William & Donna Santucci
Free Our Warriors
5547 Mahoning Ave Ste. 173
Austintown, Ohio 44515
330-951-1438

Judicial Proceedings Panel
Defense Advisory Committee on
Investigation, Prosecution and Defense
of Sexual Assault in the Armed Forces
One Liberty Center
875 N. Randolph Street
Attn: DAC-IPAD
Suite 150
Arlington, Virginia 22203
*Electronic Mail to whs.pentagon.em.mbx.dacipad@mail.mil*

Re: Public Commentary Letter of Submission

Dear Members of the Panel:

We are Bill & Donna Santucci - Our son, Anthony Santucci is in his ninth year incarcerated at the United States Disciplinary Barracks ("USDB") on Fort Leavenworth, KS due to a false allegation of sexual assault followed by an unconstitutional trial and military appeal. We have exhausted his direct military appeals and have a Habeas petition pending decision before the United States Court of Appeals for the Tenth Circuit in Denver, Colorado which was heard at oral argument in September, 2021.

By way of background, Anthony enlisted in the US Army Infantry 2012 at the time that changes were made in how the Uniformed Code of Military Justice ("UCMJ") handles sexual assaults in the Armed Forces. We believe the impetus for the sexual assault revisions was noble in concept to correct for accusations having been swept under the rug in the past.

However, in trying to right these wrongs, the pendulum has swung too far the other way so that now the accused's constitutional rights and protections have been unlawfully infringed upon, with the practical effect of reversing the sacrosanct presumption of innocence until proven guilty. Our direct experience, and the experiences of other similarly situated families reveal that in many instances, to include ours, a military accused is guilty until proven innocent. This cannot stand in our system of American justice.

Our son was just 21 when a married women approached him at a bar. They bought each other drinks and danced. They were seen kissing, "dirty dancing" and at one point, she was seen grabbing his crotch. As the night wound down, she asked Anthony if they could "go back to his place and play." They drove back to his barracks in her car as Anthony had arrived at the bar with friends and had no vehicle.

No fewer than 15 points of undisputed evidence prove a consenting adult sexual encounter. Among them:

1) asking to go to his room to “play”

2) leaving her shirt on because of a C-section scar

3) At one point, they stopped having intercourse. He asked her if she wanted to continue having sex, and she said yes.

4) She kissed him goodbye (which makes no sense after a rape).

She drove herself home and once there realized that she could not have another child. (She already had four). She called 911 asking for the morning after pill. The operator kept asking if she was assault and if the perpetrator was still there. She just kept asking for the morning after pill. Finally, likely realizing that they would not send an ambulance just for the morning after pill, she said “yes and I need the morning after pill” when asked again if she was assaulted.

No Investigation was done on Anthony’s behalf, that is, no exonerating or mitigating leads were pursued. After his conviction, we found proof of multiple lies testified to by his accuser through photos at the bar two weeks after their encounter and on her Facebook page. These findings prove that the accuser lied under oath. However, these could not be entered into evidence upon his appeal as they were not part of his original court martial.

At trial, the victim and her husband testified that she was so distraught by this sexual assault that she could barely leave her house. However, we obtained pictures from the same bar where 2 weeks earlier she had met Anthony, drinking with two men who are not her husband.

Her husband testified that she could not stand to be on Ft. Polk, Louisiana and had to move back to Alabama with their four children, thus breaking up his family.

Our son, Anthony met her at the bar in July of 2013. Her Facebook page relationship status showed that she was in a relationship with a man in Alabama in September 2013 and moved in with him when she moved to Alabama in October 2013.

Had this information been presented at the court martial, maybe there would have been a different outcome. Although these things do not prove she wasn’t sexually assaulted, they do show that she and her husband lied under oath. Was she lying about her encounter with Anthony? We believe so and fully believe in Anthony’s innocence.

We are not the type of parents who believe in our children no matter what. After reading the record of trial many times, we know Anthony is innocent. If we thought he was guilty, we would know he is right where he should be. We would continue to love and support him but would not continue with the legal fight for his freedom.

Indeed, Anthony passed a post-trial polygraph with no deception noted. He had asked to take one when he was first accused, but his military attorney told him not to do so.

The courts-martial and appellate process should never have been handled by the military. The convening authority who recommended the courts martial is the same one who selects the

jury and decides posttrial clemency before appeal. The jury was not a jury of his peers. The convening authority is their direct commander. Four of the jurors had people close to them that were victims of sexual assault, three were in the same chain of command and one had the prosecutor representing him in another matter.

We believe in a civilian court, this would never be allowed.

Anthony's case is not the only one with these issues. There are many more. We know that sexual assault does happen in the military and those cases need to be prosecuted to the fullest extent of the law.

However, the changes made to the UCMJ regarding sexual assault have stripped our service members of their basic rights and has incentivized women to make false allegations.

Anthony is from a small town in Ohio. His family loves him and wants him to be home where he belongs. He grew up listening to stories by his grandfather, father, and uncles about their time in the service in Vietnam and World War II. He has wanted to be in the military since he was a small child. He was living his dream of being in the Army Airborne Infantry. He was anxious to be deployed to serve his country to the best of his ability, but unfortunately that did not happen. Despite all of this, Anthony has remained positive and focused. He is studying business and real estate and reads many self-help books. He has written two books on real estate, yet to be published, and one book on his experiences since this false accusation. He has asked us to start a non-profit organization to help bring this issue to light and help others who have been wrongfully convicted. Freeourwarriors.org

We have spent all of our savings, Anthony's savings, and sold his car to help fund his legal fight, totalling close to $200,000 and it is ongoing. We are beyond devastated. Anthony is now 31 years old. He has missed time with his family, seeing his nieces and nephew grow up and moving forward with his life. We are 68 and 64 respectively. Our time on this earth is growing short. We have already missed so much time with Anthony and it is heartbreaking to think that something will happen to one or both of us before Anthony comes home. How would you feel if this was your son?

We are asking that changes to the handling of sexual assaults in the military be fair to both the victim and accused so that justice can be appropriately served, and the constitutional rights of our service members can be preserved.

Sexual assault trials should be in a neutral court and out of the military venue. How can anyone have a fair trial where the jurors are under the command of the very officer who ordered the court martial?

We appreciate your consideration and allowing our input at the hearing to include our Opening and Reply legal briefs currently before the Tenth Circuit.

Sincerely,

*Bill & Donna Santucci*

Bill & Donna Santucci

**No. 20-3149**

---

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

---

ANTHONY V. 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. 19-3116-JWL

---

# APPELLANT'S OPENING BRIEF

---

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

*Attorneys for Appellant*

September 21, 2020

Oral Argument Requested

# TABLE OF CONTENTS

TABLE OF AUTHORITIES .....v

STATEMENT OF RELATED CASES .....ix

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW .....1

PRELIMINARY STATEMENT OF JURISDICTION .....2

STATEMENT OF THE CASE.....6

STATEMENT OF FACTS .....6

SUMMARY OF THE ARGUMENTS .....10

ARGUMENTS.....16

I. The District Judge Erred by Declining to Apply Supreme Court and Tenth Circuit Precedents *Monk v. Zelez* and *Dodson v. Zelez* which hold that Article III Courts are dutybound to Adjudicate the Constitutional Claims Military Petitioners Bring Based on Defective Jury Instructions and Award the Writ of Habeas Corpus .....16

A. *De Novo* Standard of Review for Denial of Habeas Corpus .....16

B. *Monk*, which the District Judge Was Briefed Upon But Refused to Apply, Instructs that even where Article I Military Tribunals Considered Constitutional Claims, Article III Courts are the final Arbiters of whether the Proceedings Complied with the Constitution pursuant to Separation of Powers, Checks and Balances, and Judicial Review .....16

C. Article III Review is Appropriate After Article I Considered and Rejected constitutional Claims .....19

D. The Offending Reasonable Doubt Instruction in *Monk*.....20

E. Harmless Beyond a Reasonable Doubt Analysis in *Monk* .....22

F. Application of *Monk* to Santucci's constitutional instructional Claims....23

G. Failure to Issue the Requested Mistake-of-Fact Instruction.....23

H. Harmless Beyond a Reasonable Doubt Analysis – Mistake of Fact .....26

I. Pro-Prosecution Propensity and Burden-Diluting Instructions Given ....28

J. Application of *Monk* to Unconstitutional Propensity and Burden-Diluting Instructions Given by the Article I Tribunal .....30

K. Cumulative effects of Instructional Errors on the Record as a Whole....32

L. Monk Passed a Polygraph Examination Considered by this Court, as Did Santucci.....35

II. The District Court's Incomplete Consideration of the Applicable Precedent and Misplaced Reliance on Inapposite Caselaw Resulted in an Erroneous Disposition of Santucci's Section 2241 Petition .....37

A. *De Novo* Standard of Review.....37

B. The Lower Court Erroneously Adopted an Overly Narrow View of Its Review Authority Under 28 U.S.C. § 2241, Despite Supreme Court and Tenth Circuit Precedents Demonstrating that It Should Have Reached and Decided the Merits of Santucci's Substantial Constitutional Claims, Which Were Not Given Adequate Consideration by Article I Military Tribunals .....38

1. *Dodson v. Zelez* Authorizes Awarding the Writ and was Briefed to the District Judge, but the Lower Court Declined to Apply It .....40

2. The District Judge Errantly Relied on Irrelevant and Unpublished Decisions While Disregarding *Monk* and *Dodson* .....43

3. *Burns v. Wilson* Provides Supreme Court Authority to Review the Merits and Award the Writ, But the Lower Court Failed to Apply It.....44

4. The Dissent in *Burns v. Wilson* Authorizes Article III Review of the Merits and Awarding the Writ, but the Lower Court Did Not Consider It.....46

5. Additional Tenth Circuit Precedents the Lower Court Overlooked Authorize Article III Review and Awarding the Writ.....48

CONCLUSION.....52

STATEMENT IN SUPPORT OF ORAL ARGUMENT.....54

CERTIFICATE OF COMPLIANCE.....57

SEPARATE CERTIFICATIONS.....58

CERTIFICATE OF SERVICE.....59

ATTACHMENT 1 - *Santucci v. Commandant*, 2020 U.S. Dist. LEXIS 91249 (D. Kan. May 26, 2020).....60

ATTACHMENT 2 – Judgment Below, Case No. 19-3116-JWL.....61

# TABLE OF AUTHORITIES

## Constitution for the United States of America

U.S. Const. art. I.....*passim*

U.S. Const. art. III .....*passim*

U.S. Const. amend. V.....21, 23

U.S. Const. amend. VI ..... 4, 6, 9, 15, 41-43, 46, 47, 52

## United States Supreme Court

*Berger v. United States*, 295 U.S. 78 (1935) .....15

*Burns v. Wilson*, 346 U.S. 137 (1953) .....*passim*

*Cage v. Louisiana*, 498 U.S. 39 (1991) .....17

*Chapman v. California*, 386 U.S. 18 (1967).....27, 35

*Gusik v. Schilder*, 340 U.S. 128 (1950) .....11, 39

*Holland v. United States*, 348 U.S. 121 (1954) .....17

*Jones v. Cunningham*, 371 U.S. 236 (1963) .....38

*Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992).....3

*Rose v. Clark*, 478 U.S. 570 (1986) .....35

*Schlesinger v. Councilman*, 420 U.S. 738 (1975).....11, 39

*Smith v. Bennett*, 365 U.S. 708 (1961).....38

*Strickland v. Washington*, 466 U.S. 668 (1984) .....47, 52

*United States v. Hasting*, 461 U.S. 499 (1983).....1, 14

**U.S. Court of Appeals for the Tenth Circuit**

*Ali Saleh Kahlah al-Marri v. Davis*, 714 F.3d 1183 (10th Cir. 2013).....37

*Coleman v. Saffle*, 869 F.2d 1377 (10th Cir. 1989).....2

*Dodson v. Zelez*, 917 F.2d 1250 (10th Cir. 1990).....*passim*

*Dixon v. United States*, 237 F.2d 509 (10th Cir. 1956).....1, 10, 49

*Fricke v. Sec'y of the Navy*, 509 F.3d 1287 (10th Cir. 2007).....16

*Kennedy v. Commandant*, 377 F.2d 339 (10th Cir. 1967).....1, 10, 16, 19, 23

*Lips v. Commandant*, 997 F.2d 808 (10th Cir. 1993).....1, 10, 48, 49

*Lundy v. Zelez*, 908 F.2d 593 (10th Cir. 1990).....1, 10, 49

*Mendrano v. Smith*, 797 F.2d 1538 (10th Cir. 1986).....1, 10, 18, 19, 23

*Monk v. Zelez*, 901 F.2d 885 (10th Cir. 1990).....*passim*

*United States v. Bader*, 678 F.3d 858 (10th Cir. 2012).....31

*United States v. Smith*, 888 F.2d 720 (10th Cir. 1989).....35

*United States v. Urbano*, 563 F.3d 1150 (10th Cir. 2009).....31

*Wallis v. O'Kier*, 491 F.2d 1323 (10th Cir. 1974).....18

*Watson v. McCotter*, 782 F.2d 143 (10th Cir. 1986).....18, 23, 48, 49

**Other U.S. Circuit Courts of Appeals**

*Byrd v. Lewis*, 566 F.3d 855 (9th Cir. 2009).....32

*Calley v. Callaway*, 519 F.2d 184 (5th Cir. 1975).....10, 19, 23, 40

*Carter v. Montgomery*, 769 F.2d 1537 (11th Cir. 1985).....32

*Doe v. Busby*, 661 F.3d 1001 (9th Cir. 2011) .....32

*Hanna v. Riveland*, 87 F.3d 1034 (9th Cir. 1996) .....32

*Kauffman v. Secretary of the Air Force*, 415 F.2d 991 (D.C. Cir. 1969) ....11, 39, 51

