No. 15-1257

In the Supreme Court of the United States

HASAN K. AKBAR, PETITIONER

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Whether the President's authority to promulgate aggravating factors that court-martial members must find beyond a reasonable doubt before imposing a death sentence under the Uniform Code of Military Justice, which this Court upheld in *Loving* v. *United States*, 517 U.S. 748 (1996), is invalid in light of *Ring* v. *Arizona*, 536 U.S. 584 (2002), which held that a sentencing court's finding of an aggravating factor necessary to the imposition of a death sentence violates the Sixth Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 1a-164a) is reported at 74 M.J. 364. The opinion of the United States Army Court of Criminal Appeals (Pet. App. 165a-236a) is not reported in the Military Justice Reporter but is available at 2012 WL 2887230.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 2015. A petition for reconsideration was denied on November 9, 2015. On January 15, 2016, the Chief Justice extended the time to file a petition for a writ of certiorari to and including April 7, 2016, and the petition was filed on April 6, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(1).

STATEMENT

Petitioner, a sergeant in the United States Army, was convicted by a general court-martial on three specifications of attempted murder, in violation of Article 80 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 880; and on two specifications of premeditated murder, in violation of Article 118 of the UCMJ, 10 U.S.C. 918. Pet. App. 2a. The 15 court-martial members sentenced petitioner to death. *Ibid.* The United States Army Court of Criminal Appeals affirmed. *Id.* at 165a-236a. The United States Court of Appeals for the Armed Forces (CAAF) affirmed. *Id.* at 1a-164a.

1. Courts-martial have jurisdiction to try offenses that are made punishable by the UCMJ and committed by persons subject to the UCMJ. Arts. 2(a)(1), 17-20, UCMJ, 10 U.S.C. 802, 817-820. Article 118 of the UCMJ prohibits four categories of unlawful killings, including, as relevant here, premeditated murder. Art. 118(1), 10 U.S.C. 918(1). It further provides that the penalty for a violation of Article 118(1) is "death or imprisonment for life as a court-martial may direct." *Ibid.* A defendant may be sentenced to death only by a general court-martial, comprising a military judge and, except in extenuating circumstances inapplicable in this case, at least 12 members. Arts. 16(1)(A), 25a, UCMJ, 10 U.S.C. 816(1)(A), 825a. Unlike other court-martial sentences, a sentence of death requires "the concurrence of all the members of the court-martial present at the time the vote is taken." Art. 52(b)(1), UCMJ, 10 U.S.C. 852(b)(1).

The President has promulgated additional procedures for capital sentencing in Rule 1004 of the Rules for Courts-Martial (R.C.M.). See *Loving* v. *United*

States, 517 U.S. 748, 754 (1996). Rule 1004 reiterates that the death penalty requires a unanimous vote by the court-martial's members. R.C.M. 1004(a)(2). It requires the members to find, beyond a reasonable doubt, the existence of at least one aggravating factor, and it requires that they all concur in the same factor or factors and that they concur that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances (including the applicable aggravating factor or factors). R.C.M. 1004(b)(4) and (c). For an offense of premeditated murder in violation of Article 118(1), the aggravating factors include, *inter alia*, that "[t]he accused has been found guilty in the same case of another violation of Article 118." R.C.M. 1004(c)(7)(J).

2. On March 22, 2003, petitioner was 31 years old, had been in the Army for almost five years, and had attained the rank of sergeant. Pet. App. 5a. He was a member of the 1st Brigade of the 101st Airborne Division, which was stationed in Kuwait and scheduled to cross the border into Iraq in the next few days as part of Operation Iraqi Freedom. *Id.* at 6a. That evening, petitioner was assigned to guard his squad's grenades with a more junior soldier. *Id.* at 6a, 168a. When the junior soldier went to wake the next guard shift, petitioner took four fragmentation grenades and three incendiary grenades. *Ibid.*

After his shift was over and while most of the camp was asleep, petitioner walked to the area of the camp where the brigade headquarters was located and shut off the generator that powered the exterior lights in that area. Pet. App. 6a, 168a. He tossed an incendiary grenade into the tent where the brigade commander, executive officer, and sergeant major were

sleeping. *Ibid.* After the explosion, when one of them emerged from the tent, petitioner shot him. *Ibid.* Petitioner then moved to another tent containing sleeping officers, shouted "[w]e're under attack," and tossed a fragmentation grenade into the tent, injuring several officers and killing one of them. *Id.* at 7a, 168a-169a. He then moved to a third tent and tossed another fragmentation grenade inside. *Id.* at 7a, 169a. When a captain emerged from the tent, petitioner fatally shot him in the back at close range. *Ibid.*

In addition to the two fatalities, petitioner's attack injured 14 soldiers, some permanently. Pet. App. 169a. Petitioner was soon apprehended, and subsequent investigation revealed that, several weeks earlier, he had written in his diary that "as soon as I am in Iraq I am going to kill as many of [my fellow servicemembers] as possible." *Id.* at 5a, 7a, 132a.

