No. 12-802

In the Supreme Court of the United States

MICHAEL C. BEHENNA, PETITIONER

v.

UNITED STATES OF AMERICA

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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QUESTION PRESENTED

Whether the Court of Appeals for the Armed Forces correctly held that an erroneous self-defense instruction was harmless error because, based on petitioner's testimony about the particular circumstances under which he shot and killed an Iraqi prisoner, petitioner was not entitled to a self-defense instruction.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 1a-43a) is reported at 71 M.J. 228. The opinion of the United States Army Court of Criminal Appeals (Pet. App. 45a-75a) is reported at 70 M.J. 521.

JURISDICTION

The judgment of the court of appeals was entered on July 5, 2012. A petition for reconsideration was denied on August 6, 2012 (Pet. App. 44a). On October 23, 2012, the Chief Justice extended the time to file a petition for a writ of certiorari to and including January 3, 2013. The petition for a writ of certiorari was filed on January 2, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner, a First Lieutenant in the United States Army, was convicted at a general court-martial composed of officer members of unpremeditated murder and assault, in violation of Articles 118 and 128 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 918 and 928 (2006). Pet. App. 46a. He was sentenced to a dismissal from the service, 25 years of confinement, and forfeiture of all pay and allowances. *Ibid.* The convening authority reduced the term of confinement to 20 years, but otherwise approved the sentence. *Ibid.* The United States Army Court of Criminal Appeals affirmed. *Id.* at 45a-75a. The United States Court of Appeals for the Armed Forces (CAAF) affirmed. *Id.* at 1a-43a.

1. The procedures and punishments of courts-martial are governed by the Rules for Courts-Martial (R.C.M.) of the *Manual for Courts-Martial* (*MCM*). See R.C.M. 101. Rule 916 of the Rules for Courts-Martial sets forth available defenses, including that of self-defense. In a prosecution for homicide, a defendant may avail himself of the defense of self-defense if he:

> (A) Apprehended, on reasonable grounds, that death or grievous bodily harm was about to be inflicted wrongfully on the accused; and
>
> (B) Believed that the force the accused used was necessary for protection against death or grievous bodily harm.

R.C.M. 916(e)(1). Such a defense is not available, however, "if the accused was an aggressor, engaged in mutual combat, or provoked the attack which gave rise to the apprehension, unless the accused had withdrawn in good faith after the aggression, combat, or provocation

and before the offense alleged occurred." R.C.M. 916(e)(4) ("Loss of right to self-defense."). By case law, an aggressor may also regain the right of self-defense if the victim escalates the level of the conflict. See *United States* v. *Cardwell*, 15 M.J. 124, 126 (C.M.A. 1983).

2. a. In 2007, petitioner deployed to Iraq, where he led a platoon responsible for conducting counter-insurgency operations in Albu Toma, an area north of Baghdad. Pet. App. 3a. Beginning in February 2008, petitioner received information that Ali Mansur (the man petitioner was convicted of unlawfully killing) was a member of an insurgent group in Albu Toma that was leading violent attacks on Coalition Forces. *Id.* at 48a.

On April 21, 2008, petitioner's platoon was on patrol near Salaam Village when a bomb exploded near the platoon's vehicles. Pet. App. 3a. Petitioner saw several of his platoon members hurt or killed by the explosion. *Ibid.* An intelligence report later linked Mansur to the bombing. *Ibid.* Petitioner went to Mansur's house, isolated him in a room, and began interrogating him. *Id.* at 48a. When Mansur did not provide the information petitioner sought, petitioner repeatedly struck him on the back with a Kevlar helmet until petitioner's platoon sergeant entered the room. *Ibid.* Petitioner turned Mansur over to interrogators and later reviewed the interrogation report. *Id.* at 3a, 48a. Dissatisfied with the information the interrogators had obtained, petitioner asked that Mansur be reinterrogated about specific individuals in the area who may have been involved in the April 21 attack on petitioner's platoon. *Id.* at 3a-4a, 48a. Petitioner, who was present during the reinterrogation but not permitted to ask questions, believed that Mansur was being deceptive. *Id.* at 4a, 48a.

On May 16, 2008, petitioner was ordered to return Mansur to Albu Toma and another detainee to a different location. Pet. App. 4a, 48a. Petitioner went to Mansur's cell and told him (through an interpreter referred to in the proceedings as Harry) that petitioner would kill him if he did not provide specific information to petitioner later in the day. *Id.* at 4a, 48a-49a. Petitioner admitted that his threat was unauthorized and later contended that he sought only to scare Mansur into providing information. *Id.* at 4a, 49a.