*Khan v. Hart*, 943 F.2d 1261 (10th Cir. 1991) .....50

*Riley v. McDaniel*, 786 F.3d 719 (9th Cir. 2015) .....31

**United States District Courts**

*Application of Stapley*, 246 F.Supp. 316 (D. Utah 1965) .....50

*Jefferson v. Berrong*, 783 F. Supp. 1304 (D. Kan. 1992) .....49, 50

*Santucci v. Commandant*, 2020 U.S. Dist. LEXIS 91249
(D. Kan. May 26, 2020) .....6

**United States Court of Appeals for the Armed Forces**

*United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016) .....28

*United States v. Santucci*, 76 M.J. 341 (C.A.A.F. 2017) .....5

**United States Army Court of Criminal Appeals**

*United States v. Santucci*, 2016 CCA LEXIS 594* (Army Ct. Crim. App. 30 Sept. 2016) (unpub.) .....4, 25, 28

**Statutes**

10 U.S.C. § 836 .....39
10 U.S.C. § 866 .....5
10 U.S.C. § 867 .....5
10 U.S.C. § 920 .....3
10 U.S.C. § 925 .....3
10 U.S.C. § 928 .....3
10 U.S.C. § 934 .....3

28 U.S.C. § 1259 ..... 5
28 U.S.C. § 1291 ..... 2
28 U.S.C. § 1331 ..... 2
28 U.S.C. § 2241 ..... *passim*
28 U.S.C. § 2243 ..... 1, 2, 5, 38, 52
28 U.S.C. § 2253 ..... 43, 44

**Rules**

Fed. R. App. P. 4(a)(1)(B) ..... 2

Rule for Courts-Martial 916 (prosecution must disprove affirmative defenses beyond a reasonable doubt) ..... 24

**Other Authority**

*Military Judge's Benchbook*, Dept. of the Army Pamphlet 27-9 (June 28, 2012) .... 25

## STATEMENT OF RELATED CASES

Appellant Anthony V. Santucci is aware of no other related cases in this Court.

Date: September 21, 2020

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

*Attorneys for Appellant Anthony V. Santucci*

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. The district judge erred by refusing to apply Supreme Court precedent in *Burns v. Wilson* and this Circuit's binding decisions in *Monk v. Zelez* and *Dodson v. Zelez,* which inform that the lower court was dutybound to reach the merits of Santucci's constitutional jury instruction claims and award a writ of habeas corpus pursuant to 28 U.S.C. §§ 2241 and 2243 ("dispose of the matter as law and justice require.").

2. The district judge erred by disregarding the law of this Circuit when the lower court declined to adjudicate Santucci's substantial questions of constitutional law, largely free of factual questions, falling directly within the standard of review set forth in this Circuit's decisions in *Monk, Dodson, Dickson, Dixon, Kennedy, Lips, Lundy, McCotter, Mendrano,* and *Wallis,* and instead relied on select portions of inapposite cases to justify abandonment of the court's role in the constitutional scheme of separation of powers to judicially review constitutional determinations of other branches of government as part of checks and balances.

3. Neither Article I nor Article III courts has tested the numerous jury instruction errors for prejudice against the whole record as required by Supreme Court and Tenth Circuit precedent, rather, Article I military tribunals found error but tested prejudice for each individual error instead of the cumulative effects of all

the constitutional errors. *See United States v. Hasting*, 461 U.S. 499, 510 (1983) ("is the duty of a reviewing court to consider the trial record as a whole…."); *Coleman v. Saffle*, 869 F.2d 1377, 1389 (10th Cir. 1989) ("In assessing whether the failure to give the jury instruction was harmless error, this court must look at the whole record.").

## PRELIMINARY STATEMENT OF JURISDICTION

The district judge possessed jurisdiction to entertain Santucci's Article III challenges to Article I military tribunals' constitutional errors pursuant to 28 U.S.C. § 2241 (federal habeas corpus for military petitioners), 28 U.S.C. § 2243 (Article III court may enter orders to serve law and justice), and 28 U.S.C. § 1331 (Federal question jurisdiction).

On July 24, 2020, Santucci timely filed a Notice of Appeal, which was docketed before this Court the same day. Fed. R. App. P. 4(a)(1)(B). This Court possesses jurisdiction pursuant to 28 U.S.C. § 1291.

## STATEMENT OF THE CASE

Having exhausted his direct appellate options, Santucci brought this case to secure Article III collateral review of multiple constitutional errors committed by the Article I military tribunals, including: (1) the refusal to deliver a mistake of fact jury instruction on the question of consent to adult sexual relations in a contested trial; (2) the refusal to instruct the jury that the prosecution was obligated to

disprove, beyond a reasonable doubt, the absence of a mistake of fact; (3) issuing an unconstitutional propensity to commit sexual assaults jury instruction (the jury was instructed to use the standard of preponderance of the evidence to compare one charged offense of which Santucci was presumed innocent as propensity to commit another charged offense of which he was also presumed innocent); and diluting the prosecution's constitutional standard of proof from beyond a reasonable doubt to preponderance of the evidence in a separate jury instruction. *See Keeney v. Tamayo-Reyes*, 504 U.S. 1, 14 (1992) (habeas corpus is not an appellate proceeding, rather, an original civil action in a federal civil court).

In March 2014, a military jury convicted Santucci, contrary to his pleas, of one specification of rape, one specification of sexual assault, one specification of forcible sodomy, one specification of assault consummated by a battery, and two specifications of adultery in violation of Articles 120 and 134, UCMJ; 10 U.S.C. §§ 920, 925, 928 and 934. All these allegations arose from an encounter with a woman referred to as "TW," whose initials are used here to protect her privacy.

Consistent with his plea, the military jury found Santucci guilty of one specification of making a false official statement in violation of Article 107,

UCMJ, 10 U.S.C. § 907 (2012). *Id*. The jury acquitted Santucci of sexually assaulting another woman, referred to as "JM."[1]

The jury sentenced Santucci to a dishonorable discharge, confinement for twenty years, and forfeiture of all pay and allowances. He remains confined at the United States Disciplinary Barracks on Fort Leavenworth, Kansas with Registration Number 93723.

Santucci brought a direct appeal to the United States Army Court of Criminal Appeals ("the Army Court"), an Article I tribunal, and raised the jury instruction errors in addition to ineffective assistance of counsel. *United States v. Santucci*, No. ARMY 20140216, 2016 CCA LEXIS 594 (Army Ct. Crim. App. Sep. 30, 2016). The Army Court set aside one sexual assault conviction as an unreasonable multiplication of charges, but affirmed the remaining findings, and it also affirmed the sentence – declining to reduce Santucci's term of confinement, even though it set aside a serious sexual assault conviction. *Id*.

The Army Court also found that the Article I trial judge erred in not issuing a defense-requested mistake of fact instruction, and wrongly issued two unconstitutional propensity instructions. But the Army Court, weighing the errors

[1] Santucci submits that the prosecution joined this unrelated offense and unrelated complainant to set conditions for the unconstitutional propensity instruction that the jury could consider charges of which Santucci was presumed innocent as evidence to prove separate charges, also of which Santucci was presumed innocent, to color him as a bad person, and to bootstrap comparatively weak cases by joining them, which suggests vindictiveness and prosecutorial overreach, demonstrated by the prosecution's closing summation, discussed, *infra*.

individually rather than assessing their cumulative impact on the whole, found that the errors did not so contaminate the jury's deliberations to negatively affect the convictions or sentence. *Id*. The Army Court did not comment on Santucci's Sixth Amendment ineffective assistance of counsel claim.

The U.S. Court of Appeals for the Armed Forces (CAAF) granted review. *United States v. Santucci*, 76 M.J. 341 (C.A.A.F 2017), but affirmed the findings and the sentence.

On June 28, 2018, the United States Supreme Court denied Santucci's Petition for a Writ of Certiorari brought pursuant to 28 U.S.C. § 1259. The *Abdirahman* petition for certiorari (which contained Santucci's petition for certiorari consolidated with 167 others) was denied on June 28, 2018.[2]

With no direct appeals remaining, Santucci filed a petition with the U.S. District Court for the District of Kansas (the "district judge" or "lower court") on

[2] The first level of appeal in the military process involves the Court of Criminal Appeals for the servicemember's branch, for example, the Army Court of Criminal Appeals (Army Court). 10 U.S.C. § 866 (2012). This court consists of uniformed Judge Advocates appointed by The Judge Advocate General. *Id*. Review at the first level is mandatory for sentences involving death, confinement in excess of one year, dismissal of an officer, or a punitive discharge (bad conduct discharge or dishonorable discharge) for an enlisted servicemember where the right to appellate review has not been waived. *Id*. The second level of appeal involves the Court of Appeals for the Armed Forces (CAAF), consisting of five civilian judges appointed by the President. 10 U.S.C. § 867. Review at the second level is largely discretionary. 10 U.S.C. § 867 (2012). If the CAAF denies review, the military appellate process is concluded and access to the United States Supreme Court is not available. *Id*. If the CAAF grants review, appeal of its decision can be pursued before the United States Supreme Court. 28 U.S.C. § 1259 (2012).

June 28, 2019, (Doc. 1), proceeding pursuant to 28 U.S.C. §§ 2241 and 2243 invoking separation of powers and alleging constitutional deprivations that were not harmless beyond a reasonable doubt throughout the Article I trial and appeal.

On May 26, 2020, the district judge dismissed all of his claims without a hearing or without adjudicating the merits of Santucci's constitutional grounds for habeas relief based squarely on due process (jury instructions) and the Sixth Amendment (ineffective assistance of counsel) (Docs. 24-25). *Santucci v. Commandant*, 2020 U.S. Dist. LEXIS 91249 (D. Kan. May 26, 2020). This appeal follows.

## STATEMENT OF FACTS

Santucci, an Ohio native from a loving family and no criminal history, joined the Army one year after high school and served as a Private (E-1) in Bravo Company, 1/509th Infantry Regiment, Joint Readiness Training Center, Fort Polk, Louisiana. Born in 1991, he was 21 years-old at the time of the adult sexual encounter giving rise to this case. He joined the Army one year after high school and spent the next two years on active duty.

During the afternoon of July 5, 2013, a woman referred to here as "TW" went to the Paradise Bar, drank "Jaeger Bombs," "Vegas Bombs," sat next to Santucci, bought Santucci drinks, and danced with Santucci. Several years older

than Santucci and having four children, TW informed him that she was in the process of getting a divorce. (R. at 370).

A digital image of TW dancing with Santucci at the Paradise Bar on the night in question is enclosed as Attachment A to the original Petition for a Writ of Habeas Corpus in Petitioner's Appendix. One witness described them as dancing on the pole, kissing, groping each other, and that TW was sexually rubbing Santucci's crotch with her hand while dancing. (R. at 385). At some point, TW asked Santucci if he wanted to go back to his room and "play."

