APPENDIX TABLE OF CONTENTS

APPENDIX A

United States Court of Appeals
for the Tenth Circuit

April 25, 2023, Filed
No. 20-3149

Anthony V. Santucci,
Petitioner – Appellant,

v.

Commandant, United States Disciplinary Barracks, Fort Leavenworth, Kansas,
Respondent – Appellee.

Counsel: John N. Maher (Kevin J. Mikolashek with him on the opening brief), Maher Legal Services PC, Geneva, Illinois, for Petitioner-Appellant.

Jared S. Maag, Assistant United States Attorney (Kate E. Brubacher, United States Attorney, and James A. Brown, Assistant United States Attorney with him on the brief), Office of the United States Attorney, District of Kansas, Topeka, Kansas, for Respondent-Appellee.

Judges: Before HOLMES, Chief Judge, EBEL, and EID, Circuit Judges.

Opinion by: HOLMES

Opinion

[*846] **HOLMES**, Chief Judge.

Petitioner-Appellant Anthony Santucci appeals from the denial of his *28 U.S.C. §§ 2241* and *2243* petition for a writ of habeas corpus. In 2014, a military jury convicted Mr. Santucci of rape, forcible sodomy, battery, and adultery. He asserts that a court-martial trial judge deprived him of his *Fifth Amendment* right to due process by failing to instruct the jury on an affirmative defense and issuing unconstitutional propensity instructions at his trial. The U.S. Army Court of Criminal Appeals (the "ACCA") agreed with Mr. Santucci that the court-martial tribunal erred on both issues; nevertheless, it affirmed Mr. Santucci's convictions on the [**2] basis that these errors were harmless.

In his habeas petition, Mr. Santucci argued, in relevant part, that the ACCA misapplied the harmless error standard by failing to review the cumulative impact of the erroneous instructions. Because, in his view, the military tribunals deprived him of his constitutional right to a fair trial, Mr. Santucci contended that the district court was authorized to review the merits of his claims. On habeas review, the U.S. District Court for the District of Kansas denied Mr. Santucci's petition, finding that the ACCA had fully and fairly considered his claims. Mr. Santucci appeals, arguing that the federal district court should have adjudicated his constitutional claims on the merits. Had the court done so, says Mr. Santucci,

habeas corpus relief would have been appropriate because the erroneous instructions, viewed cumulatively, prejudiced him beyond a reasonable doubt.

Exercising jurisdiction under *28 U.S.C. § 1291*, we **affirm** the district court's judgment.

I

A

Military officials charged Mr. Santucci, then an Army private stationed in Fort Polk, Louisiana, with violating *Articles 120*, *125*, *128*, and *134 of the Uniform Code of Military Justice ("UCMJ")*, following allegations that he raped a woman, TW, in July of 2013. *See 10 U.S.C. §§ 920*, *925*, *928*, *934*.[1] In 2014, a

---

[1] *HN1*[ ] Military court-martial procedures are governed by the UCMJ, *10 U.S.C. §§ 801-946a*. A general court-martial has jurisdiction to try military personnel for serious offenses, including rape and sexual assault. *See id. §§ 818(c)*, *920*. In noncapital cases, a general court-martial is tried before a military judge and eight panel members. *See id. § 816(b)(1)*. As a unit, the members operate in a manner roughly similar to a jury in a civilian proceeding. *See Mendrano v. Smith, 797 F.2d 1538, 1540-41 (10th Cir. 1986)* (describing differences between trial before "panel members" and a civilian jury but noting that "the modern military court-martial proceeding bears a considerable resemblance to a civilian jury trial"); *cf.* 6 WEST'S FEDERAL ADMINISTRATIVE PRACTICE § 6474, Westlaw (database updated July 2022) ("The accused has the option of requesting trial . . . with 'members' (*the equivalent of a jury trial*)." (emphasis added)). Accordingly, for convenience, we frequently use the term

jury [**3] sitting as a general court-martial convicted Mr. Santucci on one count each of rape, sexual assault, forcible sodomy, and battery, as well as two counts of adultery.[2] Relevant to [*847] this appeal, the charges against Mr. Santucci regarding TW were tried together with other charges for sexual assault and adultery involving a second alleged victim, JM.

At trial, the evidence indicated that Mr. Santucci met TW— who was married—at a bar, where the two had drinks and danced together. The government and Mr. Santucci introduced competing narratives of what happened next. Mr. Santucci testified that he went home with TW and engaged in what he believed to be consensual sexual activity, including "rough" anal and vaginal sex. Aplt.'s Opening Br. at 7. In his closing statement, Mr. Santucci's defense counsel argued that TW's statements to Mr. Santucci, along with her actions following their encounter, indicated that she had consented to the sexual activity—even though she had later regretted that decision.

In contrast, the prosecution urged that TW had been too intoxicated to consent, and that Mr. Santucci raped

---

"jury" in this opinion to refer to the panel members who heard the evidence and received the instructions in Mr. Santucci's trial, while remaining cognizant that military panels are not precise equivalents of civilian juries.

[2] Mr. Santucci also pleaded guilty to making a false statement to investigators. *See* Aplt.'s App. at 55 n.1 (Army Ct. of Crim. Appeals Decision, dated Sept. 30, 2016). That conviction is not at issue in this appeal.

her. The prosecution elicited testimony [**4] from TW that "she remembered little" after coming home from the bar with Mr. Santucci. Aplt.'s App. at 56 (Army Ct. of Crim. Appeals Decision, dated Sept. 30, 2016). Nevertheless, she testified that Mr. Santucci took her to his barracks and raped her while choking and slapping her. Recalling the rape, TW testified that Mr. Santucci penetrated her vaginally with his penis before penetrating her anus, the latter of which caused her to bleed. More generally, TW testified that Mr. Santucci's assault left her with bruises on her arms and legs, a swollen face, a sore head, and scratches on her back. To corroborate TW's testimony, the prosecution introduced medical evidence of physical injuries, including evidence of bruises and scratches on her arms, neck, and legs, as well as teeth marks on her face and redness on her rectum. Additionally, the prosecution played the jury a recording of a 9-1-1 call that TW made, and elicited testimony from medical staff who treated TW for her injuries the day after the incident.

At the close of trial, the military judge made two decisions regarding the jury instructions related to this appeal. First, Mr. Santucci's counsel requested that the military judge [**5] provide an instruction to the jury that Mr. Santucci's mistake of fact would be a defense to his actions towards TW and JM. The Military Judges' Benchbook summarizes the mistake of fact instruction as follows:

> 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 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 [**6] accused and (state the name of the alleged victim)) along with [*848] 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)).

Id. at 61-62 (Kan. Dist. Ct. Decision, dated May 26, 2020) (quoting Dep't of Army, Pam. 27-9, MILITARY JUDGES' BENCHBOOK, para. 3-45-13 (2012)).

The military judge did not specifically rule on defense counsel's request. When delivering the instructions—implicating the offenses involving TW—the judge gave mistake-of-fact instructions for the charges of sexual assault and forcible sodomy; however, the judge did *not* do so for the charge of rape.

The second decision involved instructions related to Mr. Santucci's charge of sexually assaulting JM. Without objection from either party, the military judge provided a propensity instruction in accordance with Military Rule of Evidence ("MRE") 413. This instruction advised members of the jury that they could use "the allegations involving TW as propensity evidence in relation to the sexual assault allegation involving JM." Aplt.'s App. at 56 (citing Dep't of Army, Pam. 27-9, MILITARY JUDGES' BENCHBOOK, para. 7-13-1 n.4 (2010)). Specifically, the instruction provided:

> Evidence that the accused committed the sexual [**7] 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.

Id. at 13-14 (Mr. Santucci's Pet. for a Writ of Habeas Corpus, filed June 28, 2019) (alterations and omissions in original) (emphases omitted).

Following deliberations, the jury convicted Mr. Santucci of rape, sexual assault, forcible sodomy, battery, and adultery with respect to TW. The jury also convicted Mr. Santucci of adultery for his conduct with JM but, notably, acquitted him of sexually assaulting her. The jury sentenced Mr. Santucci to twenty years' confinement, [**8] a dishonorable discharge, and forfeiture of all pay and allowances.

B

1

Mr. Santucci appealed from his conviction to the ACCA.[3] Relying on a then-recent decision issued by the Court of [*849] Appeals for the Armed Forces ("CAAF") in *United States v. Hills, 75 M.J. 350 (C.A.A.F. 2016)*, he challenged the propensity instruction provided in his case. In *Hills*, the CAAF reversed a defendant's rape conviction after a military court-martial judge relied on MRE 413 to instruct the jury that "evidence that the accused committed a sexual assault offense . . . may have a bearing on your deliberations in relation to the other charged sexual assault offenses." *Id. at 353* (omission in original) (emphasis omitted). The CAAF held that the propensity instruction violated due process because it "suggest[ed] that [the] conduct of which an accused is presumed innocent may be used to show a propensity to have committed other conduct

---

[3] As Mr. Santucci explains, "[t]he 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." Aplt.'s Opening Br. at 5 n.2 (citing ***10 U.S.C. § 866***). This court consists of "uniformed Judge Advocates" and review is mandatory for sentences involving "confinement in excess of one year, dismissal of an officer, or a punitive discharge." *Id.* "The second level of appeal involves the Court of Appeals for the Armed Forces (CAAF), consisting of five civilian judges," and "[r]eview at the second level is largely discretionary." *Id.* (citing *10 U.S.C. § 867*). The petitioner may seek review in the U.S. Supreme Court *only* on those issues that the CAAF reviews. *See id.* (citing *28 U.S.C. § 1259*).

of which he is presumed innocent." *Id. at 356*. Mr. Santucci argued that the ACCA should reverse in light of *Hills*, because "the prosecution took full advantage of . . . M.R.E. 413" to bolster its case. Aplee.'s Suppl. App. at 53 (Mr. Santucci's *Grostefon* Br., filed Apr. 28, 2016). In a *Grostefon* brief,[4] Mr. Santucci also challenged the military judge's failure to give the mistake-of-fact [**9] instruction for his rape charge.[5]

The ACCA considered both the propensity and mistake-of-fact instructions in its opinion, finding that they merited discussion, but no relief.[6] Reviewing the MRE 413 (i.e., propensity) instruction, the court held that *Hills* rendered the instruction improper. Nevertheless, it affirmed Mr. Santucci's conviction on the ground that the trial court's decision to give the propensity instruction was harmless beyond a reasonable doubt and did not contribute to either Mr. Santucci's conviction or sentence. *See* Aplt.'s App. at 57.

---

[4] A *Grostefon* brief "permits a service member to raise legal claims in the military courts that his appellate counsel declined to present." *Brimeyer v. Nelson, 712 F. App'x 732, 736 (10th Cir. 2017)* (unpublished) (citing *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*).