3. The government charged petitioner with, among other things, two specifications of premeditated murder in violation of Article 118(1), UCMJ, 10 U.S.C. 918(1). Pet. App. 171a. The charge sheet did not expressly identify any aggravating factor under R.C.M. 1004(c), but it contained special instructions that the case "be tried as a capital case." Pet. App. 82a. Soon thereafter, and before arraignment, the government provided petitioner with a "Notice of Aggravating Factors" that identified its intention of proving two aggravating factors: (1) that one premeditated murder was committed in such a way or under circumstances that the life of one or more persons other than the victim was unlawfully and substantially endangered; and (2) that petitioner was found guilty in the same case of both a premeditated murder and another unlawful killing (*i.e.*, the subject of the other

premeditated-murder charge). *Id.* at 172a-173a & n.3; see R.C.M. 1004(c)(4) and (c)(7)(J).

After a four-day trial, the 15-member court-martial panel unanimously found petitioner guilty of both premeditated-murder specifications. Pet. App. 13a, 166a, 173a. The government then moved, without objection, to limit its case to the single aggravating factor under R.C.M. 1004(c)(7)(J) of having two murder convictions in the same case. Pet. App. 173a. The military judge granted the government's motion. *Ibid.* At the conclusion of the sentencing phase, the judge instructed the panel that it could not impose the death sentence unless it unanimously found, beyond a reasonable doubt, that the alleged aggravating factor existed and that aggravating circumstances "substantially outweighed" any extenuating and mitigating aspects of the offenses or of petitioner's character and background—including a non-exhaustive list of 31 mitigating circumstances identified by the judge. *Id.* at 20a, 173a, 227a-232a.

After deliberations, the president of the panel announced that the members had unanimously determined that the aggravating factor had been proved beyond a reasonable doubt and that the extenuating and mitigating circumstances were substantially outweighed by the aggravating circumstances. The president then announced that the members had voted unanimously to sentence petitioner to death. Pet. App. 21a, 174a.

4. On appeal to the Army Court of Criminal Appeals, petitioner alleged 58 assignments of error and three supplemental assignments of error. Pet. App. 167a. As relevant here, he contended that Congress's delegation of authority to the President to identify

aggravating factors for purposes of capital sentences authorized by the UCMJ is unconstitutional. *Id.* at 171a. Although this Court's 1996 decision in *Loving*, *supra*, sustained the constitutionality of that delegation for Eighth Amendment and separation-of-powers purposes, petitioner contended that the delegation is impermissible in light of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), which held that under the Fifth and Sixth Amendments, any fact that increases the penalty for a crime beyond the statutory maximum, other than a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt, and *Ring* v. *Arizona*, 536 U.S. 584 (2002), which applied *Apprendi* to reverse a death sentence under Arizona's capital-sentencing scheme. Pet. App. 177a-178a.

The Army Court of Criminal Appeals affirmed. Pet. App. 165a-236a. As relevant here, the court rejected petitioner's *Apprendi–Ring* challenge to the President's authority to promulgate sentencing procedures (including the authority to identify aggravating factors) for purposes of capital sentences by courts-martial. *Id.* at 174a-179a. The court reasoned that, unlike in *Apprendi* and *Ring*, which arose in the civilian context, the imposition of the death penalty under the UCMJ does not require any additional findings of fact because Congress itself has authorized the maximum penalty of death for a premeditated murder in violation of Article 118(1). *Id.* at 178a. The aggravating factors in R.C.M. 1004(c) simply restrict application of the death penalty; they do not increase the authorized maximum punishment and are not, for purposes of the analogy to *Ring*, the functional equivalent of elements that must be identified by the legislature. *Id.* at 178a-179a.