Later, in his room, TW told Santucci to "take his shit off"; he disrobed, and she took her clothes off. (R. at 327). TW left her shirt on, however, because she told Santucci she was self-conscious about her C-section scar.

Santucci performed oral sex on TW. (R. at 327-28). The two then had sex. In the "missionary" position, TW dug her nails into Santucci's back and buttocks and commented that Santucci "had a swimmer's butt." (R. at 329). Santucci left bites on her neck and arm as "hickeys," and placed his hand on her neck as part of "rough sex." (R. at 344; 367; 370).

While naked and kneeling on all fours, TW consented to anal sex. (R. at 331). While the two were having anal sex, TW moaned with pleasure. (R. at 347-48). When Santucci noted that TW began to bleed, he alerted her because apparently she did not know, and the two momentarily stopped sexual contact and

cleaned up in the bathroom. Santucci asked her if she wanted to continue and she said yes, after which they again had vaginal sex, with TW "on top" and then TW performed oral sex on Santucci. (R. at 331-32).

During the sexual contact, Santucci testified that although TW had been drinking at the Paradise bar, she was awake, consenting, talking, never "passed out," or indicated that she wanted to stop. (R. at 333-34).

Thereafter, TW put on her clothes, but did not give her phone number to Santucci as he requested because she shared the phone with her husband.

Before she left, she kissed Santucci goodbye.

She drove herself home.

Three hours after the alleged rape, TW had a blood alcohol concentration of .052, (R. at 412), as she reported to the emergency room seeking a "morning-after pill" and informing that she could not have any more than the four children she already had. Although TW authorized swabs to test for STDs, she did not authorize a swab for DNA.

The jury was not instructed, even though the defense requested it, that the jury could find Santucci not-guilty of raping TW based on the legally recognized defense of "mistake of fact," that is, if the jury believed the evidence offered at trial that Santucci honestly and reasonably believed TW consented. Nor did the Article I judge instruct that because the evidence raised a mistake of fact to each

offense, the prosecution was obligated to prove disprove the affirmative defense beyond a reasonable doubt.

The Article I judge, did, however provide an unconstitutional propensity instruction that diluted the prosecution's burden of proof beyond a reasonable doubt. While not telling the jury they could acquit based on mistake of fact, the judge informed that it could, based on preponderant evidence of raping TW, conclude that Santucci was predisposed to commit sexual offenses.

> Evidence that the accused committed the sexual offense of Rape against [TW]….may have no bearing on your deliberations in relation to the Sexual Assault of [JM],….unless you first determine by a preponderance of the evidence, and that is more likely than not, that [Santucci raped TW].
>
> If you determine by a preponderance of the evidence that [Santucci Raped TW], even if you are not convinced beyond a reasonable doubt about that the accused is guilty of that offense, you may nonetheless then consider the evidence of that offense for its bearing on any matter to which it is relevant in relation to [JM].
>
> You may also consider the evidence of such Rape for its tendency, if any, to show the accused's propensity or predisposition to engage in sexual offenses.

(R. at 476-77).

During closing, the prosecutor reminded the jury that the judge issued this instruction, and that the standard of proof was "by a preponderance of the evidence, just more likely than not … You can use that. And that is important."

> …if you decide, by a preponderance of the evidence, just more likely than not, that [Santucci] assaulted or raped [TW], you can use that to show [Santucci's] propensity or predisposition to engage in sexual offenses. You can use that. And that is important.

(R. at 482-83) (emphasis added).

## SUMMARY OF THE ARGUMENTS

It is the law in this Circuit that decisions made by Article I military tribunals on constitutional issues are subject to Article III review when they are "substantial and largely free of factual questions." *Monk v. Zelez*, 901 F.2d 901 F.2d 885, 888 (10th Cir. 1990), *citing Mendrano v. Smith*, 797 F.2d 1538, 1542 n. 6 (10th Cir. 1986) and *Calley v. Callaway*, 519 F.2d 184, 199-203 (5th Cir. 1975).

The district judge declined to apply these precedents to the substantial due process grounds Santucci presented involving a series of instructional mistakes which stacked the deck for the prosecution, deprived him of a full and fair Article I trial and appeal, which resulted in his unlawful convictions and sentence.

The lower court failed to apply the leading Supreme Court case in this area of the law, *Burns v. Wilson*, as well as this Court's decisions in *Dodson*, *Dickson*, *Dixon*, *Kennedy*, *Lips*, *Lundy*, *McCotter*, and *Wallis*, *infra*, all of which uniformly

hold that substantial questions of constitutional law largely free of factual issues brought under federal habeas pursuant to Section 2241 should be actually determined by Article III courts. Nor did the lower court consider *Schlesinger*, *Gusik*, and *Kauffman infra*, from the Supreme Court and other Circuit Courts of Appeal, providing similar guidance. These precedents demonstrate that Santucci's constitutional claims fall squarely within the standard of review clearly established in this Circuit.

Without applying any of these precedents, the district judge instead adopted the errant view that because Article I military tribunals considered Santucci's constitutional claims, the district court was stripped of the authority to ensure the Article III constitutional protections had been afforded.

The district judge appears to believe there is an impermeable barrier preventing Article III jurists from exercising constitutional and statutory separation of powers authority to adjudicate the merits of constitutional habeas claims military petitioners advance because the matters were presented to Article I tribunals, which is flat wrong. The lower court's decision essentially holds that abdication to Article I military tribunal judgments on constitutional issues is somehow proper. The cases identified *supra* and discussed below demonstrate no such barrier – and sufficiently guide district courts that their scope of review

expands to review of the merits with the strength of the constitutional violation presented and the lack of factual issues to be resolved.

To reach this unconstitutional abdication of constitutional issues to Article I tribunals, the district judge not only had to evade relevant and binding holdings of the Supreme Court and this Circuit which all but directed granting of the writ for jury instruction errors speaking directly to the cornerstones of American due process, but also disregard the lower court's role as part of the constitutional scheme of Article III professional jurists checking Article I military officers who happen to be spending a few years as a judge before moving on to another assignment or retiring.

The practical results of the district judge's refusal to apply the constitutional, statutory, and precedential authorities cited herein is that military petitioners in this Circuit will continue to have the constitutional courts of their country closed to them, even where, like here, most reasonable jurists would agree that unlawful jury instructions and ineffective assistance of counsel require habeas relief.

The lower court cited but refused to apply *Burns v. Wilson*, 346 U.S. 137, 142 (1953) ("[t]he military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights) and this Circuit's holdings and rationales in *Monk*, 901 F.2d at 888 (reversing the district of Kansas and awarding habeas writ to military

petitioner convicted of murder on grounds of unconstitutional jury instructions) and *Dodson v. Zelez*, 917 F.2d 1250, 1262-63 (10th Cir. 1990) (this Court reached the merits of a Marine petitioner's constitutional jury instruction claim and reversed the District of Kansas's denial of the habeas writ).

Application of these authorities informs that Santucci is deserving of the writ to remedy the federal government's deprivation of his liberty, justifying reversing, setting aside, vacating, and dismissing the convictions and sentence.

In *Monk*, this Court explained that district judges possess the duty to decide questions military petitioners present that are of constitutional magnitude and largely free of factual issues. Quoting *Kennedy v. Commandant*, 377 F.2d 339, 342 (10th Cir. 1967), this Court counseled the district courts that their duty extended to ensuring fundamental rights secured to all by the Constitution are observed by Article I military tribunals. "We 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." *Monk*, 901 F.2d at 888.

After having declined to issue mistake of fact instructions (a complete defense to all charged offenses) and then issuing unlawful propensity to commit sexual assaults coupled with directions that the prosecution's burden of proof was diminished to preponderance of the evidence, the Article I appellate tribunal

agreed that these issues were error, but found the errors harmless beyond a reasonable doubt.

As Santucci urged to Article I tribunals and before the district judge below, the proper analysis, which has never been conducted, is the cumulative effects these due process errors had on the proceedings overall to accurately gauge the prejudice to Santucci – not evaluating each error individually and in isolation from the others. *See Hasting*, 461 U.S. at 510 (evaluate constitutional errors on the whole record); *Coleman*, 869 F.2d at 1389 (same).

The prosecution's summation at trial reveals just how tactically advantageous the propensity and prosecutorial burden-diluting instructions were viewed by the government. After having reminded the jury that the judge just instructed them to follow the propensity and lesser evidentiary burden of preponderant evidence instructions, he went on to implore the jury to do the very thing that is constitutionally objectionable:

> …if you decide, ***by a preponderance of the evidence, just more likely than not***, that [Santucci] assaulted or raped [TW], you can use that to ***show [Santucci's] propensity or predisposition to engage in sexual offenses***. You can use that. And that is important.

(R. at 482-83) (emphasis added).

To date, no court, either Article I or Article III, has addressed the cumulative effects of these fundamental fairness errors, nor the unconstitutional and "foul" use

to which the prosecution put them before the jury. *Berger v. United States*, 295 U.S. 78, 88 (1935) (prosecutor, as representative of a sovereign, has the duty to seek justice and cannot strike foul blows seeking to win convictions at all costs).

Nor has any court evaluated the 25 errors defense counsel made and their impact, together with the defective jury instructions and prosecutorial overreach.

The district judge was apparently contented to allow a case with such clear constitutional errors to stand as a reflection of legality and fairness, comfortable in not even applying the constitutional precedents of the Supreme Court and this Circuit, allowing a young American soldier with no criminal history to remain unlawfully incarcerated.

The district judge has employed the phrase "full and fair consideration" as a talisman absolving the Article III courts of performing their duties to address how the Article I tribunals' rulings on the Constitution. But the lower court did not explain how Article I proceedings could conceivably be "full and fair" when they conducted an improper harmless error analysis on repeated jury instructions and over two dozen defense counsel errors.

Santucci demonstrated that Article I review was "legally inadequate" to resolve his claims, but the district judge sent the wrong message to Article I tribunals that multiple jury instructional and Sixth Amendment errors are appropriate in military tribunals to put a young man in prison for 26 years.

This case presents manifest injustices to Santucci, reveals the Article I military justice system as flawed seeking to protect convictions rather than do justice, and demonstrates a knowing abandonment of Article III's constitutional role to ensure compliance with constitutional precedents.

The district judge had the authority to solve these problems, questions of law largely free of any factual issues, but chose to pass --- which is an abdication of the sacrosanct role of Article III jurists to ferret out injustice, protect civil liberties, apply ***all*** the relevant law rather than select portions of it to justify a position, and provide relief to the aggrieved who have been subject to unlawful trials and unconstitutional incarceration at the hands of their government.

## ARGUMENTS

### I. The District Judge Erred by Declining to Apply Supreme Court and Tenth Circuit Precedents *Monk v. Zelez* and *Dodson v. Zelez* which hold that Article III Courts are dutybound to Adjudicate the Constitutional Claims Military Petitioners Bring Based on Defective Jury Instructions and Award the Writ of Habeas Corpus.

#### A. *De Novo* Standard of Review.

The Court engages in *de novo* review of a district court's denial of a Section 2241 claim. *Fricke v. Sec'y of the Navy*, 509 F.3d 1287, 1290 (10th Cir. 2007).

#### B. *Monk*, which the District Judge refused to Apply, Instructs that even where Article I Military Tribunals Considered Constitutional Claims, Article III Courts are the final Arbiters of whether the Proceedings Complied with the Constitution pursuant to Separation of Powers, Checks and Balances, and Judicial Review.

A charge on reasonable doubt should be expressed "in terms of the kind of doubt that would make a person hesitate to act rather than the kind on which he would be willing to act." *Holland v. United States*, 348 U.S. 121, 140 (1954). An instruction violates due process where jurors could interpret it to allow conviction based on any "degree of proof below" the reasonable doubt standard. *Cage v. Louisiana*, 498 U.S. 39, 41 (1991) (citing with approval this Court's decision in *Monk*).

In *Monk*, this court faulted both the use of the word "substantial" in the reasonable doubt charge and the use of language couched in terms of "willingness to act" as opposed to a hesitation to act. 901 F.2d at 890 (citing *Holland, supra*). This Court reversed the District of Kansas's denial of a military Section 2241 habeas petition brought by a Marine convicted of murdering his wife by strangulation. *Id*. at 886.