[5] Mr. Santucci raised several other arguments concerning ineffective assistance of counsel, prejudicial statements by the prosecution, and the sufficiency of the evidence; these matters are not at issue in this appeal.

[6] The court rejected Mr. Santucci's ineffective-assistance arguments without discussion. *See* Aplt.'s App. at 55.

In assessing harmlessness, the court observed that the "injuries suffered by TW, as corroborated by the testimony of a medical provider and other witnesses, leave no doubt that TW was not a willing participant. Her testimony credibly established, as well, that she was incapable of consenting to this conduct due to her extreme state of intoxication." *Id.* It also found that "the propensity instruction was unidirectional" because it "only allowed the panel to consider appellant's rape of TW as evidence appellant had a propensity to sexually assault JM." *Id.* Consequently, Mr. Santucci's "acquittal of sexually assaulting JM removed [**10] any risk of harm caused by the instruction," and showed that the instruction had not confused the panel. *Id.* Relatedly, the ACCA determined that the jury's decision to acquit Mr. Santucci on the assault charges related to JM showed that it was "not confused in applying the appropriate burden of proof-beyond a reasonable doubt [standard] as to each charged offense." *Id.*

The ACCA nevertheless also held that the military judge should have instructed the jury on the mistake-of-fact defense. *See id.* at 58 ("'Providing the panel with an incorrect instruction as to an affirmative defense is an error of constitutional magnitude' which we examine to determine if it is harmless beyond a reasonable doubt." (quoting *United States v. Chandler, [*850] 74 M.J. 674, 685 (C.A.A.F. 2015)*)). But again, the court reasoned that "[w]hile *some* evidence raised the instructional requirement with respect to rape, [it was] confident beyond a reasonable doubt that [the mistake-of-fact instruction's] omission did not

contribute to the verdict," *id.* at 57-58, due to the "strength of TW's testimony, corroborated by medical providers and witnesses, regarding the injuries she sustained as a result of his violence on the night in question," *id.* at 57.

The court consequently held, "[v]iewing [**11] the evidence in its entirety," 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 found its harmlessness conclusion—based on the omission of the mistake-of-fact instruction regarding the rape charge—was bolstered by the fact that Mr. Santucci also was *convicted* of forcible sodomy even though the panel had received the mistake-of-fact instruction for that offense. Moreover, the court emphasized that Mr. Santucci's theory at trial seemed to focus on the argument that TW "actually consented, not that [Mr. Santucci] mistakenly believed she did."[7] *Id.*

Mr. Santucci further appealed to the CAAF, but principally argued that the military judge who presided over his courtmartial was illegitimately appointed under the *Appointments Clause*. In another *Grostefon* supplement, Mr. Santucci also argued that

---

[7] The ACCA dismissed Mr. Santucci's conviction for sexual assault of TW on the grounds that combining the rape and sexual assault specifications constituted an unreasonable multiplication of charges. *See* Aplt.'s App. at 58. This determination is not at issue in this appeal.

the ACCA had incorrectly applied *Hills* to the issue of the improper propensity instructions and challenged the sufficiency of the evidence against him. He did *not*, however, in either brief mention the omitted mistake-of-fact instruction. Nor did Mr. Santucci argue that the ACCA conducted an improper [**12] harmless error analysis because it allegedly failed to review the cumulative impact of the instructions on his trial.

The CAAF granted review on the *Appointments Clause* issue but affirmed without discussion. The Supreme Court then denied Mr. Santucci's petition for certiorari.

2

His direct appeal having proven unsuccessful, Mr. Santucci filed the petition for a writ of habeas corpus at issue here. In relevant part, he argued that the military judge failed to provide the requested mistake-of-fact instruction, erroneously applied the propensity instruction, and that the ACCA compounded these constitutional errors by failing to conduct a proper cumulative-error analysis. Mr. Santucci also claimed that he suffered from ineffective assistance of counsel due to his trial counsel's inadequate preparations.

And, importantly for our purposes, Mr. Santucci contended that the district court could reach the merits of his claims because "constitutional protections were not observed at the trial court level or during direct appeal." *Id.* at 35. Mr. Santucci acknowledged that military courts are better suited than their

civilian counterparts to assess "matters impacting good order and discipline." *Id.* at 39. But unlike [**13] claims involving "the unique nature of the military"—which provide "the basis for civilian judicial deference"—his habeas claims, reasoned Mr. Santucci, challenge whether "constitutional safeguards were observed." *Id.* Because, in his view, "the military's [*851] 'full and fair consideration' [of those claims was] fatally flawed," *id.* at 37, an Article III court's deference to the military tribunal would be critically misplaced, *see id.* at 39.

The district court denied Mr. Santucci's petition. *See Santucci v. Commandant, No. 19-3116-JWL, 2020 U.S. Dist. LEXIS 91249, 2020 WL 2735748, at *4 (D. Kan. May 26, 2020)*. The court noted that its "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." *2020 U.S. Dist. LEXIS 91249, [WL] at *2* (citing *Fricke v. Sec'y of the Navy, 509 F.3d 1287, 1290 (10th Cir. 2007)*). Applying this standard, the court denied Mr. Santucci's request for habeas relief. *See 2020 U.S. Dist. LEXIS 91249, [WL] at *3-4*. Specifically, focusing on the ACCA's analysis of Mr. Santucci's claims as to the mistake-of-fact and propensity instructions, as well as its conclusions of harmlessness, the district court concluded that the military courts "fully and fairly considered" Mr. Santucci's claims. *Id.* In response to Mr. Santucci's argument that the ACCA's "full and fair" consideration [**14] was constitutionally flawed because it did not assess the harmfulness of the

erroneous instructions through a cumulative lens, the court explained as follows:

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 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.

*2020 U.S. Dist. LEXIS 91249, [WL] at *4.*[8]

---

[8] Mr. Santucci also argued that he had been deprived of effective assistance of counsel in violation of his *Sixth Amendment* rights, pointing to "25 unreasonable errors" that his trial counsel allegedly made. Aplt.'s App. at 27; *see also id.* at 29-34 (discussing the alleged errors). Analyzing the ineffective-assistance claim, the district court held that, as in Mr. Santucci's case, "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.'" *Santucci, 2020 U.S. Dist. LEXIS 91249, 2020 WL 2735748, at *4* (quoting *Watson v. McCotter, 782 F.2d 143, 145 (10th Cir. 1986)*).

Mr. Santucci then filed this appeal.

II

Mr. Santucci challenges the district court's denial of habeas relief, arguing that the presence of substantial constitutional questions that are largely free of factual disputes in his habeas petition meant that the district court was dutybound [**15] to adjudicate his constitutional claims on the merits, and he is entitled to habeas relief.[9]

---

[9] In a footnote, Mr. Santucci states that he has not renewed his *Sixth Amendment* claim based on ineffective assistance of counsel due to word limitations, but requests that the court "evaluate his claim as set forth in his original Petition for a Writ of Habeas Corpus which is a part of the Appendix," and states that he "stands ready to brief the issue upon the Court's instruction." Aplt.'s Opening Br. at 52 n.4. This is an insufficient argument to trigger our review. *See, e.g., Bronson v. Swensen, 500 F.3d 1099, 1104 (10th Cir. 2007)* ("[W]e routinely have declined to consider arguments that are not raised, or are inadequately presented, in an appellant's opening brief."). Furthermore, as the government points out, Mr. Santucci "does not seem to take any issue with how the district court resolved his claim that defense counsel was ineffective." Aplee.'s Resp. Br. at 26 n.9. His failure to challenge the district court's reasoning further waives our consideration of this issue. *See Reedy v. Werholtz, 660 F.3d 1270, 1275 (10th Cir. 2011)* (declining to consider an argument that "d[id] not challenge the [district] court's reasoning"); *Nixon v. City & Cnty. of Denver, 784 F.3d 1364, 1366 (10th Cir. 2015)* ("The first task of an appellant is to explain to us why the district court's decision was wrong."). Lastly, "[i]n our adversarial system of adjudication, we follow the principle of party presentation." *United States v. Sineneng-Smith, U.S. , 140 S. Ct. 1575, 1579, 206 L. Ed. 2d 866 (2020).* Mr. Santucci had avenues open to him to either structure

[*852] More specifically, Mr. Santucci contends that the district court erroneously believed that Article III courts are barred from exercising their authority to "adjudicate the merits of constitutional habeas claims" that initially were "presented to Article I tribunals." Aplt.'s Opening Br. at 11. Mr. Santucci urges that—contrary to the district court's alleged account of its authority—the presence of substantial constitutional issues that are largely free of factual disputes in his habeas claims obliged the district court to review his claims containing those issues on the merits. Further, Mr. Santucci contends that, upon reaching the merits, the district court should have concluded that the ACCA erred in its harmless-error analysis by not considering cumulative effects.

We start by summarizing—and clarifying—the proper framework under which we review habeas claims stemming from decisions of military tribunals. We then consider and reject Mr. Santucci's contrary arguments that effectively champion a different analytical framework for considering such claims. Lastly, applying the proper analytical [**16] framework, we conclude that Mr. Santucci has not shown that the military tribunals failed to consider his claims fully and fairly. And, therefore, the district

---

his briefing to include this issue or to file a motion requesting an expansion of the word limits; he did not avail himself of these avenues. Consequently, he is limited to the arguments that he did brief and, under the party-presentation principle, we, not only will not, but "cannot make arguments for him." *United States v. Yelloweagle, 643 F.3d 1275, 1284 (10th Cir. 2011).*

court appropriately denied his claim for habeas relief.

A

1

HN2[ ] The Constitution empowers Congress to "make Rules for the Government and Regulation of the land and naval Forces." *U.S. CONST. art. I, § 8, cl. 14.* Pursuant to that authority, Congress, through the UCMJ, "has long provided for specialized military courts to adjudicate charges against service members." *Ortiz v. United States, U.S. , 138 S. Ct. 2165, 2170, 201 L. Ed. 2d 601 (2018).* With "several tiers of appellate review," today's military justice system "closely resembles civilian structures of justice," including those found in the states. *Id.* Congress's power to vest military courts with the authority to rule on court-martial cases "is given without any connection" to Article III; "indeed, . . . the two powers are entirely independent of each other." *Dynes v. Hoover, 61 U.S. 65, 79, 15 L. Ed. 838 (1857)*; *cf. generally Rhode Island v. Massachusetts, 37 U.S. 657, 674, 9 L. Ed. 1233 (1838)* (acknowledging that states have their own judicial system independent from the judicial power of the United States).

