No. 20-3149

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ANTHONY SANTUCCI,

Plaintiff-Appellant,

v.

COMMANDANT, UNITED STATES DISCIPLINARY BARRACKS, FORT LEAVENWORTH, KANSAS,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS (TOPEKA)
HONORABLE JOHN W. LUNGSTRUM
NO. 5:19 CV-03116-JWL

APPELLANT'S REPLY BRIEF

John N. Maher
MAHER LEGAL SERVICES PC
26 South 3rd Street, Number 68
Geneva, Illinois 60134
Tel: (708) 468-8155
john@maherlegalservices.com

Attorney for Appellant

December 21, 2020

Oral Argument Requested

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SUMMARY OF ARGUMENT

Appellant Anthony Santucci ("Santucci") agrees with Appellee Commandant, U.S. Disciplinary Barracks ("the Commandant") that the sole issue before the Court is whether the district court properly applied the standard of review governing any Petition for Writ of Habeas Corpus ("habeas petition") filed by a petitioner seeking review of an Article I military court conviction. (Appellee's Br. at 3). For the reasons described in Santucci's Opening Brief and below, however, this Court should conclude that the district court misapplied this Circuit's precedent, should set aside the district court's decision rejecting the petition, and should grant Santucci's Petition for Writ of Habeas Corpus.

The district court's analysis essentially consisted of a recitation of the bare facts and conclusions reached by the U.S. Army Court of Criminal Appeals ("the Army Court"), followed by the conclusion that the Army Court's consideration of the issues had been full and fair, and that therefore the district court's hands were tied in terms of being able to conduct a meaningful review of the issues. But the district court's analysis was not complete. While the district court rested its conclusion on its determination that the military courts gave full and fair review to the issues presented, in this Circuit a district court may reach the merits of a military habeas claim if it presents constitutional issues that are both "substantial

and largely free of factual questions." *Lundy v. Zelez*, 908 F.2d 593, 594-95 (10th Cir. 1990).

In the Commandant's Brief of Respondent ("Appellee's Brief"), the Commandant concedes that this is part of the analysis, noting that "a federal court sits 'only [to] review habeas corpus petitions from the military courts that raise substantial constitutional issues.'" (Commandant's Br. at 17), *quoting Roberts v. Callahan*, 321 F.3d 994, 997 (10th Cir. 2003). But the district court failed to complete this analysis, and in doing so erred, turning a blind eye to substantial constitutional issues that resulted in an unreliable result at trial. A *de novo* review of the errors Santucci has raised must lead to the conclusion that the errors committed by the Article I courts were indeed substantial, were of a constitutional nature, are largely free of factual issues, and must not be countenanced by any Article III court. This Court should therefore reverse the district court's decision, and remand with instruction to grant Santucci's habeas petition.

ARGUMENT

It is beyond dispute that there are occasions when Article III courts reviewing decisions made by the Article I courts raised in a habeas petition are duty-bound to intervene. *See generally Burns v. Wilson*, 346 U.S. 137 (1953); *Schlesinger v. Councilman*, 420 U.S. 738 (1975); and *Gusik v. Schilder*, 340 U.S. 128 (1950). The parties discussed their respective views of the applicable standard

in their opening briefs, largely relying on the same cases, including *Dodson v. Zelez*, 917 F.2d 1250, 1262-63 (10th Cir. 1990) (describing the four-prong standard employed by the Article III courts in determining whether to reach the merits of issues addressed by the Article I military courts). (Appellee's Br. at 18-26); (Appellant's Br. at 38-52). The parties advocated their respective views of the standard's application to Santucci's claims, unsurprisingly reaching opposition conclusions.