5. On further appeal to the CAAF, petitioner raised 59 issues. Pet. App. 21a, 95a-110a. The court affirmed, discussing 21 issues. *Id.* at 21a-94a. As relevant here, the court rejected petitioner's contention that Congress had impermissibly delegated to the President the authority to prescribe capital-sentencing procedures for courts-martial, including the ability to specify aggravating factors that limit the application of the death penalty. *Id.* at 80a-81a. Citing *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989), the CAAF declined to conclude that *Loving* had been overruled "sub silentio" by *Ring*. Pet. App. 81a. The court stated that it would adhere to the holding in *Loving* sustaining the constitutionality of the delegation to the President unless this Court "decides at some point in the future that there is a basis to overrule that precedent." *Ibid.*[1]

Two members of the CAAF dissented, concluding that the case should be remanded for resentencing in light of petitioner's claims of ineffective assistance of counsel. Pet. App. 111a-164a.[2]

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[1] The CAAF assumed that the government had committed an "*Apprendi*" error by omitting any aggravating factor under R.C.M. 1004(c) from the charge sheet. Pet. App. 82a-83a. It concluded, however, that any such error was harmless because the presence of the multiple-murders aggravating factor was already apparent from the charge sheet's inclusion of two specifications of premeditated murder. *Id.* at 83a-84a. Moreover, it noted that petitioner received actual notice of the aggravating factors that the government intended to prove before arraignment. *Id.* at 84a.

[2] Unlike in the CAAF, petitioner does not advance an ineffective-assistance-of-counsel argument in this Court. Compare Pet. i (question presented), with Pet. App. 22a (noting argument in lower court). Accordingly, the Court should decline the invitation of one

ARGUMENT

Petitioner contends (Pet. 8-15) that Congress's delegation of authority to the President to promulgate aggravating factors for capital cases in courts-martial, which this Court upheld in *Loving* v. *United States*, 517 U.S. 748 (1996), is now infirm in light of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Ring* v. *Arizona*, 536 U.S. 584 (2002). That contention lacks merit. *Loving*'s reasoning has not been invalidated by *Ring*. Nor does R.C.M. 1004(c) implicate the constitutional rights at issue in *Apprendi* and *Ring*: The Sixth Amendment's jury-trial guarantee does not apply to courts-martial; and the due process right to proof beyond a reasonable doubt is satisfied by the rule. Further review is unwarranted.

1. In *Loving*, this Court held that, although the Eighth Amendment did require aggravating factors to limit the scope of capital sentences otherwise authorized by the UCMJ, see 517 U.S. at 755-756, the promulgation of those factors by the President in R.C.M. 1004, rather than by Congress itself, did not violate separation-of-powers principles, see 517 U.S. at 756-769. The Court rejected the contention that Congress's constitutional power to make rules for the

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amicus brief to grant certiorari to address such a question. See U.S. Air Force and Navy-Marine Corps Appellate Defense Divisions Amicus Br. 4; cf. *Wood* v. *Allen*, 558 U.S. 290, 304 (2010) (declining to address petitioner's argument that lower court had unreasonably rejected his ineffective-assistance-of-counsel claim when that question was not fairly included in the question presented). In any event, as the CAAF explained at length (Pet. App. 22a-54a) after conducting de-novo review (*id.* at 22a), the conduct of petitioner's counsel did not constitute ineffective assistance and petitioner cannot "establish prejudice at the findings phase or penalty phase of the trial" (*id.* at 53a).

government and regulation of the armed forces (U.S. Const. Art. I, § 8, Cl. 14) prevents it from delegating some authority to the President to define aspects of military crimes and criminal punishments. See *Loving*, 517 U.S. at 768-769. The Court then held that Congress had in fact delegated such power to the President under Articles 18, 36, and 56 of the UCMJ, 10 U.S.C. 818, 836, 856. See *Loving*, 517 U.S. at 769-771. Finally, the Court held that the delegation was not invalid for want of sufficient guidance to the President, because the President's role as Commander in Chief (including a long history of being able to intervene in cases where courts-martial decreed death sentences) sufficed to show the President's "undoubted competency to prescribe" aggravating factors without further guidance from Congress. *Id.* at 771-774.