Monk passed several polygraph exams denying his involvement in his wife's death, testified at trial in his own defense, and Article I tribunals reviewed but rejected his constitutional claims that flawed jury instructions led to his conviction and sentence. *Id*. at 888. This Court awarded Monk's petition for a writ of habeas corpus and concluded its decision with the following: "we hold that the reasonable doubt instruction given at Monk's court-martial violated his constitutional right to

trial under the standard of proof beyond a reasonable doubt and requires that his petition for writ of habeas corpus be granted." *Id*. at 893.

In determining to award the writ, the Tenth Circuit applied the leading Supreme Court case in the area of military habeas petitions filed in Article III courts, *Burns*, 346 U.S. at 142, where a plurality found 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." In the same analysis, this Court applied *Watson v. McCotter*, 782 F.2d, 143 (10th Cir. 1986) and observed that Article III review is generally limited to whether the Article I military tribunals gave full and fair consideration to each of the petitioner's constitutional claims). *Monk*, 901 F.2d at 888 *citing Watson*, 782 F.2d at 144.

This Court next reasoned that "[i]n appropriate cases, however, we will consider and decide constitutional issues that were also considered by the military courts." *Id*., *citing Mendrano*, 797 F.2d at 1541-42 & n. 6: "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.), *cert. denied*, 419 U.S. 901, 42 L. Ed. 2d 147, 95 S. Ct. 185 (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"); *Kennedy*, 377 F.2d at 342 ("[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").

### C. Article III Review Appropriate After Article I Considered and Rejected Claims.

This Court reasoned 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; *Calley*, 519 F.2d at 199-203 ("[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"); *Burns*, 346 U.S. at 142 ("[t]he military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights); and *Wallis*, 491 F.2d at 1325 ("where a military prisoner is in custody by reason of an alleged constitutional violation, the constitutional courts of the United States have the power and are under the duty to make inquiry").

Having determined that Monk's Article I jury instruction claim was within the scope of Article III review, mainly because it was both a substantial constitutional issue and largely free of factual questions, this Court turned to the merits of the offending reasonable doubt instruction the Article I judge issued to the jury in Monk's murder trial, framing the issue as "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Id*., (internal citations omitted). "This standard is met, and habeas corpus relief will be granted, if the instruction as given, in the context of the charge as a whole, "could mislead the jury into finding no reasonable doubt when in fact there was some." *Id*.

**D. The Offending Reasonable Doubt Instruction in *Monk*.**

This Court then emphasized the critical importance the reasonable doubt instruction plays in American constitutional and criminal law. "Because the government's burden of proving guilt beyond a reasonable doubt is one of the fundamental components of due process, and the constitutional cornerstone of the criminal justice system, an erroneous instruction on this burden requires habeas corpus relief unless it was harmless beyond a reasonable doubt." *Id*.

The offending portions of the reasonable doubt instruction in *Monk* were as follows:

> 'Reasonable doubt' means a ***substantial*** honest, conscientious doubt suggested by the material evidence or

> lack of it in the case. It is an honest, ***substantial misgiving*** generated by insufficiency of proof of guilt.
>
> * * * * *
>
> If you have an abiding conviction of Corporal [Monk's] guilt such as ***you would be willing to act*** upon in the more weighty and important matters relating to your own affairs, then you have no reasonable doubt.

*Id*. at 889.

This Court agreed with Monk's claims, described as:

> First, he claims that the military judge erred in equating "reasonable doubt" with a "substantial" doubt or misgiving. Second, he contends that the judge erred in instructing the court-martial members that no reasonable doubt exists if they would be "willing to act" on their belief in Monk's guilt to the same extent as they would be willing to act on a belief concerning an important personal matter. Together, Monk asserts, and in the context of the charge as a whole, these alleged errors diluted the government's burden of proving Monk's guilt "beyond a reasonable doubt" and thus violated the due process clause of the fifth amendment.

*Id*.

"There can also be no question that the reasonable doubt instruction given at Monk's court-martial was constitutionally defective in both aspects identified by Monk, explaining that "[a]ppellate courts have uniformly criticized and rejected jury instructions equating reasonable doubt with "substantial doubt" and the troublesome "willingness to act" language "should have been in terms of the kind

of doubt that would make a person hesitate to act, rather than the kind on which he would be willing to act." *Id*. at 889-90.

**E. Tenth Circuit's Harmless Beyond a Reasonable Doubt Analysis.**

Having found constitutional instructional error, this Court focused on the impact the constitutional errors had on the trial using the "harmless beyond a reasonable doubt" test. *Id*. at 890. "We must now consider whether this language 'so infected' [Monk's] court-martial that his conviction violates due process." *Id*.

This Court held that it did: "the reasonable doubt instruction in this case, viewed in the context of the [jury] charge as a whole, diluted this burden by creating a standard that "could mislead [the members of the court-martial] into finding no reasonable doubt when in fact there was some." *Id*.

This Court further reasoned that other aspects of the jury instruction that did not infect the trial were "simply [ ] not enough in this case to overcome the possibility that the members were misled by the challenged language to impose a less stringent burden of proof on the government than is constitutionally required." *Id*. "Given the circumstantial and hotly contested nature of the evidence supporting Monk's conviction, we also cannot say that this error was harmless beyond a reasonable doubt." *Id*.

This Court emphasized that the combination of the defective language required reversal, reversed the District of Kansas, directed that the habeas writ be issued immediately. *Id*. at 894.

**F. Application of *Monk* to Santucci's Constitutional Instructional Claims.**

Santucci's claims, arguably more severe than those for which relief was granted in *Monk*, are "appropriate" for Article III review and determination under *Burns, Watson*, *Mendrano, Wallis, Kennedy*, and *Calley*, each of which this Court in *Monk* cited as providing sufficient authority to reach the merits and decide the issues even though Article I tribunals considered and rejected Monk's constitutional claims. Like Monk's claims, Santucci's claims are constitutionally substantial because they speak directly to the Due Process clause of the Fifth Amendment. They are also largely free of factual issues and purely questions of constitutional and criminal law.

**G. Failure to Issue the Requested Mistake-of-Fact Instructions.**

If the requested mistake-of-fact instruction were given in this fully contested rape trial where Santucci testified in his own behalf and the physical evidence was inconclusive on the question of consent, the jury would have had two bases, spoken directly from the judge and provided in writing for their use in the deliberation room, on which to acquit Santucci. That never happened, even though,

at least 13 material and uncontested points, *supra*, supported delivery of the instruction. (Doc. 1).

Had instruction issued, it would have triggered another instruction that the burden shifted to the prosecution to prove, beyond a reasonable doubt, that there was no mistake-of-fact. Rule for Courts-Martial ("RCM") 916 (b)(1) ("the prosecution shall have the burden of proving beyond a reasonable doubt that the defense did not exist").

Accordingly, the failure to deliver the requested instruction not only deprived Santucci of due process because the judge did not tell the jury that he could be acquitted on those grounds, but also eliminated the prosecution's obligation to disprove the affirmative defense beyond a reasonable doubt, a second violation of due process.

The instructions that should have issued to the jury, are:

> An honest and reasonable mistake-of-fact as to the victim's consent is a defense to rape. If a mistake-of-fact is in issue, give the following instructions.
>
> The evidence has raised the issue of mistake on the part of [Santucci] concerning whether [TW] consented to sexual intercourse in relation to the offense of rape.
>
> If the [Santucci] had an honest and mistaken belief [TW] consented to the act of sexual intercourse***, he is not guilty of rape if Santucci's belief was reasonable.***

> To be reasonable the belief must have been based on information, or lack of it, which would indicate to a reasonable person that [TW] was consenting to the sexual intercourse.
>
> In deciding whether [Santucci] was under the mistaken belief that [TW] consented, you should consider the probability or improbability of the evidence presented on the matter.
>
> You should also consider [Santucci's] (age) (education) (experience) (prior contact with [TW]) (the nature of any conversations between [Santucci] and [TW]) along with the other evidence on this issue (including but not limited to (here the military judge may summarize other evidence that may bear on the accused's mistake-of-fact)).

*Military Judge's Benchbook*, Dept. of the Army Pamphlet 27-9 at 493-94 (June 28, 2012) (emphasis added).

Upon Article I direct appellate, the military tribunal agreed that sufficient defense evidence was adduced at trial to support delivery of the instruction and that the instruction should have been given. The Article I tribunal, however, rejected Santucci's claim that the failure was not harmless beyond a reasonable doubt. *United States v. Santucci*, 2016 CCA LEXIS 594* (Army Ct. Crim. App. 30 Sept. 2016) (unpub.).

What was missed altogether, was the shifting effect of the instruction, placing upon the prosecution the burden to disprove, beyond a reasonable doubt, the existence of the affirmative defense. Nowhere in the Article I tribunal's

analysis is this burden eliminating due process violation mentioned or applied to Santucci, which can be neither "full" nor "fair."

**H. Harmless Beyond a Reasonable Doubt Analysis – Mistake of Fact.**

The unfair prejudice can be seen not only in Santucci's being deprived of the oral instruction and written instructions for the jury's use in the deliberation room, but also the benefit of the instruction coming directly from the judge's position of authority. The fact remains that the jury went into the deliberation room mis-informed, unknowing that a complete defense to all charges applied and that the prosecution bore the high burden of proving the defense did not exist beyond a reasonable doubt.

Santucci had no chance of availing himself of this exonerating defense because the Article I judge took it away from him, the Article I appellate tribunal conducted a flawed harmless error analysis. Failure to give the defense instruction together with its burden-shifting effect contributed to Santucci's conviction and sentence because the jury was never informed that the evidence adduced in his favor at trial constituted a complete defense that had to be disproven beyond a reasonable doubt. These absences misled the jury into finding no reasonable doubt, when had they been correctly and fully instructed, they may have concluded there was some.

In *Monk*, the prejudicial finding was the dilution of the prosecution's burden of proof beyond a reasonable doubt that was not cured by the rest of the jury instruction. At least in *Monk*, the required instruction was delivered, albeit using constitutionally defective language. Here, the required instructions were not issued at all. The failure to deliver the mistake-of-fact defense instruction, like the ill-fated instruction in *Monk*, also relieved the prosecution of its burden to disprove the affirmative defense beyond a reasonable doubt. These due process errors contributed to Santucci's convictions and sentence.

Therefore, this Court cannot be confident that these failures are harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967) (once constitutional error has been established, the prosecution bears the burden of proving that the error did not contribute to the conviction). *See also Harris v. Alexander*, 548 F.3d 200 (2nd Cir. 2008) (trial court violated due process by refusing to instruct jury on accused's theory of the case); *Jackson v. Edwards*, 404 F.3d 612 (2nd Cir. 2005) (trial court's denial of defense request for instruction on affirmative defense violated Due Process); *Cockerham v. Cain*, 283 F.3d 657 (5th Cir. 2002) (habeas granted where jury instructions could have been understood to allow conviction without proof beyond a reasonable doubt); *Barker v. Yukins*, 199 F.3d 867 (6th Cir. 1999) (habeas granted where judge refused to give requested affirmative defense instruction violated Due Process).

**I. Pro-Prosecution Propensity and Burden-Diluting Instructions Given.**

The instructions that were actually given, essentially that the jury could compare one charged offense with another charged offense, and find by a preponderance of the evidence that Santucci had a propensity to commit sexual offenses, further diluted the prosecution's burden to prove each element of each offense beyond a reasonable doubt. *United States v. Hills*, 75 M.J. 350, 356 (C.A.A.F. 2016) (noting that propensity instructions like these have been flatly rejected as unconstitutional).

Indeed, the Article I tribunal agreed that the propensity instructions at issue were unconstitutional, but again, found the error harmless beyond a reasonable doubt. *United States v. Santucci*, 2016 CCA LEXIS 594 * (Army Ct. Crim. App. 30 Sept. 2016) (unpub.).

The Article I trial judge worsened the absence of the mistake-of-fact and burden removing constitutional errors by issuing pro-prosecution propensity instructions diluting the prosecution's constitutional burden of proof.

He authorized the jury to consider conduct of which Santucci is presumed innocent to show a propensity, by a preponderance of the evidence, to have committed other conduct of which he is also presumed innocent, which is by any standard unconstitutional violations of due process. *Hills*, 75 M.J. at 356.

