No. 98-251

In the Supreme Court of the United States

OCTOBER TERM, 1998

DWIGHT J. LOVING, PETITIONER

v.

WILLIAM L. HART, COLONEL, COMMANDANT
UNITED STATES DISCIPLINARY BARRACKS, AND
THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES
(CAPITAL CASE)

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's capital sentence for a felony murder in which he personally killed the victim is proper under applicable constitutional and harmless-error standards, notwithstanding petitioner's claim, raised for the first time on collateral review, that his sentence is not supported by a proper finding that petitioner intentionally killed or was recklessly indifferent to human life.

2. Whether Military Rule of Evidence 606(b) precluded post-verdict inquiry into the internal deliberations and voting procedures of the court-martial members.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 1a-48a) is reported at 47 M.J. 438.

JURISDICTION

The United States Court of Appeals for the Armed Forces entered judgment on February 26, 1998. A petition for rehearing was denied on April 9, 1998. On July 2, 1998, Chief Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including August 7, 1998. The petition was filed on that date. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. 1259(3). Respondents believe that this Court lacks jurisdiction under that provision.

STATEMENT

Petitioner was convicted by a general court-martial of premeditated murder of one victim and felony murder of another, in violation of Article 118(1) and (4) of the Uniform Code of Military Justice (U.C.M.J.), 10 U.S.C. 918(1) and (4). *Loving* v. *United States*, 517 U.S. 748, 751 (1996). The same court-martial convicted petitioner of several other, noncapital violations of the U.C.M.J., including attempted murder of a third victim and several specifications of robbery. Pet. App. 1a-2a. After a separate sentencing hearing relating to the two capital convictions (the premeditated murder of Bobby Sharbino and the felony murder of Christopher Fay), the court-martial sentenced petitioner to death. *Id.* at 64a-65a. Petitioner's convictions and sentence were affirmed on direct review by the United States Army Court of Military Review and the United States Court of Appeals for the Armed Forces (formerly the United States Court of Military Appeals), and by this Court on certiorari. 34 M.J. 956 (1992), aff'd, 41 M.J. 213 (1994), aff'd, 517 U.S. 748 (1996).

After his convictions and sentence were affirmed on direct review, petitioner filed a petition with the United States Army Court of Criminal Appeals seeking extraordinary relief in the nature of mandamus. Pet. App. 2a. That court's denial of the petition for extraordinary relief was affirmed by the United States Court of Appeals for the Armed Forces. 47 M.J. 438; Pet. App. 1a-48a.

1. Petitioner was an Army private stationed at Fort Hood, Texas. 517 U.S. at 751. On the night of December 11, 1988, petitioner committed two armed robberies of convenience stores that netted less than $100. Petitioner then decided to rob cab drivers. Pet.

App. 58a-59a. On December 12, 1988, in the course of those robberies, petitioner murdered two taxicab drivers and attempted to murder a third. *Id.* at 58a-60a, 62a.

The court-martial evidence, which included petitioner's undisputed videotaped confession, established the following facts. The first robbery and murder victim, Private Christopher Fay, was an active duty soldier working for extra money as a cab driver. At approximately 8:00 p.m. on December 12, Fay drove petitioner from Killeen, Texas, to a secluded area of Fort Hood, where petitioner robbed him at gunpoint. After taking Fay's money, petitioner shot him in the back of the head. While watching blood "gushing out" of Fay's head, petitioner shot him in the back of the head a second time. Fay's dead body was discovered by another soldier at Fort Hood a short while later. Pet. App. 59a.

Petitioner, after fleeing to his Fort Hood barracks, called for a second cab at 8:15 that same evening. The second cab, driven by retired Army Sergeant Bobby Sharbino, drove petitioner from Fort Hood to a secluded street in Killeen, Texas. Petitioner robbed Sharbino at gunpoint, ordered him to lie down on the seat, and murdered him by shooting him in the head. Pet. App. 59a.

After the second murder, petitioner socialized with his girlfriend and others at local nightclubs. Pet. App. 59a. Later that evening, petitioner robbed and attempted to murder a third cab driver. The cab driver successfully defended himself, but petitioner escaped on foot. *Id.* at 60a. The next day, petitioner was arrested by Army investigators and made a videotaped confession; he later reviewed and signed a written transcript of the confession. *Id.* at 61a-63a.