Petitioner returned the other detainee to his town with a four-truck convoy and released him. Pet. App. 4a, 49a. Petitioner and the convoy then traveled to Albu Toma, where petitioner met with a local resident; but petitioner did not release Mansur. *Ibid.* Instead, petitioner directed his team to take the desert route back to base because petitioner wanted to talk to Mansur in a remote, secure location. *Ibid.* En route to base, petitioner stopped the convoy at a remote location near two railroad culverts. *Ibid.* Petitioner, accompanied by Harry and Staff Sergeant (SSG) Hal Warner, took Mansur from a truck into the second culvert, which was more than 100 meters from the rest of the convoy. *Id.* at 4a-5a, 49a. Petitioner did not involve other soldiers because he knew his planned interrogation was unauthorized. *Id.* at 49a. As they left the convoy, petitioner asked SSG Warner whether he had a thermite grenade. *Id.* at 5a.

Outside the second culvert, petitioner told Mansur that he wanted information and Mansur replied that he did not know anything. Pet. App. 5a. Petitioner and SSG Warner then cut off all of Mansur's clothes, including his pants and underwear, in order to humiliate Mansur, although petitioner later acknowledged that he was

not authorized to do that. *Id.* at 5a, 49a; C.A. J.A. 189-190. When petitioner tried to remove the zip-ties on Mansur's hand with a knife, he accidently cut Mansur's wrist, so translator Harry completed the job. Pet. App. 5a, 49a; C.A. J.A. 191-192. Petitioner directed Mansur to sit on a piece of rock or concrete with his back against the side of the culvert. Pet. App. 5a, 49a-50a; C.A. J.A. 192. Petitioner and Harry stood with their backs to the other side of the culvert, approximately three feet away from Mansur. Pet. App. 50a. At some point, SSG Warner stepped outside the culvert. *Ibid.* Petitioner was in full battle gear, including his helmet, M-4 rifle, body armor, and Glock pistol. *Ibid.*; C.A. J.A. 205. Petitioner asked Mansur various questions, which Mansur continued to contend he did not have answers to; in an attempt to scare Mansur, petitioner took out his loaded Glock, pointed it at Mansur, and threatened to kill him if he did not answer petitioner's questions. Pet. App. 5a, 50a; C.A. J.A. 58-60, 193-195, 205.

b. Petitioner and the government disagree about what happened next. Harry, who was the government's primary witness, testified that he stepped out of the culvert when petitioner pulled out his gun because he was afraid he would be hit by a ricocheting bullet. Pet. App. 5a; C.A. J.A. 58-60. Harry testified that Mansur told petitioner he would talk and that, as Harry began to translate Mansur's statement, petitioner shot Mansur twice while Mansur remained seated. Pet. App. 5a-6a, 50a; C.A. J.A. 58-61. Harry testified that he did not see Mansur make any sudden movements before petitioner fired at him. Pet. App. 50a; C.A. J.A. 60.

SSG Warner testified that he was relieving himself approximately 40 meters outside the culvert when he heard the first shot. Pet. App. 6a, 50a. He testified that

he moved toward the culvert and saw the muzzle flash from the second shot. *Ibid.* At petitioner's direction, SSG Warner ignited a grenade next to Mansur, causing burns to Mansur's dead body. *Id.* at 6a, 50a-51a. Upon returning to base, petitioner asked SSG Warner if he was "cool" and discussed the difference between a moral and a legal killing. *Id.* at 7a, 51a. When Harry asked petitioner why he had killed Mansur, petitioner told him that Mansur had twice planted explosives on a particular road and had a hand in another explosion. *Ibid.*

Petitioner testified that he shot Mansur in self-defense. Pet. App. 6a-7a; C.A. J.A. 196-197. He confirmed that he pointed his Glock at Mansur and told him "[t]his is your last chance to tell the information or you will die." C.A. J.A. 195. When Mansur said something in response that petitioner did not understand, petitioner turned his head toward Harry, who was translating. *Id.* at 196. Petitioner testified that he then heard the sound of concrete hitting concrete over his shoulder, turned back to Mansur, and saw Mansur getting up with his hands reaching toward petitioner's pistol. *Id.* at 196-197. Petitioner testified that, fearing that Mansur would grab the pistol and use it against him, petitioner moved to the left to create space between him and Mansur and fired two shots at Mansur. *Ibid.* Petitioner's shots hit Mansur in the head and chest, killing him. Pet. App. 6a-7a. In support of his theory of self-defense, petitioner presented expert-witness testimony indicating that Mansur was standing when he was shot and that the chest wound was inflicted first. *Id.* at 7a-8a, 52a.