Santucci reproduces the offending instructions here to underscore just how unfairly disadvantaged the trial judge stacked the deck against him and for the prosecution:

> Evidence that the accused committed the sexual offense of Rape against [TW]….may have no bearing on your deliberations in relation to the Sexual Assault of [JM],….***unless you first determine by a preponderance of the evidence, and that is more likely than not, that [Santucci raped TW].***
>
> ***If you determine by a preponderance of the evidence that [Santucci Raped TW], even if you are not convinced beyond a reasonable doubt about that the accused is guilty of that offense, you may nonetheless then consider the evidence of that offense for its bearing on any matter to which it is relevant in relation to [JM].***
>
> ***You may also consider the evidence of such Rape for its tendency, if any, to show the accused's propensity or predisposition to engage in sexual offenses.***

(R. at 476-77) (emphasis added).

Santucci noted that constitutional law does not permit the prosecution to show propensity by relying on the very acts the prosecution needs to prove beyond a reasonable doubt in the same case. Language such as "more likely than not," "even if you are not convinced beyond a reasonable doubt that the accused is guilty," and "tendency to show the accused's propensity or predisposition to engage in sexual offenses," surely rises to the level of constitutional error –

worsened because they were delivered from the authority of the judge's bench to the jury, then written for the jury's use in the deliberation room.

Santucci pled not guilty, and these instructions both undermined the presumption of innocence and created a significant risk that he was convicted based on evidence that did not establish his guilt beyond a reasonable doubt. The conflicting standards of proof and contradictory statements about the bearing that one charged offense could have on another degrade any confidence that the errors were harmless beyond a reasonable doubt.

**J. Application of *Monk* to Unconstitutional Propensity Instructions.**

In *Monk*, this Court agreed with the military habeas petitioner that equating "reasonable doubt" with a "substantial" doubt or "misgiving," and, that no reasonable doubt exists if the jury would be "willing to act" on their belief in Monk's guilt to the same extent as they would be willing to act on a belief concerning an important personal matter were "constitutionally defective." 901 F.2d at 889.

Here, not only did the Article I tribunal issue patently unconstitutional propensity and disposition instructions, but also equated reasonable doubt with preponderant evidence, "more likely than not," "even if you are not convinced beyond a reasonable doubt that the accused is guilty," and "tendency to show the accused propensity or predisposition to engage in sexual offenses."

Applying the analysis in *Monk*, surely lowering the prosecution's burden of proof to preponderant evidence is equally as unconstitutional as lowering the standard to "substantial" evidence this Court found unconstitutional and prejudicial.

Similarly, the "willing to act" language found unconstitutional and prejudicial in *Monk* is not as misleading or misinformative as "even if you are not convinced beyond a reasonable doubt that the accused is guilty," the jury can consider charged conduct for its "tendency to show the accused's propensity or predisposition to engage in sexual offenses." This unconstitutional and clearly conflated language evidences that the jury applied a less stringent burden of proof on the prosecution than is constitutionally required.

Juries are presumed to follow the judge's instructions. *United States v. Urbano*, 563 F.3d 1150, 1155 (10th Cir. 2009). Consequently, the jury followed the defective instructions and convicted Santucci pursuant to the unlawful propensity and burden diluting instructions. *United States v. Bader*, 678 F.3d 858, 869 (10th Cir. 2012) (reversing, remanding, and vacating convictions and sentence based on defective jury instructions: "we also are convinced that there is a reasonable probability that this error affected the outcome—i.e., that there is a reasonable probability that the jury would not have convicted Mr. Bader of the [] counts but for this error."). *See also Riley v. McDaniel*, 786 F.3d 719 (9th Cir.

2015) (habeas granted where jury instruction relieved the state of its burden to prove an element of the offense thereby violating due process); *Doe v. Busby*, 661 F.3d 1001 (9th Cir. 2011) (habeas granted where jury instruction impermissibly lowered prosecution's burden of proof violating Due Process permitting a murder conviction based on a preponderance of the evidence that uncharged crimes occurred); *Byrd v. Lewis*, 566 F.3d 855, 866 (9th Cir. 2009) (habeas granted where instruction on sexual offenses had unconstitutional effect of "allow[ing] the jury to find Gibson guilty of the charged offenses by relying on facts found only by a preponderance of the evidence"); *Hanna v. Riveland*, 87 F.3d 1034 (9th Cir. 1996) (habeas granted where instruction on permissive inference unconstitutionally relieved the prosecution of its burden on an element of the offense); *Carter v. Montgomery*, 769 F.2d 1537 (11th Cir. 1985) (jury instruction relieved prosecution of burden of proving all elements of the crime beyond a reasonable doubt).

**K. Cumulative Effects of Instructional Errors.**

The errors here are more constitutional severe than those for which relief was granted in Monk. The analysis embraces the harmfulness of the propensity instructions together with the Article I tribunal's having failed to issue the mistake-of-fact defense and its required evidentiary burden shift to the prosecution. The instructions given (propensity and dilution of beyond a reasonable doubt), unlawfully authorized the jury to convict in violation of the Constitution, while at

the same time, the instructions not given (mistake-of-fact and burden shift) did not alert the jury that it could acquit and that the jury had to acquit if the prosecution failed to disprove the mistake-of-fact beyond a reasonable doubt. Stated differently, had the propensity instructions not issued and the mistake-of-fact instructions been properly delivered, there is a reasonable probability the jury's deliberations stood to be altogether different, resulting in an acquittal.

Consider: after having reminded the jury that the judge just instructed them to follow the propensity and lesser evidentiary burden of preponderant evidence instructions, the prosecution went on to implore the jury to do the very things that are constitutionally objectionable:

> …if you decide, ***by a preponderance of the evidence, just more likely than not***, that [Santucci] assaulted or raped [TW], you can use that to ***show [Santucci's] propensity or predisposition to engage in sexual offenses***. You can use that. And that is important.

(R. at 482-83) (emphasis added).

The persuasive position of a prosecutor, representative of the sovereign, drawing upon the trial judge's unconstitutional instructions to encourage the jury to follow the instructions for an unconstitutional purpose and measure the evidence by an unconstitutional standard proves that the propensity instructions were not harmless beyond a reasonable doubt and led to Santucci's conviction and sentence.

Of note, what is absent from the prosecutor's summation, is his attempt to convince the jury that Santucci's "honest but mistaken belief" that TW consented, *i.e.*, mistake-of-fact, did not exist beyond a reasonable doubt. The instructions given, and the instructions withheld "could mislead the jury into finding no reasonable doubt when "in fact there was some."[3]

Santucci pled not guilty and requested trial by jury. There was only one eyewitness, who initially did not seek to press charges. (R. at 310). Santucci contested TW's testimony by taking the stand in his own defense. The physical evidence was consistent with consensual sex. TW went to the hospital the following day but did not state, "I was just raped and assaulted." Rather, she called asking for a "morning after pill" and repeatedly said she could not have any more children.

Common sense informs that a rape victim will report the heinous violent act committed against her, not merely request "morning after pill." At the emergency room, TW initially declined a Sexual Assault Nurse Exam. (R. at 299). Instead, she asked for a prophylactic, sexually transmitted disease test and a "morning after pill." *Id*. Even though offered, TW did not consent to a DNA swab, which is

[3] They jury suspended deliberations and asked the trial judge for clarification on the Specifications under Charge I (rape and sexual assault of TW and sexual assault of JM), indicating the jury was indeed confused on how to evaluate the propensity issue the trial judge injected into Charge I between TW and JM. (R. at 525-26).

designed to identify the sexual of the partner of the person being treated. (R. at 308).

The facts recounted above were before the jury. The unconstitutional instructions "possibly" clouded the jury's assessment of the evidence adduced, which is not harmless beyond a reasonable doubt according to *Monk*, 901 F.2d at 890, especially when the effects of the repeated errors are tested on the record as a whole, which has not occurred to date. *Chapman*, 386 U.S. at 18 (harmless error test on record as a whole); *Rose v. Clark*, 478 U.S. 570 (1986) (same); *United States v. Smith*, 888 F.2d 720 (10th Cir. 1989) (same).

**L. Monk Passed a Polygraph Examination, as Did Santucci.**

With the correct instructions given and the incorrect instructions withheld, the jury could have believed Santucci over TW. Weighing in favor of Santucci is his having passed a posttrial polygraph examination. This Court noted Monk's having passed a polygraph exam as bearing on whether the unconstitutional jury instruction possibly clouded the jury's assessment of the evidence. *Monk*, 901 F.2d at 886 ("[i]n the investigation that followed, Monk "passed" several polygraph tests regarding the events…").

Like Monk, the polygrapher here asked Santucci questions during the examination which directly focused on the issue of consensual or nonconsensual sexual relations and the examiner's conclusions were "no detection of deception."

For example, the examiner, with over 44-years' experience as an investigator and former Naval Criminal Investigative Service (NCIS) Agent, asked, Santucci, "did you have to use any force to have sex with TW in your barracks room?" Santucci responded in the negative.

When the examiner asked whether TW, in Santucci's room, stated, "take your shit off," meaning his clothes, Santucci replied in the affirmative.

When the examiner asked, "did TW tell you to stop at any time while having sex with her," Santucci replied in the negative.

The polygrapher's analysis is reproduced here:

> The four question MMGQT relevant question format was used for **SANTUCCI**'s polygraph examination. Two computer polygraph scoring programs were used to evaluate the examination; and the examiner used a nationally recognized numerical scoring method; all methods resulted in an evaluation of: **NO DECEPTION INDICATED**. It was the opinion of the undersigned polygraph examiner that no significant, specific and consistent physiological responses were present and indicated attempted deception to the relevant questions. The polygraph examination administered to **SANTUCCI** was evaluated **NO DECEPTION INDICATED**.
>
> Following **SANTUCCI**'s polygraph examination, his collected polygraph charts were reviewed and evaluated. It was the opinion of the undersigned polygraph examiner that **SANTUCCI** was truthful in his responses to the relevant questions. Before **SANTUCCI** departed the testing site he was informed of the analysis and advised that he passed his polygraph examination. **SANTUCCI**'s

> polygraph examination was evaluated **NO DECEPTION INDICATED**.

*See* Santucci's Motion to Expand, Ex. A (Doc. 19) (emphasis in original).

The unconstitutional jury instructions, speaking to fundamental due process, produced an unfair proceeding and an unreliable result. Following the rationale and holding of this Court in *Monk* and the cases cited therein, any of the instructional errors on its own so infected the entire trial that the resulting conviction violates due process. The cumulative effects of all instructional errors leave no doubt that the jury applied the wrong standards considering the instructions given and the instructions withheld.

## II. THE DISTRICT COURT'S INCOMPLETE CONSIDERATION OF APPLICABLE PRECEDENT AND MISPLACED RELIANCE ON INAPPOSITE CASELAW RESULTED IN AN ERRONEOUS DISPOSITION OF SANTUCCI'S SECTION 2241 PETITION.

### A. *De Novo* Standard of Review.

This Court reviews a district court's denial of habeas relief brought pursuant to 28 U.S.C. § 2241, *de novo. Ali Saleh Kahlah al-Marri v. Davis*, 714 F.3d 1183 (10th Cir. 2013).

**B. The Lower Court Erroneously Adopted an Overly Narrow View of Its Review Authority Under 28 U.S.C. § 2241, Despite Supreme Court and Tenth Circuit Precedents Demonstrating that It Should Have Reached and Decided the Merits of Santucci's Substantial Constitutional Claims, Which Were Not Given Adequate Consideration by Article I Military Tribunals.**

The "Great Writ" demands application of basic constitutional doctrines of fairness, *see Jones v. Cunningham*, 371 U.S. 236, 243 (1963), and the courts' freedom to issue the writ is aptly described as the "highest safeguard of liberty." *Smith v. Bennett*, 365 U.S. 708, 712 (1961).

This Court and the lower court are authorized to reach and determine the merits of Santucci's constitutional claims and award the Writ. Federal statutes, 28 U.S.C. § 2241 and 28 U.S.C. § 2243, empower this Court to entertain a military prisoner's habeas claims and to grant relief as law and justice require, as does the caselaw interpreting these statutes.

In *Burns*, 346 U.S. at 137, the Court made clear that *de novo* civilian habeas review of military decisions is altogether proper when constitutional deprivations resulted in unfair proceedings or unreliable results, and consequently unjust confinement. A Section 2241 case, a plurality of the Supreme Court observed:

> The constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect Soldiers – as well as civilians – from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispending with rudimentary fairness rather than finding truth through adherence to those basic guarantees which

> have long been recognized and honored by the military courts as well as the civilian courts.

*Id.* at 142.