2. The general court-martial convicted petitioner of four specifications of murder contained in a single charge (Charge I): premeditated murder of Fay (Charge I, Specification 1); premeditated murder of Sharbino (Charge I, Specification 2); felony murder of Fay (Charge I, Specification 3); and felony murder of Sharbino (Charge I, Specification 4). The court-martial also found petitioner guilty of Charge II (attempted murder of the third cab driver) and Charge III (five specifications involving the cab driver and convenience store robberies). The guilty findings on three of the murder convictions (premeditated murder of Sharbino and felony murder of Fay and Sharbino) were announced as unanimous. The numerical divisions on the remaining guilty findings, including the Charge I specification of premeditated murder of Fay, were not announced. Pet. App. 64a.

The presiding military judge dismissed several specifications, including premeditated murder of Fay and felony murder of Sharbino, as multiplicitous. Pet. App. 64a-65a. A capital sentencing hearing was held, in accordance with Rule for Courts-Martial (R.C.M.) 1004, on the Charge I specifications involving the premeditated murder of Sharbino and the felony murder of Fay. Pet. App. 65a.

The court-martial members unanimously found that the evidence proved each of the three alleged aggravating factors beyond a reasonable doubt: 1) "The premeditated murder of Bobby Gene Sharbino was committed while [petitioner] was engaged in the commission or attempted commission of a robbery"; 2) "Having been found guilty of the felony murder of Christopher Fay as set forth in specification 3 of Charge I, [petitioner] was the actual perpetrator of the killing"; and 3) "Having been found guilty of pre-

meditated murder of Bobby Gene Sharbino, [petitioner] was also found guilty of another violation of Article 118, U.C.M.J., in the same case." In accordance with the version of R.C.M. 1004(b)(4)(C) in effect at the time of the offense, the members also unanimously found that any extenuating and mitigating circumstances were substantially outweighed by any aggravating circumstances. Petitioner was sentenced to a dishonorable discharge, total forfeitures, and to be put to death. Pet. App. 2a-3a, 221a-222a.

3. After his convictions and sentence were affirmed by all courts (including this Court) on direct review, petitioner filed a petition with the United States Army Court of Criminal Appeals seeking extraordinary relief in the nature of mandamus. Pet. App. 2a. The petition raised only one issue: the claim that petitioner's death sentence had been imposed in violation of the Eighth Amendment because it was based in part on a conviction of felony murder that was unsupported by a unanimous finding of intent to kill or reckless indifference to human life. *Ibid.* Petitioner had never raised that claim at any previous stage of the proceedings. The Army Court of Criminal Appeals summarily denied the petition and, after agreeing to hear petitioner's writ-appeal from that denial, the United States Court of Appeals for the Armed Forces affirmed. *Id.* at 1a-48a.

The judges on the Court of Appeals for the Armed Forces unanimously agreed that the claim raised in petitioner's writ-appeal did not warrant setting aside his death sentence. See Pet. App. 4a-18a (majority opinion of Gierke, J.); *id.* at 18a-35a (Sullivan, J., concurring in part and in the result); *id.* at 35a (Effron, J., concurring in part and dissenting in part). After examining the statute and this Court's capital punish-

ment jurisprudence (*id.* at 9a-10a), the majority held that the second aggravating factor (that petitioner was the "actual perpetrator" of the killing for which he had been found guilty of felony murder) applies only to a perpetrator who intentionally kills or who exhibits reckless indifference to human life. *Id.* at 10a. As so construed, the majority held (*id.* at 11a), this factor sufficiently narrows the class of death-eligible offenders to meet the narrowing requirement of *Zant* v. *Stevens*, 462 U.S. 862 (1983), and the culpability requirement of *Enmund* v. *Florida*, 458 U.S. 782 (1982), and *Tison* v. *Arizona*, 481 U.S. 137 (1987).

