No 23 -

In The

Supreme Court of the United States

Anthony Santucci,

Petitioner,

v.

United States,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether this Court's plurality decision in *Burns v. Wilson*, 346 U.S. 137 (1953) (Article III habeas review not appropriate where Article I military tribunals provided "full" and "fair" direct review, or, where Article I military tribunals were "adequate" to make constitutional determinations), remains viable when applied to crimes unconnected to military service but prosecuted by Article I military tribunals.

II. Whether the Court of Appeals articulated a workable test to correctly interpret what "full," "fair," and "adequate" Article I direct review legally means to establish a practicable legal standard upon Article III review, to ensure stability and predictability under *stare decisis*, especially where the Tenth Circuit is the "North Star" for military habeas appeals and each Circuit Court of Appeals and District Court is poised to follow the test announced in *Santucci v. Commandant*, 66 F.4th 844, 856 (10th Cir. 2023).

III. Whether the Court of Appeals adequately considered the historical rationales supporting Article III deference to military constitutional determinations to ascertain if the rationale extends to crimes unconnected to military service.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petitioner is Anthony Santucci, appellant below. Respondent is the United States, appellee below. Petitioner is not a corporation.

RELATED PROCEEDINGS

Bales v. *Commandant*, No. 20-3167 (10th Cir. May 11, 2023) (decided pursuant to new analytical rubric announced in the case now issue).

Lorance v. Commandant, Case No. 19-cv-3232-JWL (D. Kan) (Stay pending resolution of *Santucci*).

Camacho v. Commandant, Case No. 5:20-HC-2189-M (E.D.N.C.) (Stay pending resolution of *Santucci*).

Gibbs v. Commandant, 20-3041-JWL (D. Kan.) (Stay pending resolution of *Santucci*).

Norris v. Commandant, Case No. 20-cv-03066 (D. Kan.) (Stay pending resolution of *Santucci*).

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JURISDICTION

The United States Court of Appeals for the Tenth Circuit issued its decision on April 25, 2023. *Santucci v. Commandant*, 66 F.4th 844 (10th Cir. 2023). This Court possesses jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Art. I
U.S. Const. Art. III
U.S. Const. Amend. V
U.S. Const. Amend. VI

STATUTORY PROVISIONS INVOLVED

10 U.S.C. §§ 866, 867, 907, 920, 925, 928, 934
28 U.S.C. 2241
28 U.S.C. 2243

SUMMARY OF THE ARGUMENTS

I. This Court's plurality decision in *Burns v. Wilson*, 346 U.S. 137 (1953), which accords deference to punitive adjudications in the military justice system and its Article I tribunals during habeas proceedings remains viable to justify continued deference involving crimes connected to military service. The founding American military penal codes, The Articles of War and The Articles for the Government of the Navy, contained uniquely military offenses deserving of Article III deference. When Article III courts began

reviewing Article I courts-martial upon collateral habeas review, deference to the military's particularized needs for good order and discipline to fight wars and protect citizens was legally and logically sound. Today, Article I tribunals prosecute numbers of crimes, as Justice Kagan wrote, "unconnected to military service."

Accordingly, the justification for Article III deference to the constitutional determinations of a non-judicial branch of government is non-existent where the offense is beyond the insular military offenses that warranted deference. While clarifying and reaffirming 70 years of caselaw since *Burns*, the lower court did not evaluate whether during collateral habeas challenges of the constitutional decisions of an Article I military tribunal for crimes, like here, that are unconnected to military service, remain deserving of deference given the absence of the historical justification to defer in the first place. For crimes unconnected to the military, deference is no longer applicable and merits-based Article III review of Article I constitutional determinations is proper.

II. The Tenth Circuit Court of Appeals, in its opinion below, recited faithfully the *Burns* terminology that the Article I military tribunals have provided "full," "fair," and "adequate" consideration of the constitutional issues that have been raised. These terms cannot be used as a talisman to ward away the work that needs to be done to ensure constitutional protections are adhered to. Rather, this case should be used as the benchmark establishing that military servicemembers are entitled to the same protections

as their civilian colleagues when accused of non-military-related offenses. Congress so indicated when it passed 28 U.S.C. §§ 2241 and 2243, (Article III habeas for servicemembers and Article III courts can dispose of military habeas cases as "law and justice" require). This Court in 1953 expanded Article III habeas review in *Burns*. The decision below runs contrary to statute and impermissibly circumscribes *Burns*'s reach.