3. The military judge instructed the panel on the defense of self-defense. C.A. J.A. 213-216. The military judge first gave the panel a general instruction on self-defense, noting that "[t]he evidence has raised the issue

of self-defense" and explaining that, "[f]or self-defense to exist the accused must have had a reasonable apprehension that death or grievous bodily harm was about to be inflicted on himself and he must have actually believed that the force he used was necessary to prevent death or grievous bodily harm." *Id.* at 213. The military judge further noted that, "[i]n order to find the accused guilty you must be convinced beyond a reasonable doubt that the accused did not act in self-defense." *Id.* at 214. The military judge also explained that "[t]he accused under the pressure of a fast moving situation or immediate attack is not required to pause at his peril to evaluate the degree of danger or the amount of force necessary to protect himself." *Id.* at 215.

In addition, the military judge gave an instruction on the limitations on self-defense. C.A. J.A. 215-216. The instruction stated:

> Now there exists evidence in this case that the accused may have been assaulting Ali Mansur immediately prior to the shooting by pointing a loaded weapon at him. A person who without provocation or other legal justification or excuse assaults another person is not entitled to self-defense unless the person being assaulted escalates the level of force beyond that which was originally used. The burden of proof on this issue is on the prosecution. If you are convinced beyond a reasonable doubt that the accused, without provocation or other legal justification or excuse, assaulted Ali Mansur then you have found that the accused gave up the right to self-defense. However, if you have a reasonable doubt that the accused assaulted Ali Mansur, was provoked by Ali Mansur, or had some other legal justification or excuse, and you are not convinced beyond a reasonable

> doubt that Ali Mansur did not escalate the level of force, then you must conclude that the accused had the right to self-defense, and then you must determine if the accused actually did act in self-defense.

Ibid. Petitioner objected to the instruction's limitations on self-defense, arguing that there was no "evidence of an assault under the circumstances" because "[t]he act of pointing a weapon toward any combatant in a war zone" does not "give[] rise to * * * [an] inference of the offense of assault." *Id.* at 210.

The panel convicted petitioner of unpremeditated murder, in violation of Article 118 of the UCMJ, 10 U.S.C. 918; and assault, in violation of Article 128 of the UCMJ, 10 U.S.C. 928. See C.A. J.A. 32-34, 241.

4. The United States Army Court of Criminal Appeals affirmed. Pet. App. 45a-75a. As relevant here, the court held that the military judge "rendered legally correct and appropriate self-defense instructions tailored to the evidence presented." *Id.* at 67a. The court concluded that "[t]he instructions fully encompassed the defense's theory of the case at trial pertaining to self-defense" and "correctly set forth the applicable established principle" that "[a] person who, without provocation or other legal justification or excuse, assaults another person is not entitled to self-defense unless the person being assaulted escalates the level of force beyond that which was originally used." *Id.* at 68a.

5. a. The CAAF affirmed by a divided vote. Pet. App. 1a-43a. As relevant here, the CAAF initially held that the military judge gave a correct instruction on the general defense of self-defense. *Id.* at 10a. The court concluded, however that the military judge's instruction on the limitations on self-defense (in particular, the instruction on escalation) was erroneous in two respects.

Id. at 10a-12a. First, although the instruction stated that there was evidence that petitioner "may have been assaulting" Mansur, "the military judge provided no guidance on how to evaluate an offer-type assault, which occurs, for instance, when an individual points a loaded pistol at another person without lawful justification or authorization." *Id.* at 10a-11a.[1] In particular, the military judge did not instruct the members that, in order for petitioner "to have assaulted Mansur by pointing the pistol at him, Mansur had to *reasonably apprehend* immediate bodily harm." *Id.* at 11a.

Second, the court held that the end of the instruction contained "an erroneous statement of law." Pet. App. 12a. The relevant portion of the instruction stated:

> However, if you have a reasonable doubt that the accused assaulted Ali Mansur, was provoked by Ali Mansur, or had some other legal justification or excuse, *and* you are not convinced beyond a reasonable doubt that Ali Mansur did not escalate the level of force, then you must conclude that the accused had the right to self-defense, and then you must determine if the accused actually did act in self-defense.