The court rejected petitioner's contention that the court-martial instructions did not expressly limit the "actual perpetrator" factor to intentional or reckless killers. Noting that petitioner "did not request [such an instruction] or object to the lack of definition," the majority held that "the military judge's failure to define ['actual perpetrator of the killing'] was not error under the particular facts of this case." Pet. App. 12a. The majority held that "[t]he overwhelming and uncontested evidence established that [petitioner], acting alone, personally and intentionally killed Mr. Fay." *Ibid.* It further held that, "[u]nder these facts, there is no reasonable possibility that the court members understood the term 'actual perpetrator of the killing' to mean anything other than an intentional killing." *Id.* at 13a. Indeed, the court held, a "reasonable factfinder at either the trial or appellate level could come to no other conclusion" because "[t]he issue of an accidental or unintentional killing was not raised." *Ibid.* Finally, "[e]ven assuming *arguendo* that an instruction defining 'actual perpetrator of the killing' should have been given," the court was "satisfied that such a deficiency was harmless beyond a reasonable doubt because it

could not possibly have affected the court-martial's finding of the aggravating factor." *Ibid.* The court declined to remand to the Court of Criminal Appeals for a specific finding of culpability because of "the complete absence of any factual issue on this matter" and the harmless-error finding. *Id.* at 14a.

The court also held that, wholly apart from the "actual perpetrator" factor, the two other aggravating factors found by the court-martial sufficed to narrow the class of death-eligible offenders. Given those other indisputably valid factors (petitioner's premeditated murder of Sharbino during a robbery and his commission of more than one murder), the court was satisfied beyond a reasonable doubt that any error in the actual perpetrator factor had no effect upon the process of "determining 'death eligibility,' before the weighing process began." Pet. App. 14a-15a.

The court also found no prejudicial error at the weighing stage. The court recognized that in some circumstances an invalid aggravating factor may "skew" the "weighing process" in a capital sentencing proceeding. But it concluded, on the facts of this case, that any error in submitting the actual perpetrator factor at that stage was harmless beyond a reasonable doubt. Pet. App. 15a. The court explained that, whether or not properly labeled a *factor*, petitioner's "role as the 'actual perpetrator of the killing' was properly considered by the members as an aggravating *circumstance*." *Ibid.* (emphasis added) (citing R.C.M. 1004(b)(4)(C)). The court reiterated that petitioner was constitutionally sentenced for the capital offense of felony murder of Fay (along with the premeditated murder of Sharbino) and that the actual perpetrator factor was properly submitted to the jury. Pet. App. 16a. The court found no basis for reversing petitioner's

sentence, even assuming the failure to define actual perpetrator made it error to submit the felony-murder charge as a capital offense and error to submit the actual-perpetrator issue as an aggravating factor. The court was "satisfied beyond a reasonable doubt that the number of capital offenses and number of aggravating factors had no impact on the sentencing deliberations and that the mislabeling of the triggerman circumstance as a 'factor' was likewise harmless beyond a reasonable doubt." *Id*. at 17a-18a.

4. While his writ-appeal challenge of the triggerman factor was pending, petitioner also sought leave to file, out of time, a petition for rehearing of the court of appeals' 1994 decision affirming his sentence on direct review. Petitioner had unsuccessfully argued on direct review that affidavits demonstrated that court-martial members followed improper voting procedures during their sentencing deliberations. The court of appeals, with one judge dissenting, held those affidavits insufficient to upset a facially valid verdict. Pet. App. 65a-82a (citing Mil. R. Evid. 606(b)). Petitioner did not seek further review of that issue in his certiorari petition, and this Court affirmed his convictions and sentence. 517 U.S. at 774. On February 26, 1998, the same day it denied his writ appeal, the court of appeals (with one judge dissenting) denied petitioner's motion for leave to file a rehearing petition out of time. Pet. App. 291a.

ARGUMENT

1. Petitioner claims (Pet. 10-23) that his death sentence was imposed in violation of the Eighth Amendment and must be vacated, because the court-martial was not instructed to find that petitioner intentionally killed Christopher Fay or exhibited reckless

indifference to human life when killing Fay in the course of robbing him. That claim does not warrant this Court's review.

a. As an initial matter, this Court lacks jurisdiction to hear petitioner's claim under 28 U.S.C. 1259.[1] Petitioner invokes subsection (3) of Section 1259, which authorizes this Court to review cases "in which the Court of Appeals for the Armed Forces granted a petition for review under section 867(a)(3) of title 10" of the United States Code. The Court of Appeals for the Armed Forces did not review petitioner's claim under 10 U.S.C. 867(a)(3).[2] That Section applies only to cases on direct review. See *Hendrix* v. *Warden*, 49 C.M.R.