Accordingly, the High Court acknowledged the vital role Article III courts play in ensuring compliance with rudimentary due process during Article I proceedings. The Supreme Court has also found that the district courts possess jurisdiction to entertain a military petition for habeas corpus even where Article I tribunals passed on the question. *Schlesinger v. Councilman*, 420 U.S. 738, 745 (1975) (recognizing the civil courts' jurisdiction to review habeas petitions stemming from courts-martial); *see also Gusik v. Schilder,* 340 U.S. 128, 132 (1950) (describing the "terminal point" of court-martial proceedings where civil habeas corpus review may begin).

*Burns*, *Schlesinger*, and *Gusik* demonstrate that Article III courts are empowered to decide the merits of constitutional claims, even though Article I tribunals considered them previously. *See also Kauffman v. Secretary of the Air Force*, 415 F.2d 991, 997 (D.C. Cir. 1969) (incumbent upon the district court to examine whether the constitutional rulings of a military tribunal conform to prevailing Supreme Court standards).

These precedents do not stand as barriers to Article III adjudication constitutional rights, as the district judge's ruling below connotes. *See also* 10 U.S.C. § 836 (directing military tribunals to apply principles of law recognized in

criminal cases tried in federal district courts implying a need for habeas review of constitutional violations).

**1. *Dodson v. Zelez* Authorizes Awarding the Writ, but the Lower Court Declined to Apply It.**

While refusing to apply *Monk* and the authorities cited, *supra*, the lower court also refused to apply *Dodson* which informs that Santucci is deserving of the writ. In *Dodson*, this Court reached the merits of a Marine petitioner's constitutional jury instruction claim and reversed the District of Kansas's denial of the writ. 917 F.2d at 1262-63. A case involving robbery, premeditated murder, felony murder, and life imprisonment, Dodson challenged his Article I sentence to life imprisonment as constitutionally flawed because the jury did not vote by ¾ for the sentence. *Id*. This Court held Dodson's due process rights were violated, reversed the District of Kansas, awarded the writ, and directed the prosecution to either order a new sentencing hearing or to order no punishment. *Id*. at 1263.

In *Dodson*, this Court relied on the Fifth Circuit's decision in *Calley*, *supra*, and presented four elements to aid district courts sitting in the Tenth Circuit in determining whether they should adjudicate the merits of a military petitioner's constitutional claims previously addressed by Article I military tribunals.

> (1) The asserted error is of substantial constitutional dimension;

> (2) The issue is one of law rather than of disputed fact already determined by the military tribunal;
>
> (3) There are no military considerations that warrant different treatment of constitutional claims; and
>
> (4) The military courts failed to give adequate consideration to the issues involved or failed to apply proper legal standards.

*Id*. at 811.

The court below failed to apply this four-part test. First, like the constitutional issue presented in *Dodson*, Santucci's challenges (1) are constitutionally substantial because they relate directly to due process, fundamental fairness, the Sixth Amendment, and the legal efficacy of the conviction and sentence; (2) are largely free of factual issues and are questions of law; (3) involve no military considerations that warrant different treatment (indeed, the military has been trending away from swift justice in remote deployed settings overseas to maintain good order and discipline. Today, soldiers often wait over one year to go to trial while the prosecution returns them to the United States, employs experts, prepares litigation reports, conducts forensic cyber examinations, reviews social media postings, hires consultants, all of which has resulted in a body of jurisprudence which has grown to resemble that of state and federal civil practice; and (4) the Article I tribunals failed to give adequate consideration to the issues involved.

Adequate consideration must mean "correct" or at a minimum, at least plausibly justified, and defensible in the application of prevailing standards. The lower court did not explain how review can be "full" when an Article I tribunal failed apply the law of "harmless error" to the cumulative effects a series of defective jury instructions and 25 mistakes by defense counsel as if they did not exist. Nor did the lower court explain how Article I review could be "fair" where a tribunal did not evaluate the prejudicial effect of all the instructional errors on the record as a whole.

Santucci demonstrated that Article I review was "legally inadequate" to resolve his claims, *Burns*, 346 U.S. at 142, but the lower court neglected these pivotal points, sending the wrong message to Article I tribunals that jury instructional and Sixth Amendment errors do not have to be examined for prejudice on the whole, but that it is okay to parse them out into distinct parts while overlooking the total elimination of the burden shift to disprove a complete defense – which is constitutional error and unfairly prejudicial. Accordingly, the *Dodson* factors, which the lower court forewent, inform that the district court should have reached the merits and decided Santucci's claims. The lower court failed to recognize the true breadth of its authority in this case and thereby disserved not only Santucci but also the Constitution and the military justice system it was

dutybound to check and balance. At the merits, the lower court should have awarded the writ based on the due process, the Sixth Amendment errors, or both.

### 2. The District Judge Errantly Relied on Irrelevant and Unpublished Decisions While Disregarding *Monk* and *Dodson.*

While disregarding the published and precedent decisions *supra*, the lower court cited unpublished inapposite decisions in *Nixon v. Ledworth*, 635 F. App'x 560, 566 (10th Cir. 2016) (unpub.) (denial of habeas based on waiver and failure to provide a reasoned basis explaining error in the district court's conclusion that prior acts evidence was fully and fairly considered by Article I tribunals) and *Templar v. Harrison*, 298 Fed. App'x. 763, 765 (10th Cir. Oct. 30, 2008) (habeas denied where Article I courts set aside the sentence and ordered a rehearing, thus mooting grounds for habeas) (Mem. Op. at 3, 7). This does not involve waiver (*Nixon*) nor does it involve the sentence having been previously set aside (*Templar*).

That the district judge should have reviewed and applied *Dodson* is reinforced by the lower court's having cited *Thomas v. U.S. Disciplinary Barracks*, 625 F.3d 667 (10th Cir. 2010). (Mem. Op. at 3). The lower court cited *Thomas* for the singular proposition that generally, Article III review of Article I claims is limited. (Mem. Op. at 3). Reliance on *Thomas*, however, is misplaced because the Court resolved the case based on 28 U.S.C. § 2253(a), not Section 2241 as

Santucci invokes. *Thomas*, 625 F.3d at 668 ("[w]e have jurisdiction under 28 U.S.C. § 2253(a)").

The larger point, though, is that *Thomas* specifically identified and evaluated a district court's use of the *Dodson* four-part test discussed more fully above. *Id*. at 670-71. Thus, in addition to Santucci's having briefed *Dodson*, a case the lower court relied upon to rule against Santucci actually informed the district judge of the appropriate test to apply. But, it too went ignored.

The same can be rightly said about the lower court's having cited *Roberts v. Callahan*, 321 F.2d 994 (10th Cir. 2003) for essentially the proposition that because Article I courts reviewed Santucci's claims, Article III court review is precluded. (Mem. Op. at 4). *Roberts* too specifically alerts readers of the *Dodson* four-factor test. But again, alerted to *Dodson*, the lower court erroneously avoided applying its test, rationale, and holding to Santucci's claims.

### 3. *Burns v. Wilson* Provides Supreme Court Authority to Review the Merits and Award the Writ, But the Lower Court Failed to Apply It.

In *Burns*, the Supreme Court agreed that the district court and the appellate court correctly dismissed the habeas petitions of three airmen [Air Force enlisted men] sentenced to death for rape and murder while stationed on the island of Guam largely because their petition sought to simply relitigate their claims. 346 U.S. at 146.

Still, the *Burns* Court emphasized that that military courts "have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights." *Id*. at 142. But, the Supreme Court qualified that Article III review *may* be precluded where a military petitioner seeks to retry the case in civil court. "[W]hen a military decision has dealt fully and fairly with an allegation raised in that [habeas] application, it is not open to a federal civil court to grant the writ simply to reevaluate the evidence." *Id*., (internal citation omitted).

In upholding the trial and appellate courts' denials of Article III review the Court reasoned that:

> [p]etitioners have failed to show that military review was legally inadequate to resolve the claims which they have urged upon the civil courts. They simply demand an opportunity to make a new record, to prove *de novo* in the district court precisely the case which they failed to prove in the military courts.

*Id*. at 146.

The same cannot be said here. Santucci does not seek to relitigate before the lower court, or litigate *de novo*, or to make a new record. Rather, Santucci sought the justice the constitutional courts of the United States can provide to, as the *Burns* court noted, to "protect [Santucci] from a violation of his constitutional rights." *Id*. at 142.

Below, Santucci showed his convictions were the result of an "unfair proceeding," *id*., because critical defense instructions were not delivered, two burden diluting pro-prosecution instructions were given, the prosecution urged the jury to follow the defective instructions during closing, and the Article I appellate tribunal failed to apply proper legal standards, *i.e*., testing for prejudice based on overall effects of the totality of constitutional errors rather than testing each individual error standing alone. This must be the case the Supreme Court had in mind when it wrote of the "dispensing of rudimentary fairness rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civilian courts." *Id*.

Santucci applied *Burns* to the foregoing to prove that Article I review was "bent" on affirming the convictions and sentence as the products of constitutionally defective proceedings which produced "unreliable results." *Id*. *Burns* was enough authority for the district court to award the writ.

**4. The Dissent in *Burns v. Wilson* Authorizes Article III Review of the Merits and Awarding the Writ, but the Lower Court Did Not Consider It.**

Justice William O. Douglas, joined by Justice Hugo Black, concluded the Constitution required Article III habeas review of the airmen's constitutional claims and noted that the Fifth and Sixth Amendments applied to military personnel. "But never have we held that all the rights covered by the Fifth and the

Sixth Amendments were abrogated by Art. I, § 8, cl. 14 of the Constitution, empowering Congress to make rules for the armed forces." *Id*. at 152. The dissenting Justices expounded that Article III courts, not Article I courts, formulate the constitutional rules which military tribunals must follow.

> If the military agency has fairly and conscientiously applied the standards of due process formulated by this Court, I would agree that a rehash of the same facts by a federal court would not advance the cause of justice. But where the military reviewing agency has not done that, a court should entertain the petition for habeas corpus. In the first place, the military tribunals in question are federal agencies subject to no other judicial supervision except what is afforded by the federal courts. In the second place, the rules of due process which they apply are constitutional rules which we, not they, formulate.

*Id*. at 154.

Here, the lower court did not embrace the basic constitutional construct that Article III courts serve as the ultimate arbiters of the law's meaning and effect, that is, the fundamental American concept of separation of powers, checks and balances, and judicial review.

Santucci showed the court below that Article I tribunals failed to "conscientiously appl[y] the standards of due process" in mishandling the jury instructions, the harmless error analysis, and the *Strickland v.* Washington, 466 U.S. 668 (1988) claims (ineffective assistance of counsel). The dissent in *Burns*, especially when read in conjunction with the plurality decision of the court, should

have aided the district court to realize just how appropriate Santucci's claims were for Article III review and that his conviction and sentence are the result of a fatally flawed Article I process crying out for Article III intervention and expertise.

**5. Additional Tenth Circuit Precedents the Lower Court Overlooked Authorize Article III Review and Awarding the Writ.**

Turning to the judicial definition of "full and fair" consideration, this Court in *Watson*, 782 F.2d at 144 explained that "full and fair" consideration has not been defined precisely, but leaves the Article III trial judge with the discretion to reach the merits and determine if constitutional protections were correctly considered and applied:

> Although there has been inconsistency among the circuits on the proper amount of deference due the military courts and the interpretation and weight to be given the "full and fair consideration" standard of *Burns*, this circuit has consistently granted broad deference to the military in civilian collateral review of court-martial convictions. Although we have applied the "full and fair consideration" standard, we have never attempted to define it precisely. Rather, we have often recited the standard and then considered or refused to consider the merits of a given claim, with minimal discussion of what the military courts actually did.

*Watson*, 782 F.2d at 144.

As this Court observed in *Lips v. Commandant*, 997 F.2d 808, 811 (10th Cir. 1993), "[o]nly when the military has not given a petitioner's claims full and fair

consideration does the scope of review by the federal civil court expand;" *Lundy v. Zelez*, 908 F.2d 593 (10th Cir. 1990) (Article III review of Article I rulings when question is constitutionally substantial and largely free of factual issues); *Dixon v. United States*, 237 F.2d 509, 510 (10th Cir. 1956) ("in military habeas corpus the civil courts have jurisdiction to determine whether the accused was denied any basic right guaranteed to him by the Constitution").