As a result, "like state law," "[m]ilitary law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment." *Burns v. Wilson, 346 U.S. 137, 140, 73 S. Ct. 1045, 97 L. Ed. 1508 (1953)* (plurality [*853] opinion). Unsurprisingly, [**17] certain substantive

differences emerge from this independence. For instance, the Constitution's grand jury indictment requirement does not apply to "cases arising in the land or naval forces." *U.S. CONST., amend. V*. Nor do the *Fifth* and *Sixth Amendments* extend "the right to demand a jury to trials by military commission." *Ex parte Quirin, 317 U.S. 1, 40, 63 S. Ct. 2, 87 L. Ed. 3 (1942)*. And the Constitution "does not provide life tenure for those performing judicial functions in military trials." *United States ex rel. Toth v. Quarles, 350 U.S. 11, 17, 76 S. Ct. 1, 100 L. Ed. 8 (1955)*.

HN3[ ] Congress, likewise, has largely exempted the court-martial from direct Article III review. *See, e.g., Schlesinger v. Councilman, 420 U.S. 738, 746, 95 S. Ct. 1300, 43 L. Ed. 2d 591 (1975)* (noting that, at the time, Congress had not yet "deemed it appropriate to confer on th[e] [Supreme] Court 'appellate jurisdiction to supervise the administration of criminal justice in the military'" (quoting *Noyd v. Bond, 395 U.S. 683, 694, 89 S. Ct. 1876, 23 L. Ed. 2d 631 (1969)*)). In fact, Congress did not empower the Supreme Court to review military justice cases until 1983 and, even then, it restricted the Court's review to only certain cases appealed from the CAAF. *See 28 U.S.C. § 1259*; *see also United States v. Denedo, 556 U.S. 904, 909-10, 129 S. Ct. 2213, 173 L. Ed. 2d 1235 (2009)* (noting that the Supreme Court has jurisdiction to review any CAAF decision granting "relief"). Notably, Congress has never empowered the lower federal courts to directly review the outcomes of court-martial proceedings.

HN4[ ] Moreover, collateral review of court-martial

verdicts has been [**18] narrowly circumscribed. Indeed, the Supreme Court did not review a court-martial habeas case until 1879. *See Ex parte Reed, 100 U.S. 13, 25 L. Ed. 538 (1879)*; *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). Federal courts are empowered under *28 U.S.C. § 2241* to entertain habeas petitions from military prisoners. But "our review of court-martial proceedings is very limited." *Thomas v. U.S. Disciplinary Barracks, 625 F.3d 667, 670 (10th Cir. 2010)*; *see Wolff v. United States, 737 F.2d 877, 879 (10th Cir. 1984)* ("[T]he range of inquiry in acting upon applications for habeas corpus for persons confined by sentence of military courts is more narrow than in civil cases." (quoting *Kennedy v. Commandant, 377 F.2d 339, 342 (10th Cir. 1967)*)). As a testament to this deferential posture, we have said that the deference we give to military tribunals is even "greater" than that we owe "to state courts." *Thomas, 625 F.3d at 671.*

Prior to 1953, our limited review exclusively focused on determining whether the military court-martial tribunal had jurisdiction over the habeas petitioner. *See Hiatt v. Brown, 339 U.S. 103, 111, 70 S. Ct. 495, 94 L. Ed. 691 (1950)* ("It is well settled that 'by habeas corpus the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial. The single inquiry, the test, is jurisdiction.'" (quoting *United States v. Grimley, 137 U.S. 147, 150, 11 S. Ct. 54, 34 L. Ed. 636 (1890)*)); *Easley v. Hunter,*

209 F.2d 483, 486 (10th Cir. 1953) ("From early times, our courts have recognized that the Constitution confers upon Congress, and not [**19] the courts, the power to provide for the trial and disposition of offenses committed by those in the armed forces and that the civil courts are limited to a consideration of the jurisdiction of courts-martial and that they have no supervisory or correcting [*854] power over their decisions."); *see also Calley v. Callaway, 519 F.2d 184, 194 (5th Cir. 1975)* (providing "[a] brief historical outline" of the "scope of review" and noting in this regard that "Supreme Court decisions followed the jurisdictional test and emphasized that the scope of inquiry for federal courts was limited to whether the court-martial was properly constituted, whether it had jurisdiction over the person and the offense charged, and whether the sentence was authorized by law"). Under this regime, once an Article III court determined that the military court had jurisdiction, it lacked the authority to evaluate the merits of the military petitioner's case.

Nevertheless, just three years after the Supreme Court's 1950 decision in *Hiatt*, a plurality of the Court charted a new course in military habeas review in *Burns v. Wilson*. *Burns* acknowledged an avenue—albeit a narrow one—through which an Article III court could collaterally review the decision of a military court on the merits. In *Burns*, the [**20] Court addressed several prisoners' claims that their military court-martial proceedings had denied them due process of law in violation of the *Fifth Amendment*. *See 346 U.S. at 138*. Specifically, the petitioners

> charged that they had been subjected to illegal detention; that coerced confessions had been extorted from them; that they had been denied counsel of their choice and denied effective representation; that the military authorities on Guam had suppressed evidence favorable to them, procured perjured testimony against them and otherwise interfered with the preparation of their defenses. Finally, petitioners charged that their trials were conducted in an atmosphere of terror and vengeance, conducive to mob violence instead of fair play.

Id. In the Court's words, these "serious" allegations implicated the "proper administration of the power of a civil court to review the judgment of a court-martial in a habeas corpus proceeding." *Id. at 139.*

Noting that "[t]he Framers expressly entrusted" Congress with the task of determining the "precise balance to . . . str[ike]" between "the rights of men in the armed forces" and the "demands of discipline and duty," a plurality of the Court reasoned that Congress's passage of the UCMJ [**21] in the aftermath of World War II had reaffirmed military courts' responsibility "to protect a person from a violation of his constitutional rights." *Id. at 140-42.* The plurality recognized that, although Congress continued to vest the federal civil courts with jurisdiction over habeas corpus applications from court-martial convictions, "*even more than in state*

[habeas] corpus cases, it would be in disregard of the statutory scheme if the federal civil courts failed to take account of the prior proceedings—of the fair determinations of the military tribunals after all military remedies have been exhausted." *Id. at 142* (emphasis added).

Consequently, the plurality struck a careful balance in describing Article III courts' ability to review military habeas decisions. On one hand, "when a military decision has dealt fully and fairly with an allegation raised in [a habeas] application," the plurality concluded that "it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence." *Id.* On the other hand, in addressing the petitioners' due-process claims, the plurality acknowledged that "[h]ad the military courts manifestly refused to consider those claims, the District Court was empowered to review [**22] them de novo." *Id.*

Applying this standard, the *Burns* plurality noted that the Staff Judge Advocate, [*855] the Board of Review in the office of the Judge Advocate General, the Judicial Council in the Judge Advocate General's office (with the benefit of briefing and oral argument), and the Judge Advocate General all reviewed petitioners' challenges. *See id. at 144*. The military tribunals "concluded that petitioners had been accorded a complete opportunity to establish the authenticity of their allegations, and had failed." *Id.* Those facts "ma[de] it plain that the military courts . . . heard petitioners out on every significant allegation" that they were then presenting to the Supreme Court. *Id.*

For that reason, said the *Burns* plurality, "it [was] *not* the duty of the civil courts simply to repeat that process— to re-examine 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.* (emphasis added). Rather, the plurality reasoned that "[i]t is the limited function of the civil courts to determine whether the military [courts] have given fair consideration to each of these claims." *Id.* The plurality concluded that [**23] "due regard for the limitations on a civil court's power" precluded it from meeting petitioners' "demand [for] an[other] 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."[10] *Id. at 146.*

HN5[ ] Under the plurality decision in *Burns*, the scope of our habeas review expressly reaches beyond jurisdictional questions to an assessment of whether a full merits review is (at the very least) authorized because the military justice system has failed to give

---

[10] Without further comment, Justice Jackson concurred in the result. Justice Minton concurred in the judgment as well, but also briefly noted that he believed federal courts continued to have no reviewing power other than to rule on the military court's jurisdiction. *See Burns, 346 U.S. at 146-48* (Minton, J., concurring). Justices Douglas and Black dissented, asserting that it was the role of federal courts to address the alleged denial of due process. *See id. at 150-55* (Douglas, J., dissenting). Justice Frankfurter declined to rule on the case, arguing that the Court should have allowed more time to review the record. *See id. at 148-50.*

full and fair consideration to the petitioner's claims.[11] *See id. at 142*. Nevertheless, nearly forty years later, in *Dodson v. Zelez, 917 F.2d 1250 (10th Cir. 1990)*, we acknowledged that our interpretation of "the language in *Burns*"—as expressed in our post-*Burns* decisions—"ha[d] been anything but clear." *Id. at 1252*. Most of our cases following *Burns*, we explained, "simply quoted the *Burns* language and held that no [*856] review of a petition for habeas corpus was possible when the defendant's claims were fully and fairly considered by the military courts." *Id.* (collecting cases). Others "were more specific and held that we could not review *factual disputes* if they had been fully

---

[11] *HN6*[ ] In 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. *See id. at 1252* (discussing *Burns* and collecting cases in which we discussed or quoted *Burns*). The Fifth Circuit's analysis in *Calley v. Callaway, 519 F.2d 184 (5th Cir. 1975)*—the seminal decision that *Dodson* looked to—provides support for this view. Specifically, *Calley* faithfully applied *Burns*'s "scope of review," *id. at 198*, in the face of scholarly criticism that the plurality decision lacked "precedential value," *id. at 197 n.18*. In any event, by stating that "[w]e are . . . required to apply the standard outlined by the Supreme Court in *Burns*," our decision just three years later in *Roberts v. Callahan, 321 F.3d 994 (10th Cir. 2003)*, erased any doubt that *Burns* supplies in this circuit the operative and controlling foundation for our review of military habeas claims, *id. at 996*—a proposition as to which both parties agree, *see* Aplt.'s Opening Br. at 1 ("The district judge erred by refusing to apply Supreme Court *precedent* in *Burns v. Wilson* . . . ." (emphasis added)); Aplee. Br. at 16 (describing *Burns* as the operative framework for our review).

and fairly considered by the military courts." *Id.* (collecting cases). In yet [**24] another decision—*Monk v. Zelez, 901 F.2d 885 (10th Cir. 1990)* (per curiam)—we "held that review was proper when the constitutional claim was both 'substantial and largely free of factual questions.'" *Dodson, 917 F.2d at 1252* (quoting *Monk, 901 F.2d at 888*).