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[1] Section 1259 of Title 28 of the United States Code provides:

Decisions of the United States Court of Appeals for the Armed Forces may be reviewed by the Supreme Court by writ of certiorari in the following cases:

(1) Cases reviewed by the Court of Appeals for the Armed Forces under section 867(a)(1) of title 10.

(2) Cases certified to the Court of Appeals for the Armed Forces by the Judge Advocate General under section 867(a)(2) of title 10.

(3) Cases in which the Court of Appeals for the Armed Forces granted a petition for review under section 867(a)(3) of title 10.

(4) Cases, other than those described in paragraphs (1), (2), and (3) of this subsection, in which the Court of Appeals for the Armed Forces granted relief.

[2] Section 867(a)(3) states that the Court of Appeals for the Armed Forces shall review the record in

"(3) all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review."

146, 147 (C.M.A. 1974). Petitioner did not rely on that provision in seeking review in the court below, and that court did not invoke it; rather the court relied on the All Writs Act, 28 U.S.C. 1651(a). Pet. App. 4a. There is no basis for concluding that Section 1259(3) permits this Court's review of a case in which jurisdiction in the court of appeals rested on the All Writs Act.

Nor does this Court have jurisdiction under any of the other three provisions of 28 U.S.C. 1259. That Section authorizes, in subsections (1) and (2), Supreme Court review only of cases reviewed by the Court of Appeals for the Armed Forces under 10 U.S.C. 867(a)(1) and (2), which are provisions by which that court exercises direct review of certain classes of cases.[3] Section 1259 also authorizes, in subsection (4), review of other cases in which the court of appeals has "granted relief." The Court of Appeals of the Armed Forces did not "grant[] relief" to petitioner. Thus, Section 1259 does not afford a basis for this Court's review.

Even assuming this Court might have some other source of authority to review the judgment below, it should not exercise it to review the merits of petitioner's claim, because the Court of Appeals for the Armed Forces erred in exercising jurisdiction over the

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[3] Section 867(a)(1) authorizes the Court of Appeals for the Armed Forces to review cases in which a sentence of death was imposed, and Section 867(a)(2) authorizes the Court of Appeals to review cases in which the Judge Advocate General so requests. Both provisions apply to direct appeals; neither applies to writ-appeal petitions. See Rules 4 and 18 of the Rules of the U.S. Court of Appeals for the Armed Forces. Indeed, in the court below, petitioner sought to rely on Section 867(a)(1) as a basis for jurisdiction, but the Court of Appeals deliberately declined to rest its assertion of jurisdiction on that provision. Pet. App. 4a.

claim under 28 U.S.C. 1651(a). Petitioner's current challenge is a collateral attack on his conviction and sentence, which became final upon this Court's decision on review of his direct appeal. Although that collateral challenge could have been brought in federal district court under 28 U.S.C. 2241, see *Schlesinger* v. *Councilman*, 420 U.S. 738, 747, 748 (1975); *Burns* v. *Wilson*, 346 U.S. 137, 139 (1953), petitioner instead brought it in the military courts. The United States Court of Appeals for the Armed Forces (CAAF), however, lacks jurisdiction to grant habeas corpus relief under Section 2241. See *Robison* v. *Abbott*, 49 C.M.R. 8, 9-10 (C.M.A. 1974). And that court does not have jurisdiction to grant the equivalent relief in this case under the All Writs Act, 28 U.S.C. 1651(a). Because this Court affirmed petitioner's conviction and sentence on direct review, the judgment of the court-martial was final, see 10 U.S.C. 871(c)(1)(C)(iii), 876; R.C.M. 1209(a), and the case could no longer come before the Army Court of Criminal Appeals under 10 U.S.C. 866 (1994 & Supp. II 1996). Therefore, that court had no jurisdiction under 28 U.S.C. 1651(a) to grant a petition for extraordinary relief "in aid of [its] jurisdiction[]." There is no reason for this Court to exercise any possible jurisdiction it might have to reach the merits of petitioner's claims. See, *e.g.*, *Mansfield, Coldwater & Lake Michigan Ry.* v. *Swan*, 111 U.S. 379, 381 (1884); *Liberty Mut. Ins. Co.* v. *Wetzel*, 424 U.S. 737, 740 (1976).