STATEMENT OF THE CASE

I. Proceedings at Court-Martial

On February 19, 2014, and March 19 – 21, 2014, an Article I military tribunal consisting of a jury sitting as a general court-martial 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, 125, 128 and 134, UCMJ, 10 U.S.C. §§ 920, 925, 928, 934 (2012).

Consistent with his plea, the general court-martial 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.*

Also consistent with his plea, the jury found Santucci not guilty of one specification of sexually assaulting JM, in violation of Article 120, UCMJ, 10 U.S.C. § 920.

The jury sentenced Santucci to a dishonorable discharge, confinement for twenty years, and forfeiture of all pay and allowances. The convening authority approved the adjudged sentence.

II. Proceedings Before the United States Army Court of Criminal Appeals

On September 30, 2016, pursuant to its Article 66, UCMJ, 10 U.S.C. § 866 plenary review authority, the Army Court conditionally set aside one Article 120, UCMJ conviction (sexual assault) as an unreasonable multiplication of charges, affirmed the remaining findings, and affirmed the sentence, refusing to award any sentence credit based on having dismissed a serious sexual assault conviction. *United States v. Santucci*, Army Number 20140216. Appendix C.

III. Proceedings before the United States Court of Appeals for the Armed Forces

The CAAF granted review pursuant to 10 U.S.C. § 867 but affirmed the findings and sentence on February 15, 2018. Appendices E & F.

IV. Proceedings before the United States Supreme Court

This Court denied certiorari on June 25, 2018.

V. Collateral Proceedings in the United States District Court for the District of Kansas

Seeking collateral review, Santucci filed a Petition for a Writ of Habeas Corpus in the District of Kansas on June 28, 2019. Without hearing, the District Judge dismissed Santucci's Section 2241 Petition without merits review holding that the Article I military tribunals fully and fairly considered Santucci's constitutional claims pursuant to *Burns*. Appendix D.

VI. Proceedings before the United States Court of Appeals for the Tenth Circuit

Santucci appealed to the Tenth Circuit, which in a published decision on April 25, 2013, affirmed the district court's having dismissed Santucci's Section 2241 habeas petition holding that Article I military tribunals "fully" and "fairly" considered Santucci's claims upon direct Article I appeal pursuant to *Burns* as informed by reaffirmance of *Dodson v. Zalez's* four-factor test to aide courts to determine if merits review is appropriate, *infra*. Appendix A.

ARGUMENTS

I. The Tenth Circuit's Complete Reliance on Deference to Military Tribunals Based on the Particularized Needs of the American Military Society is Misplaced and Error.

Article III refusal to supervise the constitutional determinations of Article I military tribunals, where the issues involve crimes unconnected with military service, and thereby warrant no judicial deference, results in unchecked misapplications of the Constitution not contemplated when Congress

enacted Sections 2241 and 2243 or when this Court expanded Article III habeas review in *Burns* in 1953. The underlying premise supporting Article III deference to the constitutional determinations of Article I military tribunals is no longer valid in the context of those crimes the military prosecutes that are unconnected to military service.

Judicial deference to constitutional determinations by other branches of the government implicates separation of powers, checks and balances, and judicial review. This Court cannot be contented that military officers rotating assignments in largely non-judicial careers are the final arbiters of the Constitution's meaning and effect, especially relating to servicemembers who swore to protect and defend the very document under which they, like Santucci, seek protection from government overreach into individual liberties.[1]

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[1] In a typical 20-year active-duty career as a US Army Judge Advocate (legal officer), one may expect assignments encompassing many areas of the law to fulfill the mandate to develop "generalists" as opposed to "specialists." These diverse areas of the law, varying from one to three years in assignment duration, include legal assistance (client services for estate plans, probate, creditor, domestic relations), administrative law (corporate counsel), tax assistance, claims processing (damage to household goods during moves or international claims for damage to host-nation property), professional responsibility, government ethics, contracts and fiscal law, international and operations law, (Law of Armed Conflict, Rules of Engagement, Use of Force), trial counsel (prosecutor), defense counsel, then advancement to direct management of personnel, before service as a judge.