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[1] As the *Manual for Courts-Martial* explains, there is a difference between "attempt" type assaults and "offer" type assaults. "An 'attempt' type assault requires a specific intent to inflict bodily harm, and an overt act—that is, an act that amounts to more than mere preparation and apparently tends to effect the intended bodily harm. An attempt type assault may be committed even though the victim had no knowledge of the incident at the time." *MCM*, Art. 128, ¶ 54.c.(1)(b)(i) (2012 ed.). "An 'offer' type assault is an unlawful demonstration of violence, either by an intentional or by a culpably negligent act or omission, which creates in the mind of another a reasonable apprehension of receiving immediate bodily harm. Specific intent to inflict bodily harm is not required." *Id.* ¶ 54.c.(1)(b)(ii).

C.A. J.A. 215-216 (emphasis added). That was "an inaccurate statement of law," the court held, "because [petitioner] would have had the right to self-defense if his original use of force had been lawful—[if] it was provoked, justified, or otherwise excusable (*i.e.*, [petitioner] was not an initial aggressor)—*or* if Mr. Mansur had escalated the level of force." Pet. App. 12a. It was error, the court explained, for the military judge to "link[] the lawful use of force with the issue of escalation with the conjunction 'and.'" *Ibid.*

The CAAF then reviewed the error for prejudice under the harmless-error standard. Pet. App. 12a-18a. The court noted that petitioner was "not in an active battlefield situation, that Mansur was not then actively engaged in hostile action against the United States or its allies, and that there were no other military exigencies in play"—and that, accordingly, petitioner "was not seeking a special privilege based on [his] status as a soldier or presence on the battlefield." *Id.* at 13a-14a. The court concluded that the instructional error was harmless because petitioner was not entitled to an instruction on escalation or withdrawal at all. *Id.* at 8a, 13a-18a.

Reviewing the evidence in the light most favorable to petitioner, the CAAF concluded that petitioner, as the initial aggressor, lost his right to self-defense. Pet. App. 14a-18a. The CAAF emphasized that petitioner "deviated from his assigned duty to return Mansur to his home, without authority, to take him to a remote culvert in the desert, far from any active hostilities for further unauthorized interrogation." *Id.* at 14a. The court noted that petitioner "then stripped the detainee naked and forced him to sit on a rock while [petitioner], in full combat attire with a loaded pistol, interrogated him."

Ibid. While in that position, petitioner "told Mansur, as he had on other occasions that day, that he was going to die unless he provided specific information." *Ibid.* In sum, petitioner's conduct was both "unauthorized and excessive," and the court found "no evidence on which a rational member could rely to conclude that [petitioner] was not the initial aggressor." *Id.* at 15a.[2]

The CAAF also held that no rational member could have concluded that petitioner regained his right to act in self-defense based on either Mansur's escalating the conflict or petitioner's withdrawing in good faith. Pet. App. 15a-18a. The court held that "Mansur could not have escalated the level of force in this situation, as [petitioner] had already introduced deadly force." *Id.* at 15a-16a (footnote omitted). And, even assuming "that Mansur could have escalated the level of force," the CAAF held that "a naked and unarmed individual in the desert does not escalate the level of force when he throws a piece of concrete at an initial aggressor in full battle attire, armed with a loaded pistol, and lunges for the pistol." *Id.* at 16a.[3] The CAAF similarly held that

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[2] The CAAF rejected petitioner's reliance on non-military civil cases alleging excessive use of force by government officials under 42 U.S.C. 1983. Pet. App. 15a n.5. The court noted that those cases were not directly applicable "because the protection of civil liberties of American citizens, which Mansur was not, varies greatly from the principles underlying criminal law and the justification for using deadly force." *Ibid.* The CAAF further noted that "even § 1983 cases recognize that if an officer points a weapon at an individual who poses no threat, then it is so clearly an excessive use of force that the officer is not entitled to qualified immunity." *Ibid.* (citing *Baird* v. *Renbarger*, 576 F.3d 340, 346-347 (7th Cir. 2009)).