This Court has granted certiorari in *Clinton* v. *Goldsmith*, No. 98-347 (cert. granted, Nov. 2, 1998), in which we also challenge the jurisdiction of the United States Court of Appeals for the Armed Forces to hear a

post-conviction claim for relief under 28 U.S.C. 1651(a).[4] This Court need not, however, hold this case pending its decision in *Goldsmith* because, even if United States Court of Appeals for the Armed Forces properly exercised jurisdiction in this case, this Court lacks jurisdiction under the provision petitioner has invoked (28 U.S.C. 1259(3)), there is no other clear source of jurisdiction, and the merits of petitioner's claim do not, in any event, warrant this Court's review.

b. Petitioner's theory is that, for his capital sentence to be valid, the Eighth Amendment required an instruction to the court-martial members that they must unanimously find that he had the intent to kill or exhibited reckless indifference to human life. Pet. 15-20. That theory is incorrect.[5] Even if petitioner were correct about the level of culpability needed to support a capital sentence for the actual triggerman in a felony murder, the Eighth Amendment does not require that the culpability finding be made by a particular tribunal or at any particular point in the capital punishment proceedings. *Cabana* v. *Bullock*, 474 U.S. 376, 386 (1986) ("If a person sentenced to death in fact killed, attempted to kill, or intended to kill, the Eighth Amendment itself is not violated by his or her execution regardless of who makes the determination of the requisite culpability."); *Hopkins* v. *Reeves*, 118 S. Ct. 1895, 1902 (1998) ("*Tison* and *Enmund* do not affect the

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[4] We are providing a copy of our petition in *Goldsmith* to petitioner in this case.

[5] As we have done at earlier stages of this case, we assume that the principles enunciated in *Furman* v. *Georgia*, 408 U.S. 238 (1972), and elaborated in later cases are applicable to sentences of death imposed by courts-martial. This Court has not decided that question. See *Loving*, 517 U.S. at 755; *Schick* v. *Reed*, 419 U.S. 256, 267 (1974).

showing that a State must make at a defendant's *trial* for felony murder."). The Eighth Amendment requires only that "at some point in the process, the requisite factual finding as to [petitioner's] culpability has been made." *Cabana*, 474 U.S. at 387; see also *Hopkins*, 118 S. Ct. at 1902. Thus, the Eighth Amendment cannot require that the court-martial have been instructed that it had to make the finding of petitioner's culpability. See *Cabana*, 474 U.S. at 387 (reviewing court's inquiry cannot be limited to an examination of the jury instructions).[6]

Here, moreover, the record and instructions reveal that both the court-martial and the court of appeals found that petitioner intentionally killed Fay. The

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[6] Petitioner's threshold argument (Pet. 11) that, to be eligible for a capital sentence, the actual killer in a felony murder must meet the culpability showings he describes fails to acknowledge that this Court's cases have never endorsed the proposition that the Constitution requires a finding that the triggerman in a felony murder exhibited reckless indifference to human life or had an intent to kill. Indeed, the Court's cases suggest the contrary. In *Enmund* v. *Florida*, 458 U.S. 782, 797 (1982), the Court held that, in a felony murder prosecution, the Eighth Amendment prohibits imposition of the death penalty on a person who "does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." In *Tison* v. *Arizona*, 481 U.S. 137, 158 (1987), the Court clarified that the Eighth Amendment's culpability requirement in a felony murder case is satisfied by "major participation in the felony committed, combined with reckless indifference to human life." In doing so, the Court explained that *Enmund* "clearly dealt" with "the felony murderer who actually killed" and "clearly held" that "jurisdictions that limited the death penalty to these circumstances could continue to exact it in accordance with local law when the circumstances warranted." 481 U.S. at 150. There is no dispute in this case that petitioner brought a loaded gun with him to rob Fay and in the course of that felony personally shot and killed Fay.

court of appeals correctly held that the court-martial necessarily made that finding when it found that petitioner was the "actual perpetrator" of Fay's murder. As the court of appeals explained, "the overwhelming and uncontested evidence," including petitioner's unchallenged confession, "established that [petitioner], acting alone, personally and intentionally killed Mr. Fay." Pet. App. 12a. "The issue of an accidental or unintentional killing was not raised." *Id.* at 13a. Thus, the court-martial could not reasonably have found that petitioner was the triggerman without also having found that he intentionally killed Fay.[7]