But to put a finer point on the thrust of Santucci's argument here, the district court failed to recognize that even if the issues Santucci raised had received "full and fair" consideration by the military courts, Article III courts may nonetheless reach the merits of those issues so long as they are constitutional in nature, and are both "substantial and largely free of factual questions." *Lundy v. Zelez*, 908 F.2d 593, 594-95 (10th Cir. 1990), *citing Monk v. Zelez*, 901 F.2d 885, 888 (10th Cir. 1990) (quoting *Mendrano v. Smith*, 797 F.2d 1538, 1542 n. 6 (10th Cir. 1986)) (Article III court has a constitutional duty to adjudicate constitutional questions arising from Article I tribunals that are substantial and largely free of factual questions). Although the parties differ in their view of whether the military courts gave "full and fair consideration" to Santucci's constitutional issues, there can be no dispute that the district court failed to address whether those issues were substantial and largely free of factual questions. It is up to this Court to do so.

With respect to this analysis, this Court should consider the cases in which multiple examples of cases in which courts in this Circuit have found that the military courts have fully and fairly considered a claim, but then nonetheless gone on to review the claim and grant relief because the claim was substantial and largely free of factual questions.

The Court should consider *Monk*, 901 F.2d at 886, which is virtually on all fours with the facts of Santucci's case insofar as the Article III courts granted relief where the military courts erred in failing to give a constitutionally-required jury instruction. To summarize *Monk* briefly, this Circuit reversed the District of Kansas's denial of a military habeas petition brought by a Marine convicted of murdering his wife by strangulation. The military courts reviewed but rejected Monk's constitutional claims that flawed jury instructions led to his unlawful conviction and sentence. *Id*. at 888.

This Court reversed the district court's denial of the petition. In doing so, the court acknowledged that "when a military decision has dealt fully and fairly with an allegation raised in that [petition for habeas corpus], it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence." *Monk*, 901 F.2d at 888, *citing Burns*, 346 U.S. at 142. Nonetheless, the *Monk* court recognized that "[i]n appropriate cases, however, we will consider and decide constitutional issues that were also considered by the military courts." *Id*. The Court held that Monk's

"constitutional claim is subject to our further review because it is both 'substantial and largely free of factual questions.'" *Id*. *citing Mendrano*, 797 F.2d at 1542 n. 6; *see also Calley*, 519 F.2d at199-203 ("[c]onsideration by the military of such [an issue] will not preclude judicial review[,] for the military must accord to its personnel the protections of basic constitutional rights essential to a fair trial and the guarantee of due process of law").

Thus, in *Monk*, even though a panel of this Circuit found that the military courts had fully and fairly considered the claim, it found that because the constitutional issues were substantial and largely free from factual disputes, it would reach the merits and grant relief. In granting Monk relief, the court relied on numerous other cases in which Article III courts had reached the merits of constitutional claims raised in military habeas cases. *See, e.g.*, *Mendrano*, 797 F.2d at 1541-42 & n. 6 (in pertinent part, "our cases establish that we have the power to review constitutional issues in military cases where appropriate"); *Wallis v. O'Kier*, 491 F.2d 1323, 1325 (10th Cir. 1974), ("Wallis asserted in his habeas corpus petition that he was being deprived of his liberty in violation of a right guaranteed to him by the United States Constitution. Where such a constitutional right is asserted and where it is claimed that the petitioner for the Great Writ is in custody by reason of such deprivation, the constitutional courts of the United States have the power and are under the duty to make inquiry"); and *Kennedy v.*

Commandant, 377 F.2d 339, 342 (10th Cir. 1967) ("[w]e believe it is the duty of this Court to determine if the military procedure for providing assistance to those brought before a special court-martial is violative of the fundamental rights secured to all by the United States Constitution").

Thus, though the Commandant and the district court rely primarily on *Dodson* and the "full and fair" consideration analysis, this is but one factor be considered. But that is not the only factor. *Lundy*, *Monk*, and *Medrano* are still good law, and demonstrate that the Article III courts must determine whether the constitutional issues presented are substantial and largely free of factual issues. If so, the Article III courts should address the merits given their significant place in the American constitutional construct of separation of powers.

Here, the district court erred in ending its analysis with the conclusion that because the military courts had addressed the constitutional claims Santucci raised, they had received "full and fair" consideration. The district court should have proceeded to the next step of the analysis to determine whether Santucci's constitutional claims are "both substantial and largely free of factual questions." *Lundy*, 908 F.2d at 594-95, *quoting Monk*, 901 F.2d at 888; *Mendrano*, 797 F.2d at 1542 n. 6.