HN7[ ] Drawing on our prior precedent—as well as the "clearly expressed" analysis of the Fifth Circuit's seminal case, *Calley v. Callaway*—we articulated four factors "helpful in determining whether [merits] review of a military conviction on habeas corpus is appropriate." *Dodson, 917 F.2d at 1252*. As expressed in *Dodson*, those four 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 1252-53 (omissions in original) (emphasis omitted) (citations omitted).

HN8[ ] These factors reflect "a concise statement of the factors normally relied on by the federal courts in deciding whether to review military habeas corpus

petitions" on their merits. *Id. at 1253*. To be clear, "the four-factor *test* . . . [**25] does not constitute a separate hurdle" in addition to the full-and-fair-consideration inquiry. *Roberts v. Callahan, 321 F.3d 994, 997 (10th Cir. 2003)* (emphasis added). Instead, the four-factor test "develops our understanding of [what] full and fair consideration" means, and, accordingly, we treat it as a coextensive aid to our "determination of whether [a] federal court may reach the merits of the case." *Id.* Stated otherwise, *Dodson*'s four-factor test illuminates the contours of the full-and-fair-consideration standard and thereby helps us in determining whether military tribunals have not fully and fairly considered a petitioner's claims.

Yet while *Dodson* resolved some confusion in our caselaw by providing a framework for our assessment of the full-and-fair-consideration inquiry, it offered little explicit guidance concerning whether the resolution of each factor in petitioners' favor is necessary for them to be eligible for full merits review of their claims and whether, in such circumstances, it ordinarily is necessary and appropriate for federal habeas courts to conduct such a review. Seizing on this lack of explicit guidance in *Dodson*, Mr. Santucci contends that, under our caselaw, a petitioner's assertion of a substantial constitutional [**26] claim that is largely free of factual disputes—in effect, a claim satisfying *Dodson*'s first and second factors—is sufficient, standing alone, to oblige federal courts to conduct a full merits review of the claim. We disagree. Instead, the reasonable and natural inference that we draw from *Dodson* is that petitioners must

establish—in substance—that each of the four *Dodson* factors weighs in their favor to be eligible for full merits review of their claims. *HN9*[ ] Stated otherwise, in substance, they must satisfy all four *Dodson* factors.

A careful reading of *Dodson* provides a solid foundation for these reasonable and natural inferences. *Dodson* expressly referred to the four factors as "*requirements* for our review." *917 F.2d at 1253* (emphasis added). And, in assessing the adequacy of the military tribunal's consideration of [*857] one of Mr. Dodson's many claims (i.e., in effect, inquiring as to the fourth *Dodson* factor), we observed that "[t]his factor alone is not sufficient to justify our review of th[e] issue." *Id.* Notably, neither did we explicitly nor implicitly suggest that any one factor could be sufficient to invoke an Article III full merits review of Mr. Dodson's claims.

In this regard, *Dodson*'s application of the factors [**27] to the habeas claims raised in that case is instructive. The only claim as to which we deemed a full merits review to be necessary and appropriate—Mr. Dodson's voting procedures claim—arguably satisfied, in substance, each of the four factors because it "involve[d] a substantial constitutional issue," "was one of law rather than of disputed fact," did not implicate "unique military considerations," and, though "raised before the military courts of review, . . . was summarily affirmed without discussion." *Id.*

By contrast, *Dodson* rejected claims that failed to

satisfy each of the four factors—that is, we declined to conduct a full merits review of those claims because each of the four factors did not weigh in Mr. Dodson's favor and left undisturbed the military tribunal's determinations. For instance, this was our approach with respect to Mr. Dodson's jury-composition claim where we concluded, in effect, that it did not satisfy the second *Dodson* factor: we refused to characterize it as "substantial," in light of our (and the Supreme Court's) consistent refusal "to apply the [S]ixth [A]mendment right to a jury trial in the court-martial setting" and further held that Mr. Dodson "ma[de] [**28] no substantial constitutional claim that due process was violated" by the jury's composition. *Id. at 1253-54*. This failing as to the second factor was seemingly sufficient for us to conclude that the military tribunal's "summary affirmance was appropriate . . . and fulfilled the full and fair consideration requirement." *Id. at 1254*.

Likewise, we "h[e]ld" that Mr. Dodson's speedy trial claim was "not open to our review because it [was] essentially a factual question"—and one that, moreover, had been "carefully considered by the [military tribunal] in a lengthy discussion." *Id. at 1254*. And, finally, turning to the military tribunal's exclusion of expert testimony, we declined to review that claim on the merits, even though it reflected "a substantial constitutional issue of due process" because it was "a factual issue" that was adequately reviewed by a military appellate tribunal. *Id.*

HN10[ ] Accordingly, both explicitly and implicitly,

Dodson illustrates the principle that—as a necessary condition for full merits review—a petitioner must demonstrate that the resolution of each of the *Dodson* factors weighs in the petitioner's favor. And, notably, a petitioner's favorable showing regarding the first and second *Dodson* factors (i.e., [**29] substantial constitutional claim and issue of law rather than of disputed fact, respectively)—though necessary—is not sufficient to set the table for full merits review.

Furthermore, our caselaw after—and even before *Dodson*— bolsters the inference that—at least in substance—the satisfaction of the four factors that *Dodson* highlights has been a necessary predicate for full merits review of military habeas claims. *See Thomas, 625 F.3d at 670* ("To assess the fairness of the consideration, our review of a military conviction is appropriate *only* if the . . . four [*Dodson*] conditions are met." (emphasis added)); *Lips v. Commandant, 997 F.2d 808, 811 (10th Cir. 1993)* (noting "that [a merits] review by a federal district court of a military conviction is appropriate *only* if the . . . four [*Dodson*] conditions are met" (emphasis added)); *Hubbard v. Berrong, 7 F.3d 1045, [*858] 1993 WL 415268, at *2 (10th Cir. 1993)* (unpublished table decision) ("If the [federal habeas claim] was raised before the military courts, [the] four [*Dodson*] conditions *must* be met before a district court's habeas review of a military decision is appropriate." (emphasis added)); *accord Calley, 519 F.2d at 199* (concluding "from an extensive research of the case law" that the satisfaction of the "four principal" factors, which *Dodson* later adopted, is "*necessary*" for the "federal courts to review [**30] [on

the merits] military convictions of a habeas petition" (emphasis added)); *Fletcher v. Outlaw, 578 F.3d 274, 278 (5th Cir. 2009)* (noting that "review of a military conviction is appropriate *only* if [the] four [*Calley*] conditions are met" (emphasis added)); *see also Khan v. Hart, 943 F.2d 1261, 1263 (10th Cir. 1991)* (finding all four factors satisfied where the petitioner raised a non-delegation doctrine question that did not turn on disputed facts, lacked any special military concerns, and where the adequacy of the Court of Military Appeals's consideration was not "indicate[d]" by its "formulary order"); *Monk, 901 F.2d at 888, 892-93* (conducting a merits review where the petitioner presented a substantial constitutional claim largely free of factual questions that the military tribunals arguably did not adequately consider and where no special military considerations were present); *cf. Dixon v. United States, 237 F.2d 509, 510 (10th Cir. 1956)* (declining to conduct a merits review where a military tribunal "fully considered" the petitioner's fact-free, substantial constitutional claim, namely, "whether the [petitioner's] confession was voluntary," with no special military considerations noted); *Lundy v. Zelez, 908 F.2d 593, 595 (10th Cir. 1990)* (per curiam) (declining to conduct a full merits review of the petitioner's constitutional due process claim where the petitioner failed to "allege that the Judge Advocate [**31] General failed to give fair consideration to his issue"); *Watson v. McCotter, 782 F.2d 143, 145 n.3 (10th Cir. 1986)* (affirming the dismissal of the petitioner's habeas claim because it presented "a mixed question of law and fact" that the military tribunals adequately considered).

HN11[ ] Indeed, our cases have borne out the uncontroversial observation we made in *Roberts v. Callahan* that, though each factor's importance will vary case-by-case, satisfaction of each factor is nonetheless critical to the invocation of our merits review.[12] *See 321 F.3d at 996-97*. Putting the matter differently, petitioners' failure to show that even one factor weighs in their favor is fatal to their efforts to secure full merits review. And we note that this is especially so, when the factor in question is one that we have described as "the most important," that is, the fourth, adequate-consideration factor. *Thomas, 625 F.3d at 671* (emphasizing that "the fourth consideration"—the adequacy of the military tribunal's consideration—is "the most important" and concluding that the petitioner's failure to show *in*adequate consideration was determinative without discussion of the other factors).

Moreover, it is important to underscore that in the instances where petitioners have demonstrated that, in substance, [**32] all four *Dodson* factors weigh in their favor as to their asserted claims—thus rendering those [*859] claims eligible for full merits review—federal courts in our circuit consistently have

---

[12] As an example of that proposition, we hypothesized in *Roberts* that "the first factor—the substantiality of the constitutional dimension— may appear in some cases to provide little guidance as to whether the military courts gave the case full and fair consideration." *321 F.3d at 996-97*. Nevertheless, we explained that "[t]his factor is important . . . as a reminder that we will *only* review habeas corpus petitions from the military courts that raise substantial constitutional issues." *Id. at 997* (emphasis added).

proceeded to conduct such a review.[13] *See, e.g.*, *Khan, 943 F.2d at 1263*; *Monk, 901 F.2d at 888, 892-93*; *Huschak v. Gray, 642 F. Supp. 2d 1268, 1275 n.3, 1276-82 (D. Kan. 2009)* (reviewing the petitioner's habeas claims on the merits where, substantively, the claims were substantial and free of factual dispute, no special military considerations were noted, and "there was no consideration whatsoever of petitioner's claims by the military courts"); *Jefferson v. Berrong, 783 F. Supp. 1304, 1306-08 (D. Kan. 1992)* (reviewing the petitioner's ineffective assistance of counsel claim on the merits where, in the district court's estimation, all four *Dodson* factors were satisfied); *see also Young v. Belcher, No. 12-3061-RDR, 2013 U.S. Dist. LEXIS 43241, 2013 WL 1308308, at *4 (D. Kan. Mar. 27, 2013)* (noting that a merits review is "appropriate only if" the four *Dodson* factors are satisfied (quoting *Thomas, 625 F.3d at 670*)); *Condon v. Horton, No. 19-3192-JWL, 2020 U.S. Dist. LEXIS 17205, 2020 WL*

---

[13] We note that while satisfaction of all four *Dodson* factors is necessary to obtain federal habeas *review*, petitioners like Mr. Santucci are not automatically entitled to habeas *relief*. *See Shinn v. Ramirez, --- U.S. ----, 142 S. Ct. 1718, 1731, 212 L. Ed. 2d 713 (2022)*. At least as much as state prisoners under the Antiterrorism and Effective Death Penalty Act of 1996, in the military context, petitioners "must still . . . persuade a federal habeas court that 'law and justice require' relief." *Brown v. Davenport, --- U.S. ----, 142 S.Ct. 1510, 1524, 212 L. Ed. 2d 463 (2022)* (quoting *28 U.S.C. § 2243*); *see Thomas, 625 F.3d at 671* (noting that the deference we give to military tribunals is even "greater" than that we owe "to state courts"). Ultimately, because Mr. Santucci fails to demonstrate his eligibility for habeas review, we need not opine on whether his petition contains claims that merit relief.