The opinion below can fairly be seen as endorsing continued misapplications of the Constitution, leading to unconstitutional convictions and confinement for America's servicemembers for crimes unrelated to the military, on the misplaced premise that the military is a particularized society insulated from general civil society due to the requirement for good order, discipline, and obedience to orders in a hierarchal chain-of-command. Indeed, deference remains apposite for purely military crimes.

But nowhere in the Court of Appeals decision below did Chief Judge Holmes, writing for a three-judge panel, elucidate, while examining 70 years of Supreme Court and Tenth Circuit caselaw since *Burns*, just why continued deference to constitutional determinations involving non-military-specific offenses remains appropriate in today's modern military justice system.

Today, a consequence unintended when the Uniform Code of Military Justice ("UCMJ") was codified in 1951 is the vast plethora of serious, non-military-related offenses which are adjudicated reaching far beyond the stated objective of maintaining discipline - this in light of the constitutional system of separation of powers, checks and balances, and Article III judicial review of judicial decisions of constitutional import made, in this instance, by Article I military tribunals. Presently, an entire body of Article I jurisprudence exists that comprises crimes unconnected to the military – like the charges in Santucci's prosecution and direct review. The analysis employed by the Article III courts affords

respect to the military tribunals but ignores completely that that deference rests upon the notion that the UCMJ's primary purpose was and is to punish military offenses to maintain discipline and obedience – *i.e.*, a sentry who fell asleep on watch, or a junior Marine who disobeyed an order to attack an enemy position, or an Airmen who disrespected a senior non-commissioned officer. These entirely military offenses remain deserving of Article III deference, as the historical rationalization rightly endures to military crimes.

But, since *Burns* published in 1953, the scope of Article I military tribunal law has expanded beyond swift, in a tent, put together five jury members taken from the "line" to try, before a non-attorney "legal officer" a servicemember to punish him and deter other servicemembers, to crimes with no military connection at all. At least since the United States entered Afghanistan in 2001 and Iraq in 2003, (colloquially referred to as "the endless wars"), courts-martial are rarely conducted overseas in theater. The accused is flown back to the United States, his "return to the line" not expected, nor is swift justice to send a deterrent message to others observed. Counsel engage in lengthy discovery, motions practice, sanity boards, expert witness reports, in state-of-the-art modern courtrooms equipped with modern technology and comely professional appointing. An accused often waits more than one year before trial. And the prosecutions are not grounded in maintaining good order, discipline, and/or obedience, rather, civil offenses unrelated to the unique tenants that

historically defined the unique military society deserving of judicial deference.

Herein lies a break from the rationale supporting deference and limited Article III review of Article I constitutional determinations affecting substantial rights of American servicemembers.

Justice Kagan observed the incongruence between purely military offenses warranting judicial regard, and present-day military justice prosecutions when, in 2018, she wrote that "[t]oday, trial-level courts-martial hear cases involving a wide range of offenses, including crimes unconnected with military service . . ." *Ortiz v. United States*, 138 S. Ct. 2165, 2170 (2018).

These words describe the evolution of the cases adjudicated within the military justice system. And just as so there has been an evolution in the cases being prosecuted via the military justice system, so to must there be an evolution in the review of those decisions that are not military-specific.

The Tenth Circuit's caselaw, the "North Star" of Section 2241 military habeas jurisprudence, originates with *Burns* and is built upon the rationales in *Burns*. (". . . it is that *Burns* framework that is the ultimate touchstone of a federal habeas court's analysis.") *Santucci*, 66 F.4th at 871.

The case at issue here involves crimes unconnected to military service. If not taken up by this Court, the reasoning employed below stands to be the law of the land -- a decision based upon a misplaced assumption

that created an invisible membrane through which one can see substantial constitutional errors involving (a) dilution of the standard of proof from beyond a reasonable doubt to preponderance of the evidence; (b) instructing the jury to apply a preponderance of the evidence standard *and* a beyond a reasonable doubt standard; (c) to consider by preponderant evidence whether an accused is guilty by comparing conduct of which the accused is presumed innocent with other conduct of which the accused is presumed innocent; (d) the prosecutor urging the jury to "convict by a preponderance of the evidence;" and (e) the abdication of Due Process for failing to issue exonerating jury instructions concerning mistake of fact.

