whether to exercise its discretion" to reduce a defendant's sentence. *Robinson*, 9 F.4th at 959; see *White*, 984 F.3d at 88 ("The court may consider both judge-found and jury-found drug quantities as part of its exercise of discretion"); *Ware*, 964 F.3d at 488-489. The fact that all courts of appeals at least allow *consideration* of judge-found drug quantities means that in many Section 404 cases, district courts in those circuits will reach similar outcomes as district courts in the Eleventh Circuit would.

In addition, the question whether a district court is bound by a prior judicial drug-quantity finding in considering a Section 404 motion is of declining prospective importance. Because the First Step Act allows only a single Section 404 motion, the issue can only possibly arise for the diminishing set of defendants who remain incarcerated for crack-cocaine offenses for which a sentence was imposed before August 3, 2010—the effective date of the Fair Sentencing Act—and for whom Section 404 proceedings have not yet concluded. See First Step Act § 404(b) and (c), 132 Stat. 5222. And within that set of defendants, the issue can arise only if the sentencing judge found a quantity of crack cocaine larger than the quantity reflected in the jury verdict or guilty plea, those findings could have been used to increase the defendant's statutory sentencing range, and they would, if deemed conclusive, also increase the statutory sentencing range under the modified penalties prescribed in the Fair Sentencing Act.

Moreover, in every Section 404 proceeding in every circuit, the statute expressly provides that "[n]othing in

this section shall be construed to require a court to reduce any sentence pursuant to this section." First Step Act § 404(c), 132 Stat. 5222. District courts thus have overarching discretion to deny sentence reductions in cases where the judge-found drug quantity, or some other consideration, leads the court to view the original sentence as appropriate. Petitioner has therefore not shown that the questions here are likely to arise or affect the outcome in a sufficiently significant number of cases to warrant this Court's review.

3. At all events, this case is an unsuitable vehicle in which to review the questions presented because the drug-quantity issue did not affect petitioner's sentence or the denial of his Section 404 motion. As explained above, because petitioner drove the getaway car in a murder, he was sentenced under Sentencing Guideline § 2A1.1 (1998), "the guideline applicable [to] first-degree murder convictions"—not the guideline provisions that look to drug quantity. 432 F.3d at 1253. Thus, as the Eleventh Circuit recognized, petitioner would have received "a life sentence regardless of the quantity of drugs involved." *Id.* at 1255.

And in denying petitioner's Section 404 motion, the district court determined "that a downward departure" from the "maximum sentence of life imprisonment" under Sentencing Guideline § 2A1.1 "would be inappropriate." Pet. App. 17a. The court of appeals then upheld the district court's determination as resting on an "adequate[] consider[ation of] the § 3553(a) factors"—particularly because the same district judge "presided over [petitioner's] trial and original sentencing" and had thus "already heard and considered arguments regarding the nature and circumstances of the offense and [petitioner's] criminal history." *Id.* at 10a. The court of

appeals accordingly concluded that the district court's denial of petitioner's Section 404 motion "was within the broad discretion afforded to district courts to grant or deny First Step Act motions." *Id.* at 4a.

It therefore appears that even if the district court had not been "bound by its prior finding as to drug quantity attributable to [petitioner]," it would have still found a sentence reduction to "be inappropriate." Pet. App. 16a-17a. Because the questions presented are not outcome-determinative here, this case is a poor vehicle to consider them.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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