2. Petitioner's principal contention (Pet. 9-10) is that *Loving* was based on the premise that the aggravating factors in R.C.M. 1004(c) are only sentencing factors, rather than elements of an aggravated crime of capital murder. As he notes (Pet. 9), that principle was invoked by the Court of Military Appeals in a decision issued more than five years before *Loving*. In *United States* v. *Curtis*, 32 M.J. 252 (C.M.A.), cert. denied, 502 U.S. 952 (1991), the court addressed the constitutionality of R.C.M. 1004(c). At the outset of its discussion, the court stated that, if the aggravating factors "were elements of the crime, we would have no choice but to hold that they must be set forth by Congress," because only Congress may define the elements of a crime. 32 M.J. at 260. It noted, however, that this Court's decision in *Walton* v. *Arizona*, 497 U.S. 639 (1990), had "made clear that 'aggravating

factors' are not 'elements' of a crime." *Curtis*, 32 M.J. at 260 (citing *Walton*, 497 U.S. at 648-649). The opinion in *Curtis* then went on to consider whether separation-of-powers principles or the nondelegation doctrine preclude the President from prescribing the aggravating factors in R.C.M. 1004(c), and concluded that they do not. 32 M.J. at 260-267.

Petitioner contends (Pet. 9-10) that *Loving* "relied on the reasoning of" *Curtis*, and therefore that *Loving*'s "conclusion must rely on the holding of *Walton* v. *Arizona*," which has now been overruled by *Ring*. But the opinion in *Loving* refutes petitioner's characterization. *Loving* did not cite *Walton* itself, discuss what does or does not constitute an element, or rely on that aspect of *Curtis*'s reasoning in sustaining the constitutionality of the President's promulgation of R.C.M. 1004(c).

Although *Loving* mentions *Curtis* more than once, *Curtis* is not cited in the portions of *Loving* that sustain Congress's constitutional power to delegate the definition of aggravating factors to the President—neither in the portion addressing Congress's express power to make rules governing and regulating the land and naval forces, see 517 U.S. at 759-768, nor in the portion recognizing that Congress "may * * * delegate authority to the President to define the aggravating factors that permit imposition of a statutory penalty," *id.* at 768. The latter discussion did not depend at all on the premise that aggravating factors in the military's capital-sentencing framework operate only as sentencing factors rather than as the functional equivalent of elements. To the contrary, that portion of *Loving* recognized that the Court had previously "upheld delegations whereby the Executive * * *

defines by regulation what conduct will be criminal" and that such an "exercise of a delegated authority *to define crimes*" could "supply the notice to defendants the Constitution requires." *Id.* at 768 (emphasis added). The Court then held that, "[i]n the circumstances presented here," where Congress had provided that "service members who commit premeditated and felony murder may be sentenced to death by a court-martial," Congress was permitted to "delegate authority to the President" to promulgate "the regulations providing the narrowing of the death-eligible class that the Eighth Amendment requires." *Id.* at 768-769.

Loving did cite *Curtis*, but only after "[h]aving held that Congress has the power of delegation" and turning to the question whether Congress had exercised that power. 517 U.S. at 769. Even then, *Loving* still did not cite the page containing the paragraph about whether aggravating factors are elements of a crime. Compare *Curtis*, 32 M.J. at 260, with *Loving*, 517 U.S. at 769 (discussing *Curtis*, 32 M.J. at 261), and *id.* at 772-773 (discussing *Curtis*, 32 M.J. at 263-267).

Thus, although *Ring* does vitiate one paragraph in the Court of Military Appeals' 1991 decision in *Curtis*, relying on *Walton* to describe the nature of the role that aggravating factors may play in capital cases for certain constitutional purposes (32 M.J. at 260), it does not affect *Loving*'s own reasoning about the constitutional validity of the congressional delegation that has been implemented through the President's promulgation of R.C.M. 1004(c).

3. Even apart from *Loving*'s own reasoning, petitioner further errs in contending (Pet. 8, 12 & n.6) that the constitutional rights at issue in *Ring* and *Apprendi* are at all implicated by R.C.M. 1004.

a. *Ring* vindicated the Sixth Amendment's jury-trial guarantee. See 536 U.S. at 588 ("This case concerns the Sixth Amendment right to a jury trial in capital prosecutions."); *id.* at 597 ("The question presented is whether [the factual presence of an] aggravating factor may be found by the judge, * * * or whether the Sixth Amendment's jury trial guarantee * * * requires that the aggravating factor determination be entrusted to the jury."). Relying on *Apprendi*, the Court held that the Sixth Amendment does not permit "a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty," because "the Sixth Amendment requires that [such aggravating factors] be found by a jury." *Id.* at 609.