The common law barrier to reaching the merits of constitutional claims unrelated to purely military offenses must be penetrated so professional jurists can supervise Article I military tribunals and ensure determinations comply with the Constitution for those offenses outside the specialized needs of the military.

So doing is consistent with ongoing trends to modernize the military justice system (*i.e.*, military commanders stripped of command over prosecuting sexual assaults and related crimes, as well as domestic violence offences, child abuse and retaliation; movement to require unanimous jury verdict; movement to require 12 jurors).

II. Military Disciplinary History Informs That Article III Deference for Purely Military Offenses is Constitutionally Sound, But Not When Applied to Crimes Unconnected to Military Service.

Our history reveals the impetus for initial judicial deference to military tribunals: swift and speedy adjudications, often in a deployed, encampment, or field environment, where discipline and deterrence served order, obedience, and war fighting requirements.

The June 1775 Articles of War focused only on military offenses, as did The Articles for the Government of the Navy. THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., THE BACKGROUND OF THE UNIFORM CODE OF MILITARY JUSTICE 10 (20 May 1970).

These initial American military penal codes can be seen as the original basis for judicial deference to prosecutions in the military for violations of the Articles of War. *Journals of the Continental Congress 1774-1779* Vol. II Pages 111-123 (edited from the original records in the Library of Congress by Worthington Chauncey Ford; Chief, Division of Manuscripts. Washington, DC: Government Printing Office, 1905).

Proceeding largely undisturbed to 1912, and through the War of 1812, the Mexican-American War, the Civil War, campaigns in the American West involving Native Americans, the Spanish American War, the Boxer Rebellion,

counterinsurgency operations in the Philippines as well as Central and South America and the Caribbean, to the First World War, the Articles of War were insular and the Courts deferred to the needs underpinning that specialized and respected insularity, for good reason, the nation's independence, survival, liberty, and growth depending upon it.

When American military (Article I) and legal authorities (Article III) first met in our constitutional framework in the context of judicial review, the Court initially determined deference appropriate to honor the need for discipline and good military order in the particularized society of the military. *See generally Richard D. Rosen, Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial,* 108 Mil. L. Rev. 5, 20-30 (1985) (discussing the history of collateral challenges in the federal judiciary to military tribunal proceedings).

There were seven versions of the Articles of War from 1775 to 1948. Amendments include but are not limited to changes in types of punishment, maximum sentences, statutes of limitation, jurisdiction, and appointment of counsel. *See* Major Elizabeth Murphy, *The Military Justice Divide: Why Only Crimes and Lawyers Belong in the Court-Martial Process*, 220 Mil. L. Rev. 129, 136 (2004).

After the Second World War, public expressions of dissatisfaction about unconstitutional deprivations of

liberty forced upon American military personnel led to reform.

On March 25, 1946, seven months after the Japanese surrender ending WWII, then Five-Star General or "General of the Army," in his capacity as Chief-of-Staff of the U.S. Army, Dwight D. Eisenhower, followed the Secretary of War's order to establish an Advisory Committee on Military Justice (Advisory Committee) *War Department Memorandum No. 25-46*. Appendix G.

The Advisory Committee was "provoked by public criticism of the Army system of military justice" to "suggest changes in the existing laws, regulations, and practices for the improvement of the administration of military justice in the Army" given lessons observed during Article I military tribunals during the Second World War.

The Advisory Committee noted that the civilian must realize that in entering the Army he becomes a member of a closely knit community whose safety and effectiveness are dependent upon absolute obedience to high command; and that for his own protection, as well as for the safety of his country, Army justice must be swift and sure and stern."

Citing Lord Birkenhead in commenting on the British system of military justice, the Advisory Committee wrote that "where the risks of doing one's duty [are] so great, it is inevitable that *discipline* should seek to attach equal risks to the failure to do it." (emphasis added).

The Committee found that "the general attitude is expressed by the maxim that *discipline* is a function of command." And the Committee "stressed the fact that courts-martial perform an absolutely necessary *disciplinary* function . . ."

The Committee's concern that discipline is the bedrock of the Article I military tribunal system speaks to the innate characteristics required of the nation's Armed Forces apart from the qualities of civilian life.