The court of appeals itself made the same finding. In describing how it arrived at its understanding of what the court-martial found, the court of appeals stated that "[t]he overwhelming and uncontested evidence established that [petitioner], acting alone, personally and intentionally killed Mr. Fay." Pet. App. 12a. Indeed, the court held that "[a] reasonable factfinder at either the trial or the appellate level could come to no other conclusion." *Id.* at 13a. That statement neces-

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[7] Petitioner claims (Pet. 18-19) that the court-martial members "did not unanimously find an intent to kill" Fay because their verdict that petitioner killed Fay with premeditation was not unanimous. That argument incorrectly equates "premeditation" with "intent to kill." The U.C.M.J., like many murder statutes, imposes different penalties for premeditated murder and "intentional murder without premeditation." *Loving*, 517 U.S. at 755-756; Pet. App. 173a-174a (following "congressional determination that an intentional killing preceded by consideration of the fatal act with a 'cool mind' is more serious and deserving of more serious punishment than an intentional killing without such consideration"). Accordingly, that the court-martial members did not unanimously find premeditation does not mean that they concluded that he lacked the intent to kill. See *id.* at 174a.

sarily entails an appellate finding that petitioner intentionally killed Fay.[8]

Contrary to petitioner's implication (Pet. 11, 12-13), the finding that petitioner intended to kill Fay is not constitutionally deficient simply because it was not made for the express purpose of satisfying the *Enmund*/*Tison* requirement. The relevant issue is whether the culpability finding was made, not the purpose for which it was made. See *Cabana*, 474 U.S. at 389-390 (scrutinizing findings by state supreme court to determine whether they satisfy *Enmund* even though state court "obviously was not addressing the specific requirements set forth in *Enmund*, for that case had not yet been decided").

c. Petitioner concedes (Pet. 11, 16-17) that the court of appeals could constitutionally have made the *Enmund*/*Tison* finding. He contends (Pet. 17-18), however, that he was nonetheless entitled to a jury instruction explaining that the court martial was required to make that finding because the court of appeals decided, as a matter of military law, that the court martial was the appropriate body to make the finding. That claim arises under federal law, not the Constitution, and does not involve "a fundamental defect which inherently results in a complete miscarriage of justice, [or] an omission inconsistent with the rudimentary demands of fair procedure." *Hill* v. *United*

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[8] Confirming that reading, the court of appeals also stated that it need not "remand to the Court of Criminal Appeals for a specific finding of culpability" "[i]n view of the complete absence of any factual issue on this matter." Pet. App. 14a. The court later reiterated that, "[f]or the reasons set out above, we hold that [petitioner] was convicted of a capital-felony murder that satisfies the proportionality requirements of *Enmund* and *Tison*." *Id.* at 16a.

States, 368 U.S. 424, 428 (1962). The claim is therefore not cognizable on collateral review.

In any event, any instructional error that might have occurred is necessarily harmless beyond a reasonable doubt given the finding of the court of appeals (Pet. App. 13a) that, under the facts of the case and the theory on which it was argued, "there is no reasonable possibility that the court members understood the term 'actual perpetrator of the killing' to mean anything other than an intentional killing." See *Cabana*, 474 U.S. at 391 n.6 (endorsing harmless error analysis where jury instructions would theoretically have permitted a capital sentence without a finding on the *Enmund* factors).

Cabana thus forecloses petitioner's procedural argument (*e.g.*, Pet. 18) that only a specific instruction stating that "actual perpetrator" means an intentional or reckless killer could ensure a "fair and reliable" decision. Indeed, any such requirement would constitute a new rule of criminal procedure that is not available to petitioner on collateral review. See *Teague* v. *Lane*, 489 U.S. 288 (1989).