*508949, at *2 (D. Kan. Jan. 31, 2020)* (same); *Oliver v. Commandant, No. 18-3055-JWL, 2018 U.S. Dist. LEXIS 125396, 2018 WL 3575675, at *3 (D. Kan. July 25, 2018)* (same).

This consistent application of full merits review should not come as a surprise because, by satisfying all four factors as to a given claim, petitioners will have demonstrated that a substantial constitutional issue that is largely free of factual disputes, and also not characterized by any special military concerns, has not been adequately considered by military tribunals. [**33] A federal habeas court would be hard pressed to sidestep full merits review in such circumstances. And the leeway (albeit limited) to address constitutional wrongs that *Burns* recognizes and the interests of justice, in our view, would engender a necessity—at least in ordinary circumstances—to conduct such a full merits review.

HN12[ ] In sum, we clarify here the overarching principle that we derive from our caselaw: 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 their 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.

We now turn to address Mr. Santucci's arguments which vigorously challenge and resist application of this framework. We explain why those [**34] arguments are without merit.

2

Relying primarily on pre-*Dodson* precedent, Mr. Santucci advances two related [*860] arguments, which we conclude are without merit. First, he contends that, even if the military tribunal gave full and fair consideration to the claims now advanced in his habeas petition, our precedent indicates that the district court nevertheless should have conducted a full merits review of his claims based on the quality of the constitutional issues inherent in them. *See* Oral Arg. at 13:28- 57 (arguing that Article III courts may resolve questions of significant constitutional magnitude even if the Article I tribunal fully and fairly considered the claim); Aplt.'s Reply Br. at 3 ("[T]he district court failed to recognize that even if the issues [Mr.] 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."); *id.* at 6 ("[T]hough the Commandant and the district court rely primarily on *Dodson* and the 'full and fair' consideration analysis, *this is but one factor [to] be considered*." (emphasis added)). Thus, Mr. Santucci argues that—quite apart from the full-and-fair-

consideration [**35] framework and *Dodson*, which we have clarified *supra*—courts are permitted to conduct a full merits review of petitioners' claims when they involve substantial constitutional issues, and the district court committed reversible error by not doing so here. As the foregoing discussion suggests, we believe that this argument is misguided. More specifically, it is irreconcilable with *Burns* and also unsupported by our pre-*Dodson* precedent.

Mr. Santucci's second argument bears some resemblance to his first in that it, too, elevates the primacy of constitutional questions in shaping the scope of our review. But rather than abandon *Dodson* and the full-and-fair-consideration framework that *Dodson* illuminates, Mr. Santucci posits that the presence of a substantial constitutional issue that is largely free of factual issues is, standing alone, sufficient to trigger our full merits review under *Dodson*'s full-and-fair-consideration framework. *See* Aplt.'s Opening Br. at 51 (arguing that, under the *Dodson* test, "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").

In other words, Mr. Santucci, [**36] in effect, rejects the proposition that petitioners must demonstrate that all four of the *Dodson* factors weigh in their favor to be eligible for full merits review; he believes it is sufficient to trigger such review for petitioners to show that they satisfy, in substance, the first two *Dodson* factors—that is, they show that their claim raises a

substantial constitutional issue that is largely free of factual disputes. As Mr. Santucci reasons, for *Dodson* to be consistent with our earlier precedent, the presence of such a substantial constitutional issue must be sufficient for purposes of triggering full merits review. *See* Aplt.'s Reply Br. at 6 (noting that our pre-*Dodson* precedent is "good law" and "demonstrate[s] that the Article III courts must determine whether the constitutional issues presented are substantial and largely free of factual issues").

However, in our view, Mr. Santucci's two arguments are misguided; they rely on a strained, decontextualized reading of our caselaw. Accordingly, his arguments lack the persuasive force to alter our view of the governing legal principles, and we reject them.

a

To begin, Mr. Santucci claims that, even if we were to conclude that the military tribunals [**37] fully and fairly considered the claims now advanced in his habeas [*861] petition, the district court committed reversible error under our precedent by failing to conduct a full merits review of his claims based on "the quality of the constitutional issue[s]" he raised. Oral Arg. at 13:28-57. In effect, he claims that the district court was obliged to step beyond the full-and-fairconsideration rubric and inquire whether there were substantial constitutional issues raised in his habeas petition. And, if so—to avoid reversible error—the court needed to conduct a full merits review

of them.

However, insofar as Mr. Santucci suggests that we may sidestep or disregard a military tribunal's "full and fair consideration" of a habeas petitioner's claim, his argument cannot be squared with the reasoning or result of the Supreme Court's controlling precedent in *Burns*. Undoubtedly, the petitioners in *Burns* raised a host of substantial constitutional questions—which the Court characterized as "serious . . . allegations which, in their cumulative effect, were sufficient to depict fundamental unfairness in the process whereby their guilt was determined and *their death sentences rendered*"— but this circumstance did [**38] not avail them. *346 U.S. at 142* (emphasis added). The *Burns* plurality underscored that the military's "full[] and fair[]" consideration of the "allegation[s] raised in th[e] application" prevented a more fulsome review by the Article III court. *Id.*

Furthermore, the *Burns* plurality recognized that it "would be in disregard of the statutory scheme" for Article III courts to effectively exercise direct appellate power through collateral challenges whenever a petitioner alleged a substantial constitutional claim. *Id. at 142*. In laying the foundation for this conclusion, the *Burns* plurality painstakingly outlined the statutory scheme governing military justice in the Article I military tribunals—discussing along the way the direct, Article I appellate relief available to servicemembers and the finality principles attaching to those tribunals' decisions. *See id. at 140-42*. *HN13*[ ] In sum, the controlling Supreme Court precedent of

Burns, itself, makes clear that a petitioner cannot sidestep the full-and-fair-consideration framework simply by presenting to an Article III habeas court a substantial constitutional claim.[14]

---

[14] Echoing the *Burns* dissent, Mr. Santucci argues that making the full-and-fair-consideration test central to the adjudication of his constitutional claims erodes the Article III courts' power to "serve as the ultimate arbiters of the law's meaning and effect" and rejects "the fundamental American concept of separation of powers." Aplt.'s Opening Br. at 47; *see Burns, 346 U.S. at 154* (Douglas, J., dissenting) ("[T]he military tribunals in question are federal agencies subject to no other judicial supervision except what is afforded by the federal courts. . . . [And] the rules of due process which they apply are constitutional rules which we, not they, formulate."). Putting aside that we are dutybound to apply the *Burns* plurality's decision—and *not* the dissenting opinion in *Burns*—that case does not so much as reflect an erosion of the Article III power to say "what the law is," *Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803)*, as it does a definition of the proper boundaries for the exercise of that power. *HN14*[ ] That definition in *Burns* of the metes and bounds for the proper exercise of Article III power evinces the "recogni[tion] that the military is, by necessity, a specialized society separate from civilian society," complete with its own "developed laws and traditions." *Parker v. Levy, 417 U.S. 733, 743, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974)*; *see Schlesinger, 420 U.S. at 758* ("As we have stated above, judgments of the military court system remain subject in proper cases to collateral impeachment. But implicit in the congressional scheme embodied in the Code is the view that the military court system generally is adequate to and responsibly will perform its assigned task. We think this congressional judgment must be respected and that it must be assumed that the military court system will vindicate servicemen's constitutional rights."); *cf. Ortiz, 138 S. Ct. at 2175* (noting that the military justice system "replicates the judicial apparatus found in most *States*" (emphasis added)).

[*862] Nor does our precedent require a contrary conclusion. *HN15[ ]* In construing our precedent, we note that the proper approach is to "read general language [**39] in judicial opinions . . . as referring in context to circumstances similar to the circumstances then before the Court and *not* referring to quite different circumstances that the Court was not then considering." *Illinois v. Lidster, 540 U.S. 419, 424, 124 S. Ct. 885, 157 L. Ed. 2d 843 (2004)* (emphasis added); *see also Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 399, 5 L. Ed. 257 (1821)* ("[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision."); *United States v. Herrera, 51 F.4th 1226, 1282 (10th Cir. 2022)* ("We often interpret general language in cases 'as referring in context to circumstances then before the Court.'" (quoting *Lidster, 540 U.S. at 424*)). Moreover, we "must endeavor to interpret our cases in a manner that permits them to coexist harmoniously with overarching and controlling Supreme Court precedent and with each other." *United States v. Hansen, 929 F.3d 1238, 1254 (10th Cir. 2019)*; *see* Bryan A. Garner et al., THE LAW OF JUDICIAL PRECEDENT 300 (2016) (noting that "decisions of equal authority" [i.e., from the same court] that appear to be "discordant" "should be harmonized" "[i]f at all possible" (bold-face font omitted)).

Mr. Santucci looks to *Wallis v. O'Kier, 491 F.2d 1323 (10th Cir. 1974)*, and *Kennedy v. Commandant, 377*

F.2d 339 (10th Cir. 1967), for the proposition that, irrespective of whether the military tribunal provided full and [**40] fair consideration, Article III courts have a "duty" to review substantial constitutional issues presented by military petitioners—which frequently, it seems, means constitutional issues that are free of fact-bound disputes. *See Wallis, 491 F.2d at 1325* ("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* ("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."). However, we are not persuaded by Mr. Santucci's argument.

At the outset, it is important to underscore that these cases were decided before we undertook the effort in *Dodson* to harmonize our precedent with the controlling Supreme Court authority of *Burns*. As part and parcel of that endeavor, we carefully scrutinized our prior caselaw and shed important light on the contours of our review. In that process, we recognized that some of our prior precedent—including *Wallis*—may have relied [**41] on unannounced factors that did not squarely fit within the *Burns* framework, in that those cases deemed "review of constitutional claims in habeas corpus petitions . . . proper without *really* saying when and why." *Dodson,*

917 F.2d at 1252 (emphasis added). With the clarifying benefit of *Dodson* and our subsequent caselaw, we are better situated now to resolve—with clearly defined, explicit factors—Mr. Santucci's appeal in a manner consonant with *Burns*.