Five years after the 1946 Advisory Committee's report to the War Department, Congress enacted the UCMJ and the purpose of the military law remains the same today: "[t]he purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and, thereby, strengthen the national security of the United States." Part I-1, Manual for Courts-Martial, United States (2016 Ed.); *see also Burns*, 346 U.S. at 141 (noting that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty.").

Shortly after codification of the UCMJ in 1951, this Court, "chartered a new course" interpreting Section 2241 more expansively to authorize Article III review of Article I habeas petitions, and thereby eroded the amount of judicial deference previously applied to the

constitutional determinations made by Article I legal officers. *Santucci*, 66 F.4th at 854.

As this Court noted in *Parker v. Levy*, 417 U.S. 733 (1974), the "differences between the military and civilian communities result from the fact that 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.'" *Id.* at 743 citing *United States ex rel. Toth v. Quarles,* 350 U.S. 11, 17 (1955). The military is a "separate society" warranting a military justice system. *See* Francis A Gilligan & Fredric I. Lederer, *Court-Martial Procedure*, Fourth Edition, 1-4 (2015) (foreword by former Chief Judge James E. Baker).

The reasons often provided for a separate military justice system include: (1) the worldwide deployment of military personnel; (2) the need for instant mobility of personnel; (3) the need for speedy trial to avoid loss of witnesses due to combat effects and needs; (4) the peculiar nature of military life, with attendant stress of combat; and (5) the need for disciplined personnel. *Id.*

Of all the rationales for a separate system, perhaps the most persuasive is the need for disciplined personnel. Members of the Armed Forces are subject to rules, orders, proceedings, and consequences different from the rights and obligations of their civilian counterparts. *United States v. Watson,* 69 M.J. 415 (2011). Accordingly, the Congress, the President, and the Courts are legion for the existence of a separate system of

military justice based upon the overriding requirement for disciplined warriors.

Case-in-point: the legality of an officer ordering a soldier to attack an enemy machine gun position is an overriding demand of discipline and duty compelling civilian court deference to military decisions. However, that type of "separate sovereign" distinction based on the uniqueness of the military and its needs to accomplish the mission is not the situation presented in which constitutional rights in a federal criminal trial are at issue for crimes unconnected to the military's particularized need for discipline and obedience. No military mission or national security decision is compromised in this setting by probing whether or not a military prisoner was afforded constitutional protections, where the crimes at issue are unconnected to the particularized military requirements for discipline and obedience.

The challenge arises, however, in the manner in which Article III courts, in our system of separation of powers, checks, and balances, safeguard the constitutional liberties of our warriors when they are disciplined, convicted, confined, or sentenced to death by Article I military tribunals.

III. *Burns* Should Be Revisited and Clarified.

Burns provides guidance. Also a Section 2241 military habeas case, this Court noted that "when a military decision has dealt fully and fairly with an allegation raised in that application, it is not open to a federal civil court to grant the writ simply to reevaluate the

evidence," *id.* at 142, and "it is not the duty of the civil courts simply to repeat that process - to reexamine and reweigh each item of evidence of the occurrence of events which tend to prove or disprove one of the allegations in the applications for habeas corpus." *Id.* at 143.

From this language, the "full and fair" test has unfolded. In the same decision, however, this Court also made clear that *de novo* civilian habeas review of military decisions is altogether proper when constitutional deprivations resulted in unfair proceedings or unreliable results. *Id.* at 141 ("[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"); *Schlesinger v. Councilman*, 420 U.S. 738, 745 (1975) (recognizing the civil courts' jurisdiction to review habeas petitions stemming from court-martial convictions); *Gusik v. Schilder*, 340 U.S. 128, 132 (1950) (describing the "terminal point" of court-martial proceedings where civil habeas corpus review may begin*); see also Hennis v. Hemlick*, 666 F.3d 270, 278 (4th Cir. 2012) (where military petitioner exhausts direct appeals and claim involves a substantial constitutional question, Article III adjudication of constitutional claim appropriate).

In upholding the trial and appellate tribunals' denials of Article III review to the airmen in *Burns* who were sentenced to death, this 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 (emphasis added). This language is the origin of the inquiry of whether Article I military tribunals were "inadequate" to competently determine constitutional claims during direct Article I review.