[3] Petitioner conceded in his brief before the CAAF that he never argued that Mansur escalated the conflict and did not request an

petitioner was not entitled to a withdrawal instruction because nothing in his "testimony indicated that he clearly manifested an intent to withdraw or that Mr. Mansur prevented [petitioner] from withdrawing." *Ibid.*

The CAAF therefore concluded that, "[e]ven accepting the facts as [petitioner] described them on direct examination, no rational member could have found either that Mansur escalated the situation or that [petitioner] withdrew in good faith." Pet. App. 17a. The court explained that, "even if we assume that Mansur lunged for [petitioner's] pistol and [petitioner] feared that Mansur would use the pistol if he was able to seize it, because [petitioner] was the initial aggressor, and because there was no evidence to support a finding of escalation or withdrawal, a rational member could have come to no other conclusion than that [petitioner] lost the right to act in self-defense and did not regain it." *Id.* at 17a-18a. The CAAF therefore concluded that the instructional error was harmless and affirmed petitioner's conviction. *Id.* at 18a, 24a.[4]

b. Judge Effron, joined by Judge Erdmann, dissented. Pet. App. 24a-43a. They agreed that the self-defense instruction was erroneous, but did not agree that the error was harmless. *Id.* at 35a-37a. The dissenting judges would have held that "[t]he evidence at

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instruction on escalation. See Pet. C.A. Br., 2012 WL 760447, at *17-*18, *26.

[4] The CAAF also rejected petitioner's argument that the government suppressed exculpatory expert-opinion evidence in violation of the rule this Court set forth in *Brady* v. *Maryland*, 373 U.S. 83 (1963), based in part on its view that any disclosure error would not have been material because it was relevant to a theory of self-defense, to which petitioner was not entitled. Pet. App. 18a-24a. Petitioner does not seek this Court's review of the CAAF's rejection of his *Brady* claim.

trial established an issue of self-defense for resolution by the court-martial panel, not [the CAAF]." *Id.* at 36a.

ARGUMENT

Petitioner argues (Pet. 15-29) that this Court's review is needed to correct the CAAF's "categorical" rule that "a servicemember in a combat zone categorically forfeits the right to self-defense as a matter of law by pointing a firearm without authorization at a suspected enemy." Pet. i. Review is not warranted, however, because the CAAF established no such categorical rule. On the contrary, the CAAF evaluated the facts of this case in the light most favorable to petitioner and determined, based on the totality of those circumstances, that petitioner was not entitled to an instruction on self-defense because he was the aggressor in the conflict he created. That fact-bound determination was correct and does not conflict with any decision of this Court or of any other court of appeals.

1. The CAAF applied settled legal principles in correctly holding that petitioner was not entitled to an instruction on self-defense in the particular factual circumstances presented here.

a. Congress enacted the UCMJ as part of its authority to "make Rules for the Government and Regulation of the land and naval forces." U.S. Const. Art. I, § 8, Cl. 14. Article 36 of the UCMJ authorizes the President to make procedural rules for courts-martial, including by prescribing rules of evidence. See *Loving* v. *United States*, 517 U.S. 748, 770 (1996). The President exercised that authority in promulgating the *MCM*. Rule for Courts-Martial 916(e), makes self-defense an available defense in a homicide prosecution. That rule also provides that an accused forfeits his right to such a defense if he was, *inter alia*, "an aggressor." R.C.M. 916(e)(4).

Even when an accused is the original aggressor, however, he may regain the right to assert self-defense if he withdrew from the encounter before the relevant offense, *ibid.*, or the victim "escalates the level of the conflict," *United States* v. *Cardwell*, 15 M.J. 124, 126 (C.M.A. 1983); see *United States* v. *Stanley*, 71 M.J. 60, 62-63 (C.A.A.F.), cert. denied, 133 S. Ct. 210 (2012); *United States* v. *Lewis*, 65 M.J. 85, 87-89 (C.A.A.F. 2007). A question of escalation generally arises when the aggressor uses nondeadly force and the victim responds with deadly force. In that circumstance, the initial aggressor can use reasonable force to defend himself. See *Cardwell*, 15 M.J. at 126 ("[I]f A strikes B a light blow with his fist and B retaliates with a knife thrust, A is entitled to use reasonable force in defending himself against such an attack, even though he was originally the aggressor."); *Military Judges' Benchbook*, DA PAM 27-9, Ch. 5-2-6, n.8, p. 872 (Jan. 2010). In this case, petitioner did not argue that Mansur escalated the level of their conflict and did not request an escalation instruction. See Pet. C.A. Br., 2012 WL 760447, at *17-*18, *26.

b. The CAAF applied these settled legal principles to the facts of this case and correctly determined that petitioner was not entitled to an instruction on self-defense because he was the aggressor in the confrontation he created. The propriety of instructing members on a particular defense is necessarily determined with reference to the evidence presented in the case. R.C.M. 920(a) Discussion ("Instructions should be tailored to fit the circumstances of the case, and should fairly and adequately cover the issues presented."). In determining whether petitioner was entitled to a self-defense instruction, the CAAF examined all of the facts in the

case by evaluating the evidence in the light most favorable to petitioner. See Pet. App. 14a.