In any event, read carefully and within their respective contexts, *see Lidster, 540 [*863] U.S. at 424*, neither *Kennedy* nor *Wallis* supports Mr. Santucci's ambitious reading. As we see it, we used the term "duty" in both *Kennedy* and *Wallis* as signifying in distinct but related ways our recognition that, after *Burns*, Article III habeas courts are no longer limited to reviewing questions related to the jurisdiction of military courts. Relatedly, we understand those decisions as merely highlighting that federal courts are statutorily vested with a responsibility—that is, a "duty"—to inquire into whether a full merits review is necessary and appropriate in *specific* cases regarding the merits of *particular* alleged constitutional violations and, if so, to perform such a review. We do not read these two cases as adopting some broad rule [**42] that, in every case—or, even more specifically, every case involving constitutional issues—that Article III courts have a "duty" to conduct a full merits review of military tribunals' decisions—irrespective of whether the tribunals provided full and fair consideration.

HN16[ ] In this regard, in *Kennedy*, we observed that—even though "the range of inquiry in acting upon applications for habeas corpus from persons confined by sentence of military courts is more narrow than in

civil cases"—"[i]f *Burns* . . . accomplished nothing else, it 'conclusively rejected the concept . . . that habeas corpus review should be restricted to questions of formal jurisdiction.'" *Kennedy, 377 F.2d at 342* (citation omitted) (first quoting *Suttles v. Davis, 215 F.2d 760, 761 (10th Cir. 1954)*; and then quoting *Gibbs v. Blackwell, 354 F.2d 469, 471 (5th Cir. 1965)*).

Furthermore, effectively anticipating our later adoption of *Dodson*'s second factor—excluding fact-bound issues from our review—we stated that "[w]here the constitutional issue involves a factual determination, ... *HN17*[ ] [i]t is *not* our *duty* to re-examine and reweigh each item of evidence which tends to prove or disprove the allegations in the petition for habeas corpus." *Id.* (emphases added); *see also Dodson, 917 F.2d at 1252* (referencing the second factor—that "[t]he issue must be one of law rather than of disputed fact already [**43] determined by the military tribunals"—and noting that the four factors adopted therein, though not "clearly expressed," were "found in our prior cases" (emphasis omitted)). In other words, we communicated that the leeway to extend our review beyond jurisdictional issues that *Burns* recognized did not come with a responsibility (i.e., a duty) to engage in full merits review of fact-bound constitutional issues.

Yet, notably, as to the obverse circumstances, involving the presence of constitutional issues *not* freighted with disputed factual issues, we announced no general rule that we have a duty of full merits review. That is, we did not hold that such a duty of

review exists concerning *every* constitutional issue largely free of factual disputes. Instead, we simply turned to the task of examining the petitioner's particular constitutional claims, which implicated the *Fifth* and *Sixth Amendments*.[15] And it was following this assessment of the specific nature and magnitude of the petitioner's claims that we stated the following: "We believe it is the duty of this Court to [*864] determine if the military procedure for providing assistance to those brought before a special court-martial is violative of the fundamental rights [**44] secured to all by the United States Constitution." *Id.*

It is clear to us that the *Kennedy* panel's use of the term "duty" here did not mean that the panel was announcing a universal obligation for Article III habeas courts to consider non-factbound constitutional claims. And nothing of the sort can be inferred from the language of the panel's opinion, read in context. Rather, the panel simply determined that—given *Burns*'s recognition of its authority to conduct a narrow "range of inquiry" beyond the question of the jurisdiction of the military courts—the petitioner's particular constitutional claims were ones that, upon

---

[15] Specifically, the petitioner claimed that he had been deprived of his *Sixth Amendment* right to counsel and *Fifth Amendment* right to a fair trial when the military appointed a non-legally trained officer to defend him. *See Kennedy, 377 F.2d at 341-42.* We observed that his claims—"that the appointment of a non-legally trained officer was a per se violation of his *Sixth Amendment* right to counsel as well as his *Fifth Amendment* right to a fair trial"—were free of factual disputes regarding the effectiveness or adequacy of his representative. *Id. at 342.*

examination, appropriately implicated the panel's responsibility or duty to conduct a full merits review of them. *Id.*

Citing *Kennedy*, *Wallis*'s use of the term "duty" likewise does not purport to establish a universal obligation of Article III habeas courts to conduct full merits review of constitutional issues—even ones largely free of factual disputes—without regard to whether the military courts have given full and fair consideration to those issues. *See Wallis, 491 F.2d at 1325*. Instead, like *Kennedy*, we read *Wallis* to implicitly speak of the propriety—in light of the limited leeway for review beyond jurisdictional issues [**45] that *Burns* recognized— of exercising full merits review of the *particular* constitutional issues raised in a *specific* case. In that regard, the *Wallis* panel was particularly concerned with addressing the government's argument that "this is a case where military tribunals have given full and fair consideration to the issue presented and that, since this has been done, the district court and this Court are *without jurisdiction* to review the merits of the cause." *Id.* (emphasis added). Though not citing *Burns*, the panel's response was consistent with *Burns*'s guidance that the real question in the military-habeas context is not one of "power at all" (i.e., the court's jurisdiction) because the statute, *28 U.S.C. § 2241*, confers that; rather, at issue is "the manner in which the Court should proceed to exercise its power." *Burns, 346 U.S. at 139*.

Specifically, *Wallis* concluded that the government's

argument was an "overstatement of principle." *491 F.2d at 1325*. And we believe that the panel used the term "duty" when describing our responsibility to conduct an inquiry— beyond mere jurisdictional questions—of Mr. Wallis's particular constitutional claim, brought under the *Fourth Amendment*. *See id.* The *Wallis* panel did not, through use of the term "duty," purport to establish a universal obligation [**46] of Article III habeas courts to conduct full merits review of constitutional issues—even ones largely free of factual disputes—without regard to whether the military courts have given full and fair consideration to those issues. *See id.*

Admittedly, 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 do not "really say[] . . . why." *917 F.2d at 1252*. However, our careful study of the two pre-*Dodson* cases that Mr. Santucci relies on—*Kennedy* and *Wallis*—permits us to say this much: they do not stand for the broad proposition that Mr. Santucci advances and thus do not avail him. *HN18*[ ] In other words, they do not oblige federal habeas courts, like the district court here, to conduct a full merits review in every instance in which petitioners present to them substantial constitutional issues—even where those issues are largely free of factual disputes— irrespective [*865] of whether the military courts previously have given full and fair consideration to those issues. Accordingly, Mr. Santucci's argument to this effect does not give us pause or cause us to

deviate from the [**47] full-and-fair-consideration framework that we have outlined and clarified above.

b

Mr. Santucci's remaining contrary argument is similarly unavailing. It is best understood as an alternative argument because, unlike the first argument that we addressed and rejected in the immediately preceding subsection, this argument does not effectively seek to elide or sidestep the full-and-fair-consideration framework and *Dodson*'s clarification of that framework. Rather, in his second argument, Mr. Santucci purports to explain why that framework and *Dodson*—when viewed through the prism of our pre-*Dodson* caselaw—authorize federal habeas courts to conduct full merits review based solely on the presentation of constitutional claims that are largely free of factual issues. Specifically, Mr. Santucci argues that our pre-*Dodson* precedent establishes that the presence of "questions . . . of constitutional magnitude" that are "largely free of factual issues"—in effect, the first two factors of the *Dodson* framework—is sufficient to invoke an Article III court's full merits review. Aplt.'s Opening Br. at 13; *see* Oral Arg. at 13:28-57. Because those pre-*Dodson* cases are "good law," Aplt.'s Reply Br. at 6, [**48] Mr. Santucci argues that the "district judge erred" by failing to apply "the standard of review set forth" in that precedent and by not construing *Dodson*'s guidance as calling for full merits review upon the presentation of constitutional claims that are largely free of factual issues, Aplt.'s Opening Br. at 1. In

effect, Mr. Santucci suggests that the necessary outcome of reconciling *Dodson* with our pre-*Dodson* precedent is a rule that obliged the federal district court here to conduct full merits review because he presented substantial constitutional issues in his claims that were largely free of factual disputes.

Stated otherwise, Mr. Santucci contends that—viewed through the proper prism of our harmonized precedent—his presentation of such largely fact-free, substantial constitutional issues was sufficient, without more, to oblige the district court here to conduct a full merits review of those issues. *See id.* (positing that "substantial questions of constitutional law, largely free of factual questions, fall[] directly within the standard of review set forth in" *Dodson* and our pre-*Dodson* precedent); *id.* at 10-11 (arguing that our *Dodson* and pre-*Dodson* precedent "uniformly hold that substantial [**49] 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"). In other words, because his claims are "largely free of factual issues and purely questions of constitutional and criminal law," *id.* at 23, Mr. Santucci insists that the district court was "dutybound" to fully adjudicate his constitutional claims, *see id.* at 43, 48.[16]

---

[16] Mr. Santucci further contends that, as to such issues, federal habeas courts at least possess the "*discretion*" to conduct a full merits review of them. Aplt.'s Opening Br. at 48 (emphasis added). The substance of Mr. Santucci's argument in his Opening Brief regarding the district court's ostensible discretion to review

constitutional claims is not altogether clear, and he declines to develop it further in his Reply Brief. *Compare id.* (arguing that the "full and fair consideration" standard "leaves the Article III trial judge with the discretion to reach the merits [of a claim] and determine if constitutional protections were correctly considered and applied"); *id.* at 54 (arguing 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"), *with* Aplt.'s Reply Br. 2-8 (making arguments but not mentioning habeas courts' ostensible discretion to conduct full merits review).

Insofar as he posits that an Article III court's authority to review habeas claims on their merits is discretionary, Mr. Santucci's position would appear to conflict with his insistence, found elsewhere in his briefing, that Article III courts are "dutybound to see that other branches of government observe[] the Constitution." Aplt.'s Opening Br. at 53. A duty implies the absence of discretion; those dutybound to fulfill an obligation owed to another lack the freedom of choice inherent in discretion. *Compare Duty*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A legal obligation that is owed or due to another and that needs to be satisfied; that which one is bound to do, and for which somebody else has a corresponding right."), *with Discretion*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Freedom in the exercise of judgment; the power of free decision-making."); *cf. Maine Cmty. Health Options v. United States, U.S. , 140 S. Ct. 1308, 1320-21, 206 L. Ed. 2d 764 (2020)* (in the context of statutory interpretation, recognizing the difference between terms that imply discretion and terms that impose a duty). Mr. Santucci makes no effort to reconcile these two conflicting positions.