Even setting aside *Teague*, petitioner's contention that the court-martial should have been instructed that it was required to find that petitioner acted intentionally or recklessly does not warrant relief here.[9] Because petitioner did not object to the absence of that language from the instruction on the "actual per-

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[9] The issue is unlikely to arise in the future. After concluding that the actual perpetrator factor had to embrace only intentional or reckless killings to satisfy the narrowing function required by *Zant* v. *Stephens*, 462 U.S. 862, 877 (1983), the court of appeals "strongly urged" military judges to include that language in defining the term "actual perpetrator." Pet. App. 12a n.4.

petrator" factor or request that it be so defined, a court hearing the case on direct appeal would be confined to correcting plain error. See Pet. App. 12a (quoting R.C.M. 920(f)); cf. Fed. R. Crim. P. 30, 52(b). Petitioner cannot show that the alleged instructional omission was plain error, because the evidence that he intended to kill Fay was "overwhelming and uncontested." Pet. App. 12a-14a; see *Johnson* v. *United States*, 520 U.S. 461, 470 (1997) (defendant is not entitled to plain error relief where instructions to which defendant did not object erroneously failed to submit element as to which the evidence was overwhelming).

Petitioner should be required, if anything, to clear a higher hurdle. Because petitioner did not raise his present claim on direct appeal, he must establish "cause" for the procedural default and "actual prejudice" from the omission. See *United States* v. *Frady*, 456 U.S. 152, 168, 170-171 (1982). The absence of any reason why petitioner failed to make his objection on direct appeal, coupled with the overwhelming proof of his intent to kill Fay, establishes that he cannot meet the cause and prejudice standard.

d. Petitioner also contends (Pet. 10-15) that the actual perpetrator factor, if undefined, did not sufficiently narrow the class of death-eligible defendants to meet Eighth Amendment standards. As the court of appeals noted (Pet. App. 6a-7a, 15a), the "actual perpetrator" factor (like the other two aggravating factors) was applied in two phases of the sentencing process: (1) the "eligibility phase," in which it served to "narrow[] the class of defendants eligible for the death penalty"; and (2) the "selection phase," where the jury weighed it in "determin[ing] whether to impose a death sentence on an eligible defendant." *Buchanan* v. *Angelone*, 118

S. Ct. 757, 761 (1998) (citing *Tuilaepa* v. *California*, 512 U.S. 967, 971-972 (1994)).

Petitioner cannot show prejudicial error at either of those phases. If we are correct, as discussed above, that the court-martial's finding that petitioner was the actual perpetrator necessarily included the finding that he intentionally killed, there was sufficient narrowing even under petitioner's theory. In any event, even without the actual-perpetrator factor, there was sufficient narrowing in this case at the "eligibility" phase because two other indisputably valid aggravating factors remained. Those two factors (petitioner's premeditated murder of Sharbino during a robbery and his commission of more than one murder) served the requisite narrowing function, regardless of whether petitioner was also death-eligible as the actual perpetrator of Fay's murder. Thus, petitioner's claim that "for narrowing purposes, it is just as if the [actual perpetrator] factor did not exist" (Pet. 14), even if accurate, does not justify setting aside his death sentence. Pet. App. 14a-15a; see *Zant* v. *Stephens*, 462 U.S. 862, 884 (1983) ("death sentence supported by at least one valid aggravating circumstance need not be set aside * * * simply because another aggravating circumstance is 'invalid' in the sense that it is insufficient by itself to support the death penalty").

There was likewise no defect at the "weighing" phase of the capital sentencing process. Pet. App. 15a. Because the actual perpetrator factor was one of three factors weighed in the selection phase, a defect in it could give rise to a constitutional issue. *Ibid.*; *Stringer* v. *Black*, 503 U.S. 222, 232 (1992). The court of appeals properly concluded, however, that any error in submitting the actual perpetrator factor without expressly limiting it to intentional or reckless killings was "harm-

less beyond a reasonable doubt." Pet. App. 15a-18a; *Stringer*, 503 U.S. at 232 (endorsing "constitutional harmless-error analysis" where invalid aggravator is included in the weighing process).

The alleged error was harmless beyond a reasonable doubt because, as explained above at pages 13-15 and 16, based on the evidence and arguments in the case, the court-martial could not reasonably have found that petitioner was the triggerman without also finding that he intentionally killed Fay. The alleged error was also harmless beyond a reasonable doubt because, even without further definition, the court-martial members were entitled to weigh the fact that petitioner was the actual triggerman in the felony murder of Fay. There was nothing improper or vague in the actual perpetrator aggravating circumstance. The flaw, according to petitioner, was that, without further definition that clearly limited it to intentional or reckless killings, it could not serve the narrowing function required by *Zant*. Pet. 12.[10] The actual perpetrator factor was not necessary to serve that narrowing function, because there were two other, valid aggravating factors.