That relevant evidence revealed the following. At the time of the incident, petitioner was not in an active battlefield station, Mansur was not engaged in hostile action against the United States or its allies, and no other military exigencies were in play. Pet. App. 13a. Petitioner was ordered to transport Mansur to his residence and release him there. When petitioner removed Mansur from his detention cell, he told Mansur that he would interrogate Mansur later in the day and would kill Mansur if Mansur did not give him the information he sought. *Id.* at 4a, 14a. Petitioner knew at the time that he was not authorized to interrogate Mansur. *Id.* at 4a, 49a. Instead of following orders by delivering Mansur to his residence, petitioner took Mansur to an isolated area of the desert where he led Mansur to a remote culvert out of sight of most of his convoy and continued his unauthorized interrogation. *Id.* at 4a-5a, 14a. Petitioner then stripped Mansur of all of his clothing in order to humiliate him and ordered him to sit on a rock. *Id.* at 5a, 14a. Petitioner, dressed in full combat attire, pointed a loaded weapon at Mansur and continued his unauthorized interrogation. *Ibid.* When Mansur continued to tell petitioner that he did not know the answers to petitioner's questions, petitioner told Mansur that he was going to die if he did not provide specific information. *Ibid.* That evidence, which is not disputed, establishes that petitioner was the aggressor and that he "brought about the situation that resulted in his killing of Mansur" when he pointed a loaded gun at the defenseless Mansur in an isolated area and said he would kill Mansur if Mansur did not provide information he had repeatedly insisted he did not have. *Ibid.* The

CAAF therefore correctly held that petitioner was not entitled to a self-defense instruction.

b. Petitioner and Amici Retired Flag and General Officers and Former Department of Defense Official (Retired Officers) seriously over-read the CAAF's opinion when they insist (see Pet. i, 13, 15-24; Retired Officers Amici Br. 11-13) that the CAAF created a "per se" and "categorical" rule that, "as a matter of law," a service member forfeits any right to self-defense any time he points a weapon at a suspected enemy without authorization. The CAAF relied on much more than the fact that petitioner pointed a weapon at Mansur without authorization, including petitioner's repeated threats to kill Mansur and petitioner's placing Mansur in an isolated location and a defenseless posture. Pet. App. 14a. In light of the totality of circumstances, the court correctly held that petitioner forfeited his right to self-defense when he became the aggressor against his prisoner. No broader rule was issued.

Indeed, the majority does not use the terms "per se" or "categorical" anywhere in its opinion. Although it twice uses the phrase "as a matter of law" in noting that petitioner lost the right to act in self-defense, see Pet. App. 13a, 22a, nothing indicates that the court's legal conclusion was based on only a subset of the facts surrounding petitioner's shooting of Mansur rather than on the totality of the circumstances. The error petitioner ascribes to the CAAF's opinion depends on his characterization of the court as relying solely on (1) petitioner's pointing a loaded weapon at Mansur (2) without authorization. As noted, however, the CAAF also considered the myriad surrounding circumstances, includ-

ing the absence of any "military exigenc[y]," *id.* at 13a,[5] and concluded that petitioner's threatening actions were not only "unauthorized" but "excessive," *id.* at 15a. Petitioner does not even attempt to argue that the CAAF erred by concluding that petitioner lost the right to self-defense based on those factors, *combined with* all the other pertinent facts (*e.g.*, petitioners' repeated threats to kill Mansur, petitioner's confronting Mansur in an isolated location, petitioner's stripping Mansur of all of his clothing while remaining in full combat gear). The CAAF's decision was fact-bound, as it was required to be, see pp. 20-22, *infra*, and does not warrant further review.