In any event, Mr. Santucci identifies no authority in support of his position that the district court has "discretion" to consider habeas claims on their merits even if a military tribunal has fully and fairly considered the claim. *See FED. R. APP. P. 28(a)(8)(A)* (requiring Appellant to support his contentions "with citations to

[*866] In advancing his argument, Mr. Santucci points to several of our precedents, most notably, *Monk*. He contends that *Monk* "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." *Id.* at 16 (bold-face font omitted). In his view, *Monk* illustrates that a military tribunal's adequate consideration of a petitioner's claim—which corresponds to *Dodson*'s fourth factor—does not preclude an Article III court's review of the claim's merits where the claim concerns a substantial constitutional issue "largely free of factual questions." *Id.* at 19 (quoting *Monk, 901 F.2d at 888*).

In other words, Mr. Santucci urges that *Monk* stands for the proposition [**50] that a demonstration of a

---

the authorities . . . on which the appellant relies"). Nor does he develop his discretion argument beyond what we have quoted, *supra*, and "[w]e are not . . . in the business of making arguments" for him. *Lounds v. Lincare, Inc., 812 F.3d 1208, 1227 (10th Cir. 2015)*; *see Yelloweagle, 643 F.3d at 1284* (noting that we cannot "make arguments for" a litigant); *cf. United States v. Lamirand, 669 F.3d 1091, 1099 n.7 (10th Cir. 2012)* ("[T]he argument is not adequately presented to us. [The defendant] does not even identify this distinct argument in his statement of appellate issues, much less elaborate in the brief on its substantive premises. Instead, [the defendant] puts forward only a couple of stray sentences in his briefs and does not cite to any authority that even remotely supports the argument."). Accordingly, to the extent Mr. Santucci argues that an Article III court's authority to hear military habeas claims is discretionary, we deem it waived under our briefing-waiver doctrine.

substantial constitutional question that is largely free of factual questions is sufficient to authorize an Article III court's review of a habeas claim on the merits. In effect, he contends that *Monk* is irreconcilable with our understanding of the mandatory nature of the *Dodson* framework, *viz.* our view that petitioners are required to show that all four *Dodson* factors weigh in their favor to be eligible for full merits review. For example, as Mr. Santucci sees things, even if the adequate-consideration, fourth factor of *Dodson*—which we have described as being the "most important," *Thomas, 625 F.3d at 671*—does not weigh in his favor, he nevertheless may make a sufficient showing to oblige Article III courts to conduct full merits review, so long as the [*867] claims he advances involve substantial constitutional issues that are largely free of factual disputes (that is, claims that effectively satisfy the first and second *Dodson* factors).

HN19[ ] As the party seeking relief, Mr. Santucci bears the ultimate burden of persuasion, and with that in mind, we now turn to *Monk*, as well as the other cases he cites, to see if his alternative argument has merit. *See Beeler v. Crouse, 332 F.2d 783, 783 (10th Cir. 1964)* (per curiam) ("Habeas corpus is a civil proceeding and the [**51] burden is upon the petitioner to show by a preponderance of the evidence that he is entitled to relief."); *cf. Hawkins v. Schwan's Home Serv., Inc., 778 F.3d 877, 894 (10th Cir. 2015)* ("[T]he plaintiff always bears the ultimate burden of persuasion."). After carefully studying *Monk* and our other pre-*Dodson* precedent, we are unmoved by Mr. Santucci's contention that the presence of certain constitutional

questions, standing alone, is sufficient to trigger full merits review. In fact, the case upon which Mr. Santucci relies most heavily—*Monk* —is entirely consistent with the full-and-fair-consideration framework we have elucidated today.

In *Monk*—decided before we formalized the *Dodson* framework—we reversed a district court's denial of habeas relief to a military petitioner who argued that a jury instruction equating "substantial doubt" with reasonable doubt had prejudiced the defendant in his military trial. *901 F.2d at 889-91*. Mr. Monk's claim was both "substantial and largely free of factual questions," and we did not identify any special military considerations counseling against review. *Id. at 888* (quoting *Mendrano v. Smith, 797 F.2d 1538, 1542 n.6 (10th Cir. 1986)*). That is, viewed through the lens of *Dodson*, we determined that Mr. Monk's claim clearly reflected a substantial constitutional issue that was largely free of factual questions, in satisfaction [**52] of the first two factors, and that the third factor relating to special military considerations also weighed in Mr. Monk's favor. *See Dodson, 917 F.2d at 1252-53*. However, we acknowledged that a military court had "considered [Mr.] Monk's claim that the military judge's reasonable doubt instruction deprived him of his right to due process." *Monk, 901 F.2d at 888*. Despite that, we deemed it appropriate to "consider and decide [the] constitutional issues that were also considered by the military courts." *Id.* Mr. Santucci makes much of our decision to review Mr. Monk's claim on the merits—despite the military tribunal's prior consideration—viewing it as definitive proof that

the presence of constitutional claims that are substantial and largely free of factual issues is sufficient to trigger full merits review by a federal habeas court.

Yet our reading of *Monk* makes clear that the decision to reach the merits of Mr. Monk's claim turned—*not* solely on the presence of the largely fact-free constitutional issue—but, *also*, on the panel's concern that the military tribunal failed to *adequately* consider the claim presenting that constitutional issue. In other words, in *Monk*, the factor that tipped the scales in favor of full merits review was our [**53] concern regarding the *in*adequacy of the military tribunal's consideration of the claim that presented the largely fact-free constitutional issue—a matter that we analyzed at length.[17] *See id. at 891-93*. Relatedly,

---

[17] *Monk*'s citation to our decision in *Mendrano*—another case upon which Mr. Santucci relies—bolsters our reading of *Monk*, *viz.*, our view that the *Monk* panel's decision to conduct a full merits review turned on the inadequacy of the military tribunal's consideration. *See Monk, 901 F.2d at 888*. As in *Monk*, in *Mendrano*, the government failed to argue that the military tribunals fully and fairly considered the petitioner's claim and, instead, responded to the claim on the merits. *See id. at 892-93* (reviewing the government's arguments); *Mendrano, 797 F.2d at 1542 n.6*. In *Mendrano*, we effectively condemned the decision-making of the military courts with faint praise by noting that "the military courts gave *at least some* consideration to petitioner's *Fifth* and *Sixth Amendment* claims." *797 F.2d at 1542 n.6* (emphasis added); *see Dodson, 917 F.2d at 1263 n.1* (Anderson, J., dissenting) (noting, without objection from the majority, that "no full consideration had been given to the claim by the military courts" in *Mendrano*). It was in the context of such a negative

HN20[ ] we [*868] may infer from *Monk* that, even the *in*adequacy of the military tribunal's consideration, standing alone, would not have been sufficient to trigger full merits review; it was the presence of all four factors that we subsequently highlighted in *Dodson* that did so. Thus, rather than supporting Mr. Santucci's attempt to establish the primacy and sufficiency of fact-free constitutional issues within *Dodson*'s framework, *Monk* is entirely consistent with our understanding of that framework—under which petitioners must establish that, in substance, all four *Dodson* factors weigh in their favor to be eligible for full merits review.

Turning to address these matters in detail, in *Monk*, we concluded that the military tribunal's affirmation of Mr. Monk's convictions hinged on a critical factual error. *See id. at 892*. In turn, that conclusion served as the backdrop for our decision to conduct our merits review of the purely legal constitutional [**54] questions surrounding the improper reasonable doubt

---

assessment of the character of the military courts' consideration—as well as the government's failure to "argue that full and fair consideration by the military courts makes judicial review inappropriate"—that we concluded that it was proper to conduct a full merits review of the petitioner's general "constitutional issues." *Mendrano, 797 F.2d at 1542 n.6*. *Monk*'s citation to *Mendrano* thus lends credence to our view that the decision to conduct full merits review in *Monk* turned on the *in*adequacy of the military tribunals' consideration; in other words, the citation suggests that the *Monk* panel viewed *Mendrano* as presenting a like circumstance of inadequate consideration by the military courts.

instruction Mr. Monk raised in his habeas petition. *See id. at 892-93*. Specifically, in Mr. Monk's direct appeal, "a majority of the [Court of Military Appeals], *although not the same majority*, agreed that the reasonable doubt instruction given at [Mr.] Monk's court-martial violated his constitutional right to be convicted only upon proof beyond a reasonable doubt, *that* [Mr.] *Monk had objected to this instruction at trial* and that the instruction as given prejudiced [Mr.] Monk." *Id. at 892* (emphases added). However, the controlling opinion in Mr. Monk's direct (military) appeal had incorrectly found that Mr. Monk "essentially waived his right to challenge the constitutionality of the instruction" by "fail[ing] to make a proper objection." *Id.*

After reviewing the factual record, we "agree[d] with the district court . . . and two of the three members of the Court of Military Appeals" on a key point: Mr. Monk issued a "proper objection to the reasonable doubt instruction given by the military judge and that he thus preserved th[e] issue for appeal and collateral review." *Id. at 893*. Thus, the *Monk* panel's decision to conduct a full merits review depended—*not* solely on the [**55] presence of the largely fact-free constitutional issue—but, *also*, on the panel's concern that the military tribunal failed to adequately consider the claim presenting that issue.

Relatedly, it should be clear from our explication of the *Monk* panel's analysis that its decision is congruent with—rather than antithetical to—our requisite, four-factor *Dodson* framework. That is so because, in substance, all four of the *Dodson* factors were present

when we engaged in full merits review. In other words, the [*869] outcome in *Monk* is entirely consistent with the full-and-fair-consideration framework that we have outlined and clarified here under which petitioners are obliged to demonstrate that all four factors weigh in their favor to be eligible for full merits review. Specifically, we reviewed Mr. Monk's claim on the merits in a context where he had effectively shown that all four factors that we subsequently highlighted in *Dodson* weighed in his favor: that is, he had presented a substantial constitutional issue largely free of factual questions to the court that had *not* been adequately considered by the military tribunal, in a setting that was not animated by any special military considerations counseling [**56] against review. *See id. at 886, 888, 891*.

Consequently, based on the foregoing analysis, we cannot read *Monk* as supporting Mr. Santucci's assertion that the presence of a substantial constitutional issue that is largely free of factual questions, by itself, is sufficient to allow for full merits review. To the contrary, though a substantial constitutional issue largely free of factual questions was present in *Monk*, the factor that tipped the scales in favor of full merits review was our concern about the *in*adequacy of the military tribunal's consideration of that issue. *HN21*[ ] And because, in effect, all four *Dodson* factors weighed in Mr. Monk's favor, *Monk* is consistent with the *Dodson* framework that we have clarified here: satisfaction of each factor is a necessary condition—a "requirement[]"—to Article III review. *Dodson, 917 F.2d at 1253*.