The alleged error, therefore, resulted (at worst) in the mislabeling of petitioner's role as triggerman as an aggravating "factor" rather than "circumstance." Pet. App. 15a. Therefore, as the court of appeals explained, "any defect in the court-martial's finding concerning the 'actual-perpetrator' factor did not put a 'thumb' on 'death's side of the scale' because the same facts and circumstances remained on the same sides of the scale." *Id.* at 15a-16a. Petitioner speculates (Pet. 20-23) that

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[10] Petitioner also asserts (Pet. 12) that such further definition was required to satisfy the culpability requirement of *Enmund*. That contention is addressed above. See pages 12-17, *supra*.

the mislabeling could have prejudiced him because it increased the number of death-eligible offenses from one to two, and the number of aggravating factors from two to three. As the court of appeals explained, however, "the entire emphasis by counsel for both sides during the sentencing proceedings was on the facts and circumstances of the offenses and the background of [petitioner], not on the number of capital offenses or aggravating factors. Neither counsel made reference to the number of capital offenses or aggravating factors in their sentencing arguments." Pet. App. 17a. The court of appeals thus properly determined that petitioner suffered no prejudice from the failure to define the aggravating factor. *Id.* at 17a-18a. That determination does not warrant review by this Court.

2. Petitioner also seeks (Pet. 24-28) review of a claim, rejected in 1994 by the court of appeals on direct review (Pet. App. 65a-82a), and not raised by petitioner in his original certiorari petition, that the court-martial members followed illegal voting procedures. That claim was not before the court of appeals and is therefore not properly before this Court.

Petitioner filed a motion for leave to file, out of time, a petition for rehearing on the voting procedures claim while his writ-appeal was pending before the court of appeals, but that court denied the motion. Pet. App. 291a. As discussed above at page 9 & notes 1-2, the jurisdictional statute invoked by petitioner applies only where the court of appeals "granted a petition for review under section 867(a)(3) of title 10." 28 U.S.C. 1259(3). It does not permit review of the denial of out-of-time motions for rehearing. Petitioner could have included the voting rights claim in his original certiorari petition, invoking this Court's jurisdiction under 28 U.S.C. 1259, but he failed to do so. The time for seeking

review of this claim has long since expired. See 28 U.S.C. 2101(c); Sup. Ct. R. 13.1.

The claim would not warrant further review even if it were properly before the Court. Military Rule of Evidence 606(b), like Federal Rule of Evidence 606(b), codifies a longstanding rule of procedure generally limiting post-verdict inquiry into internal jury matters. See *Tanner* v. *United States*, 483 U.S. 107, 116-125 (1987). Petitioner's arguments (*e.g.*, that members allegedly "did not vote at all on the aggravating factors" but instead "took an either/or vote writing on their secret ballots 'life' or 'death,'" (Pet. 25)) challenge internal deliberations and procedures that are immune from post-verdict inquiry.

Military Rule of Evidence 606(b) differs from its civilian counterpart by allowing inquiry not only into outside influence (something that is not alleged here) but also into "unlawful command influence" (an issue that the Court of Appeals for the Armed Forces is uniquely qualified to review). The court of appeals held in 1994 that petitioner's proffered affidavits "do not raise an issue of unlawful command influence" but instead "reflect no more than Colonel Aylor's proper exercise of authority as president [of the court-martial] to preside over the deliberations." Pet. App. 79a. Petitioner errs in relying on *United States* v. *Thomas*, 46 M.J. 311 (C.A.A.F. 1997), which set aside a death sentence when the military judge affirmatively instructed members to follow incorrect voting procedures. Because jurors are presumed to follow their instructions, see, *e.g.*, *Shannon* v. *United States*, 512 U.S. 573, 585 (1994), erroneous instructions as to the procedures to be followed may entitle a defendant to relief. Petitioner in contrast, seeks to prove that the court-martial members violated their instructions. The

court of appeals properly held in 1994 that such an attempt is precluded by Military Rule of Evidence 606(b). Petitioner's belated challenge to that conclusion, including his case-specific argument that both the majority and dissenting judges overlooked record evidence supporting his unlawful command influence claim (Pet. 26-27 & n.10), warrants no further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.