Here, there can be no doubt that Santucci identified error within the military courts, both with respect to the inappropriate propensity instruction, and the

military judge's failure to give the mistake-of-fact instruction. The Army Court found as much! (Appellant's Appendix ("App'x") at 57-58). Further, the issue whether these errors were "substantial" were addressed in Santucci's opening brief, and need not be recounted here. (Appellant's Br. at 27-35). The same holds true with respect to the Army Court's conclusion that the military judge's failures with respect to the instructions were harmless beyond a reasonable doubt.

And finally, the issue whether the Army trial judge erred in failing to give the instruction is free of factual issues. To be clear: there certainly is a factual issue as to whether Santucci mistakenly believed that the purported victim consented to the sexual conduct between them. Similarly, there is a factual dispute as to whether Santucci had the requisite intent to commit a crime. But there is no factual dispute as to whether the mistake-of-fact instruction ought to have been given, or whether the propensity instruction was erroneously given. These are strictly legal issues, and they were wrongly decided by the Army Court, which found harmless error. Stated differently, for purposes of this Court's analysis, the question whether the propensity instruction was erroneous, and the question whether the mistake-of-fact instruction ought to be given, are "largely free of factual questions," *see Lundy*, 908 F.2d at 594-95, and ought to be addressed by the Article III courts.

Further with respect to the Army Court's harmless error analysis, the Army Court's conclusion that the mistake-of-fact instruction would have made no

difference in the outcome is absurd. This query lies squarely within the province of the jury. It was substantial error for the military judge to deprive the jury of an instruction that is so fundamentally necessary for the jury to have before it in determining Santucci's guilt or innocence. Likewise, it was substantial error for the Army Court, after the fact, to substitute its judgment for that of the jury in concluding that the instruction would have made no difference. The same holds true for the propensity instruction, and with the cumulative effect of both instructional errors. No reasonable court can have confidence in the jury's verdict when the jury had not been provided with the proper ground rules for assessing the facts and weighing whether Santucci had the requisite intent.

This is precisely the type of cases that calls out for Article III review of errors made by the military courts. The Court here should conclude that the constitutional errors Santucci has presented are substantial, largely free of factual errors, and warrant relief. The district court's failure to conclude as much was error as well. It is now up to this Court to apply its own precedent, intervene and correct the error, and correct this injustice by granting the writ.

CONCLUSION

Servicemembers are entitled to the fundamental protections afforded by the Constitution, and it is left to the Article III courts to safeguard those protections. There may remain good reasons to defer to the military tribunals in factual

considerations involving strictly military matters or discipline within the ranks not involving the Constitution. But when it comes to constitutional protections, the Article III courts should not be prevented from reviewing the decisions by the military that result in convictions and confinement. Principles of fundamental fairness demand otherwise, as do the Constitution and governing federal statutes (28 U.S.C. §§ 2241 and 2243). The Court should conduct a meaningful review of Santucci's claims, find that he has presented substantial constitutional questions that are largely free of factual issues, and which warrant relief. The Court then should set aside the district court's decision and grant Santucci's habeas petition.

Date: December 21, 2020

/s/ John N. Maher

John N. Maher
MAHER LEGAL SERVICES PC
26 South 3rd Street, Number 68
Geneva, Illinois 60134
Tel: (708) 468-8155
john@maherlegalservices.com

Attorney for Appellant Anthony Santucci

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,054 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Times New Roman 14-point font.

Date: December 21, 2020

/s/ John N. Maher
MAHER LEGAL SERVICES PC
26 South 3rd Street, Number 68
Geneva, Illinois 60134
johnmaher@maherlegalservices.com

Attorney for Appellant Anthony Santucci

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: December 21, 2020

***/s/* John N. Maher**
MAHER LEGAL SERVICES PC
26 South 3rd Street, Number 68
Geneva, Illinois 60134
Tel: (708) 468-8155
johnmaher@maherlegalservices.com

Attorney for Appellant Anthony Santucci