Following the rationale in *Burns*, Santucci does not seek to relitigate, or litigate *de novo* in the district court, or to make a new record on claims already thoroughly scrutinized by Article I military tribunals. Rather, Santucci demonstrated that Article I tribunals were legally inadequate to resolve his constitutional claims and he seeks the justice this Article III court can provide to ensure that his constitutional guarantees were properly observed. In this regard, this Court in *Burns*, explicated:

> 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.

Since 1953, the Tenth Circuit has become the Polaris for courts seeking to interpret *Burns*, mainly because military prisoners seeking collateral review are confined in the District of Kansas, where the United States Disciplinary Barracks ("USDB") is located on Fort Leavenworth, Kansas. Section 2241 cases are filed in the district where the petitioner is confined.

The dissent in *Burns* also informs that this Court's review of Santucci's constitutional claims and granting of relief are altogether appropriate. Justice William O. Douglas, joined by Justice Hugo Black, concluded the Constitution required Article III habeas review of the airmens' 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 the military 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.

None of the legal authorities applicable here requires the federal civilian judiciary to follow an Article I court's constitutional determinations lockstep. To the contrary, *Burns* specifically states that Article III review is appropriate where "military review was legally inadequate to resolve the claims which they have urged upon the civil courts." 346 U.S. at 146. Indeed, it is incumbent upon courts to examine whether the constitutional rulings of a military tribunal conform to prevailing Supreme Court standards. *Kauffman* v. *Sec'y of Air Force*, 415 F.2d 991, 997 (D.C. Cir. 1969).

Since 1953, every Circuit Court of Appeals has cited *Burns*. Review of those decisions reveals hesitation, unsureness, and uncertainty as to the metes and bounds of when a constitutional court can review the merits of Article I constitutional determinations. *See*, *e.g., Ashe* v. *McNamara*, 355 F.2d 277 (1st Cir. 1965); *Crawford* v. *Cushman*, 531 F.2d 1114 (2d Cir. 1976); *Armann* v. *McKean*, 549 F.3d 279 (3d Cir. 2008); *United States* v. *Rendon*, 607 F.3d 982 (4th Cir. 2010); *Calley* v. *Callaway*, 519 F.2d 184 (5th Cir. 1975);

Charles v. *Chandler*, 180 F.3d 753 (6th Cir. 1999); *Hurn* v. *Kallis*, 762 F. App'x 332 (7th Cir. 2019); *Swisher* v. *United States*, 354 F.2d 472 (8th Cir. 1966); *Philips* v. *Perry*, 106 F.3d 358 (9th Cir. 1973); *Santucci* v. *Commandant*, 66 F.4th 844 (10th Cir. 2023); *McCarthan* v. *Dir. of Goodwill Indus.-Suncoast*, 851 F.3d 1076 (11th Cir. 2017); *Kauffman*, 415 F.2d at 991; *Matias* v. *United States*, 923 F.2d 821 (Fed. Cir. 1990).

Common among all Circuit Courts of Appeal is citation to "full" and "fair" and "adequate," with scant and often no reasoning whatsoever. Also common to all Circuit Courts of Appeal, is deference to, at times, abundantly obvious unconstitutional determinations on the grounds that full merits review is beyond the reach of the Article III judiciary. The historical rationales in the caselaw underpinning deference to the military cannot justify deference where honoring good order and discipline does not apply to crimes unconnected to military service.

The Congress enacted 28 U.S.C. §§ 2241 and 2243 as the statutory means by which Article I petitioners may seek Article III review in the federal civil courts. *Burns* recognized this jurisdictional grant to the courts but left "full," "fair," "adequate," and "manifestly refuse" to the subsequent case law for granularity and what the law means. Each of the Circuit Courts of Appeal has entertained Article I military tribunal habeas challenges, and a fair reading of each decision reveals uncertainty and even speculation in a majority of them.

IV. Before *Santucci*, the Tenth Circuit Caselaw Was "Not Entirely Pellucid;" After *Santucci*, the Tenth Circuit Caselaw is Premised on a Misplaced Deferential Rationale, with Sister-Circuits and District Courts Prepared to Follow the Errant *Stare Decisis* from the Foremost Circuit in Adjudicating Article I Military Habeas Cases.