The Sixth Amendment jury-trial right that was the primary basis for the holdings in *Apprendi* and *Ring* does not apply to military courts-martial. See, *e.g.*, *Ex parte Milligan*, 71 U.S. 2 (1866); *Mendrano* v. *Smith*, 797 F.2d 1538, 1544 (10th Cir. 1986) (collecting cases "reflect[ing] the universal view that members of the military have no right to jury trial in court-martial proceedings"). Instead of a civilian jury, a military capital defendant is tried before a general court-martial (*i.e.*, a military judge and a panel of at least 12 members of the armed forces). See Arts. 16(1)(A), 25, 25a, UCMJ, 10 U.S.C. 816(1)(A), 825, 825a. The Court has not extended *Apprendi* to sentencing decisions in which the jury historically played no role,[3] and it

[3] See, *e.g.*, *Oregon* v. *Ice*, 555 U.S. 160, 168-169 (2009) (holding that *Apprendi* does not forbid sentencing judges from finding facts to support the imposition of consecutive sentences, where they historically exercised that power and therefore are not encroaching on the jury's role).

should not extend *Apprendi* and *Ring* to sentencing procedures in courts-martial, where no Sixth Amendment jury-trial right has previously existed.

b. Petitioner adds (Pet. 12 n.6) that *Apprendi*'s constitutional reasoning also reflects Fifth Amendment concerns about whether a State "could subvert the due process protection of proof beyond a reasonable doubt by characterizing a fact as a sentencing factor." But R.C.M. 1004 presents no potential problems on that score. It expressly provides that the members of the court-martial must "find, beyond a reasonable doubt," that one or more of the enumerated aggravating factors exist (and, further, that all members must concur about which factor or factors exist). R.C.M. 1004(b)(4)(B) and (c). And petitioner cannot contend that he lacked notice that the multiple-murder aggravating factor at issue in his case could be used to support a death sentence for a violation of Article 118(1), because R.C.M. 1004(c)(7)(J) has not been amended since Rule 1004 was first promulgated in 1984. See Exec. Order No. 12,473, 49 Fed. Reg. 17,220 (Apr. 13, 1984).[4]

c. More generally, the capital-sentencing framework in courts-martial bears no resemblance to the bifurcated state systems at issue in *Apprendi* and *Ring*, under which a court could impose a sentence that exceeded a statutory limit based on facts that had not been found by the jury at trial. In contrast to

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[4] The other aggravating factor that was initially invoked by the prosecution but not used in the sentencing phase of petitioner's trial (about unlawfully and substantially endangering the life of someone other than the victim, see R.C.M. 1004(c)(4)), was last amended in 1994. See *Manual For Courts-Martial*, App. 21, at A21-79 (2012 ed.), www.au.af.mil/au/awc/awcgate/law/mcm.pdf.

that jury-and-judge model, the military's capital-sentencing scheme is a unitary one in which the members of the court-martial panel that tries the defendant at the guilt phase also impose the sentence at the penalty phase. They may not impose the death penalty unless they find that an aggravating factor exists, beyond a reasonable doubt, and that any extenuating or mitigating circumstances are substantially outweighed by aggravating circumstances. R.C.M. 1004(b)(4) and (c). Thus, R.C.M. 1004 does not shift fact-finding power from juries to judges or allow judges to increase the maximum penalty to which defendants are exposed.

Accordingly, the capital sentencing framework established by the UCMJ and R.C.M. 1004 does not implicate the constitutional rights at issue in *Apprendi* and *Ring*, and no reason exists for the Court to reconsider *Loving*'s constitutional holding.

4. Finally, petitioner contends (Pet. 14-15) that the Court should avoid "difficult and serious constitutional questions" about whether Congress may empower the President to promulgate aggravating factors for capital sentencing in the court-martial context. In petitioner's view (Pet. 14), the UCMJ could be read so narrowly that it would not include a congressional delegation permitting the President to identify the aggravating factors that will be used in such cases.

As discussed above, R.C.M. 1004(c) does not present any of the constitutional concerns about due process or the Sixth Amendment jury-trial right that were at issue in *Ring* and *Apprendi*, meaning there is no need to resort to constitutional avoidance. In any event, the Court has already held that the statutory provisions in question (Articles 18, 36, and 56 of the

UCMJ, 10 U.S.C. 818, 836, 856) "*give clear authority* to the President for the promulgation of RCM 1004." *Loving*, 517 U.S. at 770 (emphasis added). When a statute's meaning is clear, the canon of constitutional avoidance does not permit the Court to adopt a different construction. See *Public Citizen* v. *Department of Justice*, 491 U.S. 440, 481 (1989) (Kennedy, J., concurring in the judgment). Moreover, when this Court has construed the language of a statute, "*stare decisis* carries enhanced force." *Kimble* v. *Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015). And that is particularly true when, as here, Congress has left the statute in place for two decades after the Court's decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2016