Although petitioner suggests (Pet. 18-24) that the CAAF erred in concluding that petitioner introduced deadly force into his confrontation with Mansur by pointing a loaded gun at him, that determination by the CAAF is relevant only to the extent that petitioner might claim that Mansur escalated the level of the conflict when he allegedly threw concrete at petitioner and lunged for his gun. An individual may be an aggressor without using deadly force—and an aggressor loses his right to invoke self-defense unless his victim escalates the conflict. But petitioner explicitly stated in his brief to the CAAF that he has never contended that Mansur escalated the level of their conflict. See Pet. C.A. Br.,

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[5] Petitioner and Amici's assertion (Pet. 17-18, 23-24; Retired Officers Amici Br. 8-10) that the CAAF's decision will endanger the lives of American service members in combat zones is unfounded and ignores petitioner's own concessions that this case does not involve a suspected enemy who was at the relevant time "actively engaged in hostile action against the United States," that "there were no other military exigencies in play," and that this case does "not implicate the unique aspects of military service in a manner that requires us to apply other than basic criminal law concepts." Pet. App. 13a-14a.

2012 WL 760447, at *17-*18, *26. The exact level of force petitioner employed when he became the aggressor is therefore not relevant (in this case) to whether he was entitled to a self-defense instruction. In any case, the court of appeals was correct that, under the totality of the circumstances, petitioner's conduct constituted deadly force because it created a real and substantial risk of death or serious bodily injury to Mansur outside the bounds of any military conflict. And even if that conclusion had been error, the CAAF correctly concluded in the alternative "that a naked and unarmed individual in the desert does not escalate the level of force when he throws a piece of concrete at an initial aggressor in full battle attire, armed with a loaded pistol, and lunges for the pistol." Pet. App. 16a.

Finally, review is not warranted because the CAAF based its disposition of petitioner's jury-instruction claim on a harmless-error determination after concluding that the military judge's self-defense instruction was erroneous. Harmless-error review is primarily a job for a court of appeals, as this Court conducts harmless error review only "sparingly." *E.g., Pope* v. *Illinois*, 481 U.S. 497, 504 (1987); *Rose* v. *Clark*, 478 U.S. 570, 584 (1986). Petitioner has given no reason to justify a second round of harmless-error review.

2. Review is also not warranted because the CAAF's correct decision does not conflict with any decision of this Court or of any other court of appeals.

Petitioner argues (Pet. 24-26; see Retired Officers Amici Br. 10-11) that the CAAF's decision conflicts with decisions of this Court and other courts of appeals governing civil liability under 42 U.S.C. 1983 of civilian police officers for Fourth Amendment violations. Petitioner is incorrect.

Initially, as the CAAF noted, see Pet. App. 15a n.5, the decision in this case could not directly conflict with the qualified-immunity decisions on which petitioner relies. The principles underlying the Fourth Amendment's excessive-force doctrine do not govern here because the Fourth Amendment does not apply to government actions against foreign nationals who have no attachment to the United States. See *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990).

In any event, petitioner is wrong that the CAAF's decision "leaves servicemembers with *less* leeway to defend against deadly attacks than Section 1983 cases involving Fourth Amendment claims afford their civilian counterparts." Pet. 18. As petitioner repeatedly notes (Pet. 18-24), both the common-law defense of self-defense and Section 1983 case law governing Fourth Amendment claims of excessive force require a court to examine "all the circumstances" of a particular case. Pet. 18 (quoting *Beard* v. *United States*, 158 U.S. 550, 564 (1895)); see Pet. 21 (noting that courts considering Section 1983 claims must give "careful attention to the facts and circumstances of each particular case") (quoting *Graham* v. *Connor*, 490 U.S. 386, 396 (1989)). As discussed *supra*, that is exactly what the CAAF did in this case. Petitioner cannot invent a conflict by ignoring the CAAF's consideration of all the relevant facts in his case and then insisting that the CAAF erred by not considering all of the relevant facts in his case.

Petitioner contends that the CAAF "treat[ed] the act of pointing a firearm at a potential assailant as *per se* deadly force." Pet. 18. As discussed at pp. 16-18, *supra*, that mischaracterizes the CAAF's decision—not only because the CAAF did not announce a categorical rule, but because the CAAF held that petitioner was not

entitled to a self-defense instruction because he was the initial aggressor, not because he used deadly force. Petitioner does not squarely contest the CAAF's conclusion that he was the initial aggressor.