Although Santucci cited numerous Tenth Circuit decisions wherein the Court of Appeals reached the merits of Article I constitutional claims, and granted the "great Writ of liberty" in various instances, the Court below merely echoed the test interpreting *Burns* without clarifying what the terms mean in a legal sense, thereby leaving the state of the law vague, unpredictable, and difficult to prepare for and anticipate results – abandoning those military personnel convicted and confined in contravention of the Constitution with no recourse, which stands against 28 U.S.C. §§ 2241 and *Burns*, both of which "open-the-door" for collateral review.

The Court of Appeals below, although stating it was clarifying admittedly unclear standards to determine when the merits of military habeas petitioner's constitutional challenges can be reviewed, did not define just what "fully," "fairly," "adequately," or "manifestly refuse" mean when evaluating the judge-made pre-conditions to be satisfied to open constitutional claims to merits review.

For example, "[i]n *Dodson v. Zelez*, 917 F.2d 1250, 1252 (10th Cir. 1990), we acknowledged that our interpretation of the language in our post-*Burns*

decisions ha[d] been anything but clear." (Internal quotation marks omitted).

"Yet while *Dodson* resolved some confusion in our caselaw . . . it offered little explicit guidance . . ." *Santucci*, 644. F.4th at 856.

And "[a]dmittedly, the import of our pre-*Dodson* cases is not entirely pellucid because, as we noted in *Dodson*, when electing to conduct a full merits review of constitutional issues in the military habeas context, these cases sometimes to not 'really say [] . . . why." 644 F.4th at 864 (internal citation omitted).

To date, the legal definition of just what "fully," "fairly," "adequately," or "manifestly refuse" mean in the context of a Soldier, Sailor, Airman, Marine, or Coast Guardsmen convicted by an Article I military tribunal seeking the judicial expertise of Article III jurists vested with the obligation dating as far back as *Marbury v. Madison*, 5 U.S. 137 (1803), to be the final arbiter of what the law is, remains unclear. The Court of Appeals below neglected to answer these questions of constitutional magnitude which stand to affect cases in all Courts of Appeal and District Courts across the nation.

Instead, the lower court re-affirmed the four-part *Dodson* test that uses these ill-defined words but does not explain the operative effect of these words. Accordingly, the methodology set forth in the decision below remains unclear and undefined, negatively affecting not only the clarity of the law, but also the

servicemembers' and their families' lives damagingly affected by vagary, instability, and unpredictability.

Another example of the unsettled caselaw in the Tenth Circuit that affected the lower court's rationales and decisions: faulting Santucci for arguing, aside from the *Dodson* factors, another avenue to Article III merits review which was previously held proper. *Santucci*, 44 F.4th at 860. Santucci relied squarely for this line of argument on three Tenth Circuit cases which were "good law:" *Monk v. Zelez*, 901 F.2d 885, 888 (10th Cir. 1990) ("review was proper when the constitutional claim was both substantial and largely free of factual questions."); *Lundy v. Zelez*, 908 F.2d 593, 594-95 (10th Cir. 1990) (same); and *Mendrano v. Smith,* 797 F.2d 1538, 1542 n.6 (10th Cir. 1986) (same).

Notably, *Dodson*, *Monk*, *Lundy* were decided in the Tenth Circuit's 1990 term and had not been reversed or negatively treated at the time Santucci submitted his appeal. Santucci presented argument based on these authorities, which the Court of Appeals below now flatly rejected, after having granted the Writ in *Monk* based on a test involving something different than the test in *Dodson,* issued the same term.

To fault Santucci for presenting argument for merits review on Tenth Circuit holdings, in addition to *Dodson*, accentuates the need for this Court to clarify *Burns* and review the entirety of 70 years' worth of Tenth Circuit caselaw, which, *arguendo*, is based on a premise that is no longer valid when constitutional

habeas challenges derive from crimes unconnected to military service.

For these crimes unconnected to military service, there remains no legitimate reason to refuse merits review of the Constitution's application because there are no special, particularized, unique military concerns justifying such deference.