The court below did mention *Watson* and *Lips*, but only selectively to support declination to review the merits and dismiss the petition – not to cite or apply this Court's guidance, also found in *Watson* and *Lips* as to those circumstances which require the district court to adjudicate the merits of a military Section 2241 petitioner.

In *Jefferson v. Berrong*, 783 F. Supp. 1304 (D. Kan. 1992), a military habeas case decided after *Watson*, shows how the district court applied the *Dodson* four-part test and reached the merits of an ineffective assistance of counsel claim according to the following reasoning which the lower court here overlooked:

> The court recognizes that there is authority for holding that all issues raised before the CMA are fully reviewed and considered, even though a summary disposition is entered. *See e.g.*, *Watson v. McCotter*, 782 F.2d 143 (10th Cir.), *cert. denied*, 476 U.S. 1184, 91 L. Ed. 2d 549, 106 S. Ct. 2921 (1986) (summary denial of review constitutes full and fair consideration of issues presented). Given the procedural history in the present case, however, the court

> is not prepared to apply this holding in as broad a manner as respondents urge in this case.
>
> Presentation of issues before the CMA, and a resulting summary dismissal of those issues, clearly satisfies the requirement that a petitioner of habeas corpus relief must first exhaust available remedies within the military system. But significantly, the court believes such summary dismissal by the CMA, especially of an issue raised for the first time, and where the other three *Dodson* factors are satisfied, does not always evidence the full consideration anticipated under the fourth *Dodson* factor. *See e.g., Khan,* 943 F.2d at 1262 (formulary order of CMA denying relief does not indicate consideration given to petitioner's claims or admit review). If CMA's summary dismissal of such claims is seen as satisfying the fourth *Dodson* standard, then, as in the present case, federal review for constitutional error would automatically be precluded. The court finds this result would not be consistent with the rationale employed in *Dodson* or in *Burns* for determining when federal review of military court-martial proceedings is appropriate. Under the circumstances presented in this case, the court finds that review of petitioner's claim of ineffective assistance of counsel is appropriate.

*Berrong*, 783 F. Supp at 1308; *see also Khan v. Hart*, 943 F.2d 1261 (10th Cir. 1991) (reaffirming *Dodson* four part test, applying the *Dodson* test, reaching the merits and adjudicating military petitioner's constitutional grounds for habeas relief); *Application of Stapley*, 246 F. Supp. 316 (D. Utah 1965) ("the vindication of constitutional rights through such inquiry and rulings [habeas proceedings] in proper cases transcends ordinary limitations and affords federal courts both the

jurisdiction and the duty to inquire and rule upon the legality of detainment of any person entitled to constitutional protection whether in or out of military service.").

If there is a commonality among these cases, it is that servicemembers are entitled to the fundamental protections afforded by the Constitution, and that it is up to the Article III courts to safeguard those protections. There may be good reason to defer to the military tribunals in factual considerations involving strictly military matters or discipline within the ranks. 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 one Circuit Court of Appeals has explained:

> [T]he test of fairness requires that military rulings on constitutional issues conform to Supreme Court standards, unless it is shown that conditions peculiar to military life require a different rule....The wholesale exclusion of constitutional errors from civilian review and the perfunctory review of servicemen's remaining claim's … are limitations with no rational relation to the military circumstances which may qualify constitutional requirements. The benefits of collateral review. . . are lost if civilian courts apply a vague and watered-down standard of full and fair consideration ....
>
> If servicemen's rights were exclusively left to congressional and executive judgment, then the Court could not exercise any supervisory function over those rights; but the opinion [*Burns*] also stated that "the

> constitutional guarantee of due process is meaningful enough... to protect soldiers as well as civilians. . . ."

*Kauffman*, 415 F.2d 991.

To take the position that Article III judges cannot appreciate the needs of the military in determining constitutional issues is unsound, unwise, and unfair. Leaving constitutional determinations to the exclusive judgment of the military is inadequate. To find an example of the injustice that ensues if this position is adopted, one need look no further than Santucci.[4]

## CONCLUSION

Had the jury been properly instructed, Santucci might very well have been acquitted. His direct review conducted an incomplete harmful error analysis. The Court has before it a jury verdict in which no reasonable jurist could have confidence. *Monk, supra*. The cumulative effects of the defective jury instructions are prejudicial and defense counsel missed 25 opportunities to protect and defend the case.

Accordingly, "law and justice," by operation of 28 U.S.C. § 2243, demand that the Court protect and defend not only the Constitution and Santucci's

[4] To comply with word limitations, Santucci has not briefed his Sixth Amendment *Strickland,* 466 U.S. at 668, ground for habeas relief that he was deprived of the constitutional guaranty of effective assistance of counsel at trial given counsel's 25 unreasonable errors. Santucci respectfully requests the Court to evaluate his claim as set forth in his original Petition for a Writ of Habeas Corpus which is a part of the Appendix filed contemporaneously with this Opening Brief. Additionally, at the Court's pleasure, Santucci stands ready to brief the issue upon the Court's instruction.

individual liberties, but also execute Congress's intent, by operation of 28 U.S.C. § 2241, guided by *Burns* and *Monk*, to reach the merits of Santucci's due process claims that the jury instructions were unconstitutional and prejudicial, and award the writ of habeas corpus to check the failings of Article I military tribunals and reinforce existing guidance to district courts in this Circuit that they are dutybound to see that other branches of government observed the Constitution. Santucci respectfully requests the Court award the writ, vacate, set aside, and dismiss his judgment of conviction and sentence, and release him from unlawful confinement by federal officials.

Date: September 21, 2020

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

*Attorneys for Appellant Anthony V. Santucci*

## STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellant respectfully suggests that oral argument may assist the Court in reaching a just decision. Oral argument stands to be helpful for any number of reasons, perhaps the most important being the need to clearly re-affirm and emphasize that district courts in this Circuit possess the discretion, and in those cases where the constitutional issues are "substantial and largely free of factual issues," the duty, to adjudicate the merits of claims military petitioners bring pursuant to 28 U.S.C. §§ 2241 and 2243 as part of the constitutional scheme of separation of powers and checks and balances.

Although some Section 2241 cases may not be appropriate for a merits-based district court decision because Article I military tribunals may have followed Article III precedents, there is no blanket prohibition against adjudicating constitutional claims because Article I military tribunals rejected those claims.

Here, the lower court, without granting a hearing, consistently selected distinct portions of caselaw to support the decision to foreclose judicial review of the Article I military tribunals' constitutional determinations rather than cite the complete reach of the law authorizing and at times, compelling, a district court to evaluate the merits and decide the constitutional challenges. Some of the same cases the lower court relied upon, however, provide examples of the circumstances when judicial review is entirely appropriate if not required, but went unmentioned

and unapplied to the unique constitutional deprivations presented in this case which, in fairness, reasonable jurists could conclude repeated violated the most supreme law of our land.

The rationale for deference to military tribunals no longer exists as it did when this area of the law began to evolve and expand. Years ago, military justice was administered swiftly in the field, overseas on remote battlefields, speaking to the time-sensitive need to maintain good order and discipline in the ranks. This precept has eroded, however, as today, an accused regularly waits a year or more for trial while being returned to the United States, placed on limited duties, and the cases often involve extensive motions practice, private investigation, expert consultation, expert reports, sanity boards, and the trial looks more like a state or federal court proceeding where the need for swift and straightforward trials to maintain good order is no longer timely served because so much time as gone by that many in the ranks have moved on to other assignments or civilian life.

At the same time military justice was expanding into complex litigations, the focus on developing jurists capable of consistently adjudicating myriad constitutional issues has not kept pace. There are many distinctions between military judges and Article III jurists. Military judges are not out-and-out professional jurists with lifetime appointments to insulate them from outside pressures. They are first and foremost military officers, managing military careers

where there is one primary and enduring client, their military branch, in this instance, the Army. Military Judges and are spending but a few years as a trial or appellate judge after 15 or more years in previous non-judicial assignments (*e.g.*, legal assistance (family law, child custody, separation, divorce, debtor-creditor, wills, small estates), domestic claims, foreign claims, administrative law, income tax, rule of law, international law of armed conflict, use-of-force, rules of engagement, mid-career continuing education, defending Federal Tort Claims Act actions, defending military personnel law issues, performing personnel management, unit administration) and then moving on to other non-judicial assignments or retiring.

There remains a place in the law where it is altogether appropriate for Article III jurists to defer to military personnel and legal determinations – matters perhaps of purely military discipline for exclusively military offenses where the Constitution is neither implicated nor violated. However, when it comes to separation of powers, district courts, consistent with the existing law in this Circuit, should not hesitate to determine whether another branch of government, in this case the military, correctly afforded the constitutional protections a Section 2241 petitioner presents.

## 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 12,189 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: September 21, 2020

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

*Attorneys for Appellant Anthony V. Santucci*

## SEPARATE CERTIFICATIONS

I hereby certify that (1) all required privacy redactions have been made pursuant to Tenth Circuit R. 25.5; (2) that the hard copies to be submitted to the court are exact copies of the version submitted electronically; and (3) that the electronic submission was scanned for viruses with the most recent version of a commercial virus scanning program, and is free of viruses.

Date: September 21, 2020

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

*Attorneys for Appellant Anthony V. Santucci*

## CERTIFICATE OF SERVICE

I hereby certify that on September 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: September 21, 2020

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

*Attorneys for Appellant Anthony V. Santucci*

# UNITED STATES DISTRICT COURT
# DISTRICT OF KANSAS

**ANTHONY V. SANTUCCI,**

**Petitioner,**

**v.** **Case No. 19-3116-JWL**

**COMMANDANT, United States Disciplinary Barracks,**

**Respondent.**

## JUDGMENT IN A CIVIL CASE

**( )** **JURY VERDICT.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

**(x)** **DECISION BY THE COURT.** This action came before the Court. The issues have been considered and a decision has been rendered.

**IT IS ORDERED AND ADJUDGED** that the petition for habeas corpus is denied.

Entered on the docket 05/26/20

**Dated: May 26, 2020**

**TIMOTHY M. O'BRIEN**
**CLERK OF THE DISTRICT COURT**

**s/S. Nielsen-Davis**
**Deputy Clerk**

# *Santucci v. Commandant*

United States District Court for the District of Kansas

May 26, 2020, Decided; May 26, 2020, Filed

CASE NO. 19-3116-JWL

**Reporter**
2020 U.S. Dist. LEXIS 91249 *; 2020 WL 2735748

ANTHONY V. SANTUCCI, Petitioner, v. COMMANDANT, United States Disciplinary Barracks, Respondent.

**Subsequent History:** Appeal filed, 07/24/2020

**Prior History:** *United States v. Santucci, 2016 CCA LEXIS 594 (A.C.C.A., Sept. 30, 2016)*

## Core Terms

military, sexual, assault, court-martial, rape, propensity

**Counsel:** **[*1]** For Anthony V. Santucci, Petitioner: Carrie Elizabeth Parker, Christopher Michael Joseph, Diane L. Bellquist, LEAD ATTORNEYS, Joseph, Hollander & Craft, LLC - Topeka, Topeka, KS; John N. Maher, LEAD ATTORNEY, PRO HAC VICE, Maher Legal Services, PC, Geneva, IL.

For Commandant, United States Disciplinary Barracks, Respondent: Jared S. Maag, LEAD ATTORNEY, Office of United States Attorney - Topeka, Topeka, KS; Terra D. Morehead, LEAD ATTORNEY, Office of United States Attorney - KCKS, Kansas City, KS.

**Judges:** JOHN W. LUNGSTRUM, United States District Judge.

**Opinion by:** JOHN W. LUNGSTRUM

## Opinion

**MEMORANDUM AND ORDER**

This matter is a petition for habeas corpus filed under *28 U.S.C. § 2241*. Petitioner is confined at the United States Disciplinary Barracks, Fort Leavenworth, Kansas. He challenges his 2014 convictions by a general court-martial.

**Background**

In 2014, a general court-martial convicted petitioner of one specification of rape, one specification of sexual assault, one specification of forcible sodomy, one specification of assault consummated by a battery (concerning TW), and two specifications of adultery, in violation of Articles 120, 125, 128, and 134, UCMJ, *10 U.S.C. §§ 920*, *925*, *928*, and *934*. The court-martial also found petitioner guilty of one specification **[*2]** of making a false official statement in violation of Article 107, UCMJ, *10 U.S.C. § 907*. Finally, the court-martial found petitioner not guilty of one specification of a sexual assault against JM, in violation of Article 120, UCMJ, *10 U.S.C. § 920*.