In any case, far from announcing a "per se" rule about the consequences of pointing a gun, the CAAF did exactly what petitioner agrees would have been required under the common law: it "consider[ed] the specific nature of the encounter and the particular characteristics of the defender and assailant." Pet. 18. Petitioner's reliance (Pet. 19) on *Stanley*, *supra*, is misplaced. In *Stanley*, the CAAF did not announce a categorical rule that "the pointing of a firearm, in and of itself, [is] 'the *use* of deadly force.'" Pet. 19 (quoting *Stanley*, 71 M.J. at 63). The court in *Stanley* examined in detail the circumstances of the altercation and concluded that, "[u]nder the circumstances of th[at] case," the defendant introduced deadly force into the altercation when he held two people at gun point. 71 M.J. at 61-64. The court also cited cases holding both that a defendant "is not *per se* deprived of the right to act in self-defense by the fact that he has armed himself and again sought out his assailant" and that "whether an accused, by resort to a weapon, uses excessive force in repelling an assault upon him is dependent upon all of the circumstances." *Id.* at 63 n.3 (quoting *United States* v. *Moore*, 15 C.M.A. 187, 194 (1964); *United States* v. *Black*, 12 C.M.A. 571, 575 (1961)).

This Court's Section 1983 cases similarly examine the particular circumstances of individual cases when evaluating whether a law enforcement officer's use of force was reasonable. See, *e.g.*, *Scott* v. *Harris*, 550 U.S. 372, 381-386 (2007); *Brosseau* v. *Haugen*, 543 U.S. 194, 197-201 (2004); *Tennessee* v. *Garner*, 471 U.S. 1, 7-12 (1985).

The reasonableness inquiry in excessive-force cases balances the nature and quality of the intrusion on the suspect's Fourth Amendment interests against the importance of the government's interests alleged to justify the intrusion, *Scott*, 550 U.S. at 383, and "the result depends very much on the facts of each case," *Brousseau*, 543 U.S. at 201.

Petitioner's reliance (Pet. 21-22 & n.15) on cases such as *Los Angeles County* v. *Rettele*, 550 U.S. 609 (2007) (per curiam), and *Baird* v. *Renbarger*, 576 F.3d 340 (7th Cir. 2009), bears this out. In *Rettele*, the Court examined the circumstances of the case and held that police officers had not used excessive force when they displayed firearms while executing a search warrant because they had reason to believe that at least one suspect was in the house and armed. 550 U.S. at 611, 613-614. The Seventh Circuit's decision in *Baird* similarly involved a police officer's brandishing of a firearm while executing a search warrant. 576 F.3d at 343. The Seventh Circuit applied the same principles this Court applied in *Rettele* and reached the opposite result—not because it employed a different per se rule, but because the court examined the facts of the case and determined that the officer in that case did *not* have reason to believe that any suspect was armed and present. *Id.* at 343-345. The facts of this case are more like *Baird* than they are like *Rettele* because Mansur was unarmed (indeed, he was unclothed), isolated, and illegally in petitioner's custody when petitioner created the conflict.

Petitioner does not identify any case in which a court of appeals held that a police officer was entitled to qualified immunity for a use of force akin to petitioner's. That is not surprising as it is difficult to imagine that any court would conclude that a civilian officer acted

reasonably when, instead of transporting an arrestee to his home as instructed, the officer first threatened to kill the arrestee if he did not provide information, then took the arrestee to an isolated area in the middle of a field, then stripped the arrestee of all of his clothes, then interrogated the arrestee, then responded to the arrestee's protestations of ignorance by pointing a loaded weapon at his head, and then told the arrestee that he would die if he did not provide the requested information. That is what petitioner did. Far from reasonable, petitioner's use of force was excessive. Pet. App. 15a. Petitioner was the aggressor and his use of a weapon, viewed in context of all of the surrounding circumstances, deprived him of the right to claim self-defense in the conflict he created. The CAAF's determination that petitioner was not entitled a self-defense instruction was correct, does not conflict with any decision of this Court or of any other court of appeals, and does not warrant further review.[6]

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[6] There is also no merit to amicus NACDL's contention (NACDL Amicus Br. 3-16) that this Court should grant the petition for a writ of certiorari because "the Court is meant to—and should—play a different and more active role in reviewing direct appeals from the military justice system" than it does in reviewing direct appeals in civilian criminal cases. *Id.* at 2-3. In authorizing this Court's review of CAAF decisions in the Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393, Congress recognized that this Court would have "complete discretion" to refuse review in any case, that the impact on the Court's docket "would not be substantial," and that the CAAF (then the Court of Military Appeals) would "remain the primary source of judicial authority" under the Code. See H.R. Rep. No. 549, 98th Cong., 1st Sess. 16-17 (1983). As with any litigant, petitioner must demonstrate "compelling reasons" why his petition for a writ of certiorari should be granted. See Sup. Ct. R. 10. He has not done so.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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