V. The Tenth Circuit's *Santucci-Dodson* Test is Unworkable When Applied to Crimes Unconnected to Military Service.

Seeking to clarify or "iron-out" the caselaw, the Tenth Circuit reasoned,

> [i]n treating *Burns*'s full-and-fair consideration standard as the principal criterion by which we assess military habeas claims, our decision in *Dodson v. Zelez*, 917 F.2d 1250 (10th Cir. 1990) made clear – even though not explicitly so – that *Burns*'s plurality decision governs our review and should be deemed controlling.

Santucci, 66 F.4th at 855 n 11.

The Tenth Circuit then quoted its 1990 four-part "*Dodson*" test as the standard to determine if an Article III court will conduct a merits-based review of an Article I military habeas petitioner's constitutional claims:

> . . . as a necessary condition for full merits review of a given claim, a petitioner must demonstrate that the resolution of each of the *Dodson* factors weighs in the petitioner's favor as to that claim. By doing so, petitioners show that the military tribunals have *not* given full and fair consideration to their claim. Moreover, where petitioners have demonstrated that all four *Dodson* factors weigh in favor as to their asserted claims – thus rendering those claims eligible for full merits review – federal courts in our circuit consistently have proceeded to conduct such a full merits review – effectively viewing such review as both necessary and appropriate.

Id. at 859. (emphasis in original).

The reaffirmed *Santucci-Dodson* factors are:

> (1) The asserted error must be of substantial constitutional dimension . . . . (2) The issue must be one of law rather than of disputed fact already determined by the military tribunals . . . . (3) Military considerations may warrant different treatment of constitutional claims . . . . (4) The military courts must give adequate consideration to the issues involved and apply proper legal standards.

Id. at 856.

If this Court were to countenance the analysis adopted by the Court of Appeals below, the result would be willful ignorance of potentially unconstitutional convictions, confinement, and dishonor for those who have already sacrificed to serve their country. This cannot stand.

Justice Ginsburg's guidance, as exemplified in her concurrence in *Weiss v. United States*, 510 U.S. 163, 195 (1994), is particularly appropriate here: "The care the Court has taken to analyze petitioners' claims demonstrates once again that men and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service."

If this Court were to reject Santucci's Petition, it will be abandoning its obligation to secure the safeguards Justice Ginsberg has described. Indeed, the Tenth has already cited *Santucci* in refusing to reach the constitutional merits of an Article I habeas appeal, *Bales v. Commandant*, No. 20-3167 (10th Cir. May 11, 2023), and, four other district court military habeas actions are stayed pending resolution of the instant case: (1) *Lorance v. Commandant*, Case No. 19-cv-3232-JWL (D. Kan); (2) *Camacho v. Commandant*, Case No. 5:20-HC-2189-M (E.D.N.C.); (3) *Gibbs v. Commandant*, 20-3041-JWL (D. Kan.); and (4) *Norris v. Commandant*, Case No. 20-cv-03066 (D. Kan.).

The standard should be clear: if a servicemember is convicted of a crime that is wholly unrelated to his or her military service, the federal district courts can and should review those convictions upon habeas review for constitutional violations to ensure our country's servicemembers received the same due process that those not in uniform are entitled to receive.

For over two centuries, parents have been proud to see their sons and daughters serve in the Armed Forces of the United States. For example, in the evening hours of June 6, 1944, after the United States and her allies liberated Rome from Nazi occupation the same day, President Franklin D. Roosevelt addressed the nation and the world by radio. The President spoke of America's sons and daughters in arms. In describing the American and allied pre-dawn parachute jump into, and sea-borne landing on the beaches of Normandy, France ("D-Day") to free oppressed peoples from Nazi terror, FDR invoked the Almighty and referred to our warriors as the "pride of our nation." The parents of today's "pride of our nation" have encouraged their sons and daughters to serve. These parents endorse military service knowing full well that a stint or a career in the military is accompanied by risks – including extended deployments, injury, and even death and dismemberment.

But these risks should not include the sacrifice of fundamental due process rights should the son or daughter be accused of a crime unconnected to military service. That is not a sacrifice that is written

into any enlistment contract or officer commissioning document. The decisions of the lower Article III courts have created such a provision by virtue of their refusal to apply judicial scrutiny to the non-service-related convictions. It is up to this Court to reverse this error and determine what *Burns* says in a practical and workable way serving *stare decisis*, predictability, the rule of law, the Constitution, and the American warrior.

CONCLUSION

For these reasons, the Court should grant Santucci's Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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