Petitioner was sentenced to a dishonorable discharge, confinement for twenty years, and forfeiture of all pay and allowances. The convening authority approved the sentence. In September 2016, the Army Court of Criminal Appeals (ACCA) conditionally set aside the conviction for the sexual assault of TW as an unreasonable multiplication of charges and affirmed the sentence. *United States v. Santucci*, 2016 WL 5682542 (Army Ct. Crim. App. Sep. 30, 2016).

In February 2018, the Court of Appeals for the Armed Forces

(CAAF) granted review but affirmed the findings and sentence imposed. The United States Supreme Court denied certiorari in June 2018.

The events in question took place over the course of the afternoon and evening of July 5, 2013. TW went to the Paradise Bar near Fort Polk, Louisiana, where she had several drinks. Petitioner, who had recently turned 21 years old, arrived with friends. TW was several years older. She sat next to petitioner and bought him drinks, and the two danced. TW then asked petitioner if he wanted to go to his room to "play". **[*3]** They returned to his room in the barracks and engaged in sexual activity.

During that time, TW complimented petitioner's physique, and petitioner testified that throughout the evening, TW was awake and talking, and did not lose consciousness or indicate that she wanted to stop. Petitioner bit TW on her neck and arm and placed his hand on her neck, leaving marks. TW later dressed, kissed petitioner goodbye, and drove home. She declined to give her phone number because she shared the phone with her spouse.

Three hours later, TW went to an emergency room seeking a "morning-after pill"; she authorized a swab to test for STDs but not for DNA collection.

TW was examined by a nurse, who documented bruising and scratches on her arms, neck, and legs, teeth marks on her face, and redness on her rectum.

Petitioner acknowledged in trial testimony that he engaged in sexual acts with TW but described their contact as consensual.

**Claims presented**

Petitioner presents three claims for relief: (1) the military judge erred in failing to provide an instruction on mistake in fact; (2) the military judge erred in giving an erroneous propensity instruction; and (3) petitioner's trial defense counsel provided ineffective **[*4]** assistance.

**Standard of review**

A federal court may grant habeas corpus relief where a prisoner demonstrates that he is "in custody in violation of the Constitution or laws or treaties of the United States." *28 U.S.C. 2241(c)*. A federal habeas court's review of court-martial proceedings is narrow. *Thomas v. U.S. Disciplinary Barracks, 625 F.3d 667, 670 (10th Cir. 2010)*. The U.S. Supreme Court has explained that "[m]ilitary law, like state law, is a jurisprudence which exists separate from the law which governs in our federal judicial establishment," and that "Congress has taken great care both to define the rights of those subject to military law, and provide a complete system of review within the military system to secure those rights." *Nixon v. Ledwith, 635 F. App'x 560, 563 (10th Cir. Jan. 6, 2016)*(unpublished)(quoting *Burns v. Wilson, 346 U.S. 137, 140, 73 S. Ct. 1045, 97 L. Ed. 1508 (1953))*.

The federal habeas court's review of court-martial decisions generally is limited to jurisdictional issues and to a determination of whether the military courts gave full and fair consideration to the petitioner's constitutional claims. *See Fricke v. Secretary of Navy, 509 F.3d 1287, 1290 (10th Cir. 2007)*.

"[W]hen a military decision has dealt fully and fairly with an allegation raised in [a habeas] application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence." *Thomas, 625 F.3d at 670*; *see also Watson v. McCotter, 782 F.2d 143, 145 (10th Cir. 1986)*. Instead, it is the limited function of the federal courts "to determine **[*5]** whether the military have given fair consideration to each of the petitioner's claims." *Thomas, id.* (citing *Burns, 346 U.S. at 145*). A claim that was not presented to the military courts is deemed waived. *Id.* (citing *Roberts v. Callahan, 321 F.3d 994, 995 (10th Cir. 2003))*.

**Discussion**

*Expansion of the record*

Petitioner moves to expand the record to admit a report of a polygraph examination administered to him in November 2019 and the curriculum vitae of the polygraph examiner. The Court will grant the motion under Rule 7 of the Rules Governing Habeas Corpus and has considered the materials in its review of the record.

*Failure to instruct on mistake of fact*

Petitioner first claims the trial judge erred in failing to instruct the panel on mistake of fact concerning the specification of rape. As petitioner states, a military judge is required to give those instructions that "may be necessary and which are properly requested by a party." RCM 920(e)(7).

The instruction sought reads:

> The evidence has raised the issue of mistake on the part of the accused concerning whether (state the name of the

alleged victim) consented to sexual intercourse in relation to the offense of rape.

If the accused had an honest and mistaken belief that (state the name of the alleged victim) consented **[*6]** to the act of sexual intercourse, he is not guilty of rape if the accused's belief was reasonable.
To be reasonable, the belief must have been based on information, or lack of it, which would indicate to a reasonable person that (state the name of the alleged victim) was consenting to the sexual intercourse.
In deciding whether the accused was under the mistaken belief that (state the name of the alleged victim) consented, you should consider the probability or improbability of the evidence presented on the matter.
You should also consider the accused's (age)(education)(experience)(prior contact with (state the name of the alleged victim)) (the nature of any conversations between the accused and (state the name of the alleged victim)) along with the other evidence on this issue (including but not limited to (here the military judge may summarize other evidence that may bear on the accused's mistake of fact)).

U.S. DEP'T OF ARMY, PAM. 72-9, MILITARY JUDGES BENCHBOOK, p. 493.

Petitioner argues the failure to provide this instruction prevented the panel members from receiving a clear statement that if they believed petitioner, who testified in his own behalf, was honestly mistaken as to TW's **[*7]** consent they could find him not guilty of raping her. He also argues that the failure to give the instruction deprived his counsel of the ability to argue this point effectively in closing.

The ACCA agreed that the failure to instruct on mistake of fact was an error. *Santucci*, 2016 WL 5682542, at *4. However, the ACCA found that the failure did not prejudice petitioner. The ACCA noted the panel received both testimony from TW and testimony from medical providers concerning the gravity of her injuries and concluded that "this was clearly not a situation from which appellant could have feasibly claimed an honest, reasonable, mistaken belief that TW was consenting to his misconduct." *Id.* The ACCA also pointed out that although the panel was given the mistake of fact instruction concerning the forcible sodomy specification, defense counsel did not argue that petitioner mistakenly believed TW consented. Instead, defense counsel consistently presented a defense that TW actually consented, not that petitioner mistakenly believed that she had. *Id.* Based on these findings, the ACCA concluded that the failure to give the mistake in fact instruction did not contribute to the panel's verdict on the rape specification.

The Court **[*8]** has reviewed this analysis and concludes that the issue was given full and fair consideration in the military courts. It was thoroughly addressed by the ACCA. And, as respondent points out, the military judge instructed the panel that it must consider "all of the evidence concerning consent to the sexual conduct" and that "evidence that the alleged victim [TW] consented to the sexual conduct, either alone or in conjunction with the other evidence...may cause you to have reasonable doubt as to whether the government has proven that the Case 5:19-cv-03116-JWL Document 24 Filed 05/26/20 Page 6 of 9 sexual conduct was done by unlawful force." (Doc. 1, p. 10, Attach. R.)

The Court concludes that the military courts gave this claim the consideration contemplated by precedent and that petitioner is not entitled to relief on this claim. *See* *Templar v. Harrison, 298 Fed. Appx. 763, 765 (10th Cir. Oct. 30, 2008)*(the district court must deny relief on a claim that has been afforded full and fair consideration).

*Jury instruction on propensity*

Petitioner next challenges the military judge's instruction stating that evidence of petitioner's rape of TW could be used as evidence of his propensity to commit the charged sexual assault of JM.

The ACCA agreed that the instruction **[*9]** was given in error, citing a recent decision by the CAAF, *United States v. Hills, 75 M.J. 350 (C.A.A.F. 2016)*, which was decided after petitioner's court-martial. The ACCA quoted the statement from *Hills* that "[i]t is antithetical to the presumption of innocence to suggest that conduct of which an accused is presumed innocent may be used to show a propensity to have committed other conduct of which he is presumed innocent." *Santucci*, 2016 WL5682542, at *3 (quoting *Hills, 75 M.J. at 356*).

However, the ACCA held that the instruction, although erroneous, was harmless. First, it noted that there was no dispute concerning the occurrence of sexual contact between petitioner and TW and it found her injuries and testimony concerning her intoxication "le[ft] no doubt" that she did not consent. Second, the erroneous instruction stated only that the sexual assault charged against TW could be used as evidence of a propensity to sexually assault JM, and the panel had acquitted petitioner of the assault of JM. The ACCA concluded that the panel members were able to properly apply the burden of proof to the offenses charged and that petitioner has suffered no prejudice from the erroneous instruction.

Because the record shows the ACCA fully and fairly

considered this claim, **[*10]** the Court must deny relief.

*Ineffective assistance of defense counsel*

Petitioner next claims his defense counsel failed to provide adequate representation. The ACCA summarily rejected this claim, stating, "We have considered appellant's matters personally submitted under *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*, one merits discussion but no relief."[1] *Santucci*, 2016 WL 5682542, at *1.

Case law in the Tenth Circuit establishes that where a military court has "summarily disposed of the issue with the mere statement that it did not consider the issue meritorious or requiring discussion", it "has given the claim fair consideration". *Watson v. McCotter, 782 F.2d 143, 145 (10th Cir 1986)*. Accordingly, the Court concludes that this claim must be denied.

*Failure to provide full and fair review*

Petitioner argues that the military courts did not provide full and fair review in his case and urges the Court to undertake an expanded review of his claims for relief. The Court has considered this argument but concludes that this matter was given constitutionally adequate consideration in the military courts. Notably, the ACCA agreed that the military judge should have instructed the panel on mistake of fact and that the military judge erred in giving the propensity instruction. It is not the legal issue of whether the **[*11]** instructions were proper that is in dispute. Rather, it is the application of those findings to the evidentiary record that is the core of the argument. The military courts had the full evidentiary record and resolved the claims against petitioner. The Court finds these claims were given thorough consideration in the military courts, and this court may not re-evaluate the evidence. *See Thomas*, 625 F.2d at 670. IT IS, THEREFORE, BY THE COURT ORDERED the petition for habeas corpus is denied. IT IS FURTHER ORDERED petitioner's motion to supplement the record (Doc. 19) is granted.

**IT IS SO ORDERED**.

DATED: This 26th day of May, 2020, at Kansas City, Kansas.

/s/ John W. Lungstrum

JOHN W. LUNGSTRUM

U.S. District Judge

End of Document

[1] Petitioner's claims of error, raised pro se under *Grostefon*, included a claim of ineffective assistance by defense counsel. Doc. 7, Tab K, pp. 55-62.

**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

## TABLE OF CONTENTS

TABLE OF AUTHORITIES ……..……iii

SUMMARY OF ARGUMENT……1

ARGUMENT……2

CONCLUSION……8

CERTIFICATE OF COMPLIANCE……...10

CERTIFICATE OF SERVICE……11

# TABLE OF AUTHORITIES

**United States Supreme Court**

*Burns v. Wilson*, 346 U.S. 137 (1953) ……...……2, 4

*Gusik v. Schilder,* 340 U.S. 128 (1950)……2

*Schlesinger v. Councilman*, 420 U.S. 738 (1975)…….2

**U.S. Court of Appeals for the Tenth Circuit**

*Dodson v. Zelez*, 917 F.2d 1250 (10th Cir. 1990) …..……..2

*Kennedy v. Commandant*, 377 F.2d 339 (10th Cir. 1967) ……5

*Lundy v. Zelez*, 908 F.2d 593 (10th Cir. 1990) ...…….....3, 6, 7

*Mendrano v. Smith,* 797 F.2d 1538 (10th Cir. 1986) …….……...3, 4, 6

*Monk v. Zelez*, 901 F.2d 885 (10th Cir. 1990) ……..…3, 4, 6

*Roberts v. Callahan*, 321 F.2d 994 (10th Cir. 2003) ……2

*Wallis v. O'Kier*, 491 F.2d 1323, 1325 (10th Cir. 1974)……...5

**Statutes**

28 U.S.C. § 2241 …….……9

28 U.S.C. § 2243 ……..……9

## 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*