Further, besides *Monk*, Mr. Santucci broadly contends that our decisions in "*Dodson*, *Dickson*, *Dixon*, *Kennedy*, *Lips*, *Lundy*, *McCotter*, and *Wallis* . . . uniformly hold that substantial questions of constitutional law largely free of factual issues" are sufficient to equip an Article III court with the authority to conduct a full merits review. Aplt.'s Opening Br. at 10-11. We need not dwell long on these other cases that Mr. Santucci [**57] cites, however. First of all, Mr. Santucci does not even provide a complete citation for the "*Dickson*" case, *see id.* at 1, 10, and we cannot find any relevant case in our circuit by that name. Accordingly, we do not consider it further. *See FED. R. APP. P. 28(a)(8)(A)* (requiring Appellant to support his contentions "with citations to the authorities . . . on which the appellant relies"). Furthermore, apart from our decision in *Dodson*—which we have shown he misunderstands—Mr. Santucci never discusses the holdings of these cases. S*ee* Aplt.'s Opening Br. at 1, 10, 13, 18, 19, 23, 48, 49. Moreover, his reliance on *Kennedy* and *Wallis*—as to his second argument here—is confined to alluding to the passing references in those cases to the Article III court's "duty" to consider military habeas claims, *see id.* at 13, 18-19—references that we have already addressed in the immediately preceding subsection and found unavailing for Mr. Santucci. *HN22*[ ] As we have said, "'[c]ursory statements, without supporting analysis and case law' are inadequate to preserve an issue." *Burke v. Regalado, 935 F.3d 960, 1014 (10th Cir. 2019)* (quoting *Bronson v. Swensen, 500 F.3d 1099, 1105 (10th Cir. 2007)*). Because Mr. Santucci fails to develop

a fulsome argument with respect to the holdings of these cases—and because "[w]e cannot make a party's arguments for [**58] him," *United States v. Kravchuk, 335 F.3d 1147, 1153 (10th Cir. 2003)*—we decline to consider Mr. Santucci's broad, unsupported assertions regarding them further.

Lastly, we note that any reconciliation of our pre-*Dodson* caselaw with *Dodson* must itself be congruent with the Supreme Court's controlling precedent. *See, e.g.*, *Hansen, 929 F.3d at 1254* (noting that we [*870] "must endeavor to interpret our cases in a manner that permits them to coexist harmoniously with overarching and controlling Supreme Court precedent and with each other"). To that end, the Court's decision in *Burns*, in effect, coheres with the requisite, four-factor *Dodson* framework we have described, which lends force to our conclusion that *Monk* and our other pre- *Dodson* caselaw upon which Mr. Santucci relies should be read as being congruent with that framework, too.

Specifically, whereas *Monk* illustrates the availability of Article III merits review where all four factors are satisfied, *Burns* underscores that such review is out of reach where a petitioner fails to meet all four factors. As in *Monk*, several of the claims at issue in *Burns* were undeniably of substantial constitutional stature and largely free of factual issues. *See Burns, 346 U.S. at 142* (describing the "serious charges" set forth in petitioners' habeas applications, including allegations of [**59] unconstitutional imprisonment, coerced confessions, and denial of counsel of choice); *see also*

Calley, 519 F.2d at 200 (describing the constitutional claims raised in *Burns* as the kind of "pure issues of constitutional law, unentangled with an appraisal of a special set of facts" that Article III courts sitting in habeas may review (first quoting *Shaw v. United States, 357 F.2d 949, 954, 174 Ct. Cl. 899 (Ct. Cl. 1966)*; and then citing *Burns, 346 U.S. at 142, 145, 146*)).

But, despite the presence of these substantial constitutional questions largely free of factual issues, the *Burns* petitioners—unlike the petitioner in *Monk*—"*failed to show* that th[e] military['s] review was legally *inadequate* to resolve the claims which they . . . urged upon the civil courts." *Burns, 346 U.S. at 146* (emphases added). Indeed, the *Burns* plurality emphasized that the "military reviewing courts *scrutinized* the trial records before rejecting petitioners' contentions," and supported their conclusions with "lengthy opinions." *Id. at 144* (emphasis added). Notably, in lieu of showing that "this military review was legally inadequate," the *Burns* petitioners "simply demand[ed] an opportunity to make a new record." *Id. at 146*.

Thus, viewing *Burns* through the prism of *Dodson*'s four factors leads us to the following conclusion: though the petitioners had effectively satisfied the first three factors— that is, each of those [**60] factors weighed in their favor— *Burns* nevertheless concluded that full merits review was inappropriate because the military courts had adequately considered the substantial constitutional issues before them. That is,

because all four factors that *Dodson* subsequently highlighted were not present, petitioners could not secure full merits review. Or stated otherwise, contrary to Mr. Santucci's contention here, even though the *Burns* petitioners presented substantial constitutional issues largely free of factual issues, that was not sufficient to secure full merits review from the Article III court. Instead, consistent with the requisite four-factor framework we have described, *Burns* effectively refused to conduct full merits review because all four factors were not present. Thus, the Court's decision in *Burns*, in effect, coheres with the requisite, four-factor *Dodson* framework we have outlined, which supports our conclusion that *Monk* and the other pre-*Dodson* caselaw upon which Mr. Santucci relies should be read as being congruent with that framework, too.

In sum, we conclude that Mr. Santucci has not demonstrated that the harmonization or reconciliation of the pre-*Dodson* caselaw that he identifies with *Dodson* itself [**61] supports the adoption of the rule he [*871] advances: *viz*., the rule that, irrespective of whether the other *Dodson* factors weigh in favor of the military petitioner, the presentation of a substantial constitutional issue that is largely free of factual disputes provides a sufficient basis for an Article III court to conduct full merits review of the claim containing that issue.

B

Our framework clarified, "[w]e review the district

court's denial of habeas relief de novo," and address Mr. Santucci's remaining arguments. *Fricke, 509 F.3d at 1289*. First, Mr. Santucci argues that the district court's failure to cite to *Dodson* represented an "erroneous[] . . . overly narrow view of its review authority," and asks us to reverse and remand on that basis. Aplt.'s Opening Br. at 38 (bold-face font omitted). We decline that request: the district court expressly invoked the full-and-fair-consideration framework of *Burns*—which *Dodson*'s reasoning is both predicated on and clarifies—and it is that *Burns* framework that is the ultimate touchstone of a federal habeas court's analysis. Second, we conclude that Mr. Santucci's claims do not satisfy the four-part *Dodson* test. Reviewing Mr. Santucci's claims on the merits would require an impermissible [**62] reweighing of the evidence (i.e., *Dodson* factor 2). Furthermore, the military tribunals adequately considered Mr. Santucci's claims (i.e., *Dodson* factor 4). Because Mr. Santucci fails to satisfy those two factors of the *Dodson* test—when he must demonstrate that all four factors weigh in his favor—we hold that the district court did not err in declining to review his claims on the merits.

1

Mr. Santucci faults the district court for interpreting its review authority too narrowly. *See id.* In its decision, the district court did not explicitly cite to *Dodson* when analyzing Mr. Santucci's challenges; instead, it framed the issue as whether the ACCA had "fully and fairly considered" each constitutional error. *See Santucci, 2020 U.S. Dist. LEXIS 91249, 2020 WL*

*2735748, at *2-4.* Mr. Santucci argues that in declining to explicitly discuss the *Dodson* factors, the district court incorrectly concluded that its "hands were tied": that is, it simply offered a "recitation of the bare facts and conclusions reached by the [ACCA], followed by the conclusion that the [ACCA]'s consideration of the issues had been full and fair." Aplt.'s Reply Br. at 1. He contends that the district court's failure to apply *Dodson* represented an "erroneous[] . . . overly narrow view [**63] of its review authority." Aplt.'s Opening Br. at 38 (bold-face font omitted).

As an initial matter, we hold that the district court's explicit reliance on the "full and fair consideration" standard, without citing *Dodson*, was not itself a legal error because, as we already explained, *Dodson* "merely develops our understanding of full and fair consideration" and "aids our determination of whether the federal court may reach the merits of the case." *Roberts, 321 F.3d at 997*; *see also Squire v. Ledwith, 674 F. App'x 823, 827 (10th Cir. 2017)* (unpublished) (explaining that "the four-factor test is not a separate, independent inquiry from the full-and-fair consideration standard, but rather it is 'an aid in determining whether the claims were fully and fairly considered'" (quoting *Roberts, 321 F.3d at 997*)). Thus, though the district court failed to cite *Dodson*, its identification of the full-and-fair-consideration standard when formulating its standard of review—as well as its citations to other controlling cases, one of which explicitly refers to *Dodson*'s four-part framework (i.e., *Thomas, 625 F.3d at 670*)—confirms that it did not adopt an overly narrow [*872] view of

its authority.[18] *See Santucci, 2020 U.S. Dist. LEXIS 91249, 2020 WL 2735748, at *2*. Accordingly, we reject Mr. Santucci's first argument.

---

[18] Mr. Santucci faults the district court for relying on unpublished Tenth Circuit decisions in *Nixon v. Ledwith, 635 F. App'x 560 (10th Cir. 2016)* (unpublished), and *Templar v. Harrison, 298 F. App'x 763 (10th Cir. 2008)* (unpublished)—which he points out were decided on waiver and mootness grounds—and suggests that this evinces the court's departure from the four-part *Dodson* framework. *See* Aplt.'s Opening Br. at 43. But though these cases were decided on different grounds, the principles they articulate—and on which the district court relied—are consistent with those established in controlling precedent, including *Dodson*. *See Nixon, 635 F. App'x at 563* (quoting *Burns, 346 U.S. at 140*, for the proposition that Congress has provided "a complete system of review within the military system" to secure the constitutional rights of those subject to military law); *Templar, 298 F. App'x at 765* (quoting *Lips, 997 F.2d at 811*, for the proposition that the court would not grant habeas "simply to re-evaluate the evidence" when a claim had already received full and fair consideration by a military tribunal).

Mr. Santucci also attempts to distinguish our published decision in *Thomas*, which the district court cited, on the grounds that the *Thomas* court "resolved the case based on *28 U.S.C. § 2253(a)*, not *Section 2241* as [Mr.] Santucci invokes." Aplt. Opening Br. at 43-44. But the district court's decision that we reviewed in *Thomas* was itself reviewing a *Section 2241* petition. *See Thomas, 625 F.3d at 668-69*. In any event, this appears to be a distinction without a difference. The proposition from *Thomas* that the district court cited when reviewing Mr. Santucci's claims—that "[a] federal habeas court's review of court-martial proceedings is narrow," *Santucci, 2020 U.S. Dist. LEXIS 91249, 2020 WL 2735748, at *2* (citing *Thomas, 625 F.3d at 670*)—stems from *Burns* itself, *see 346 U.S. at 139* ("[I]n military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in civil cases.").

2

Next, we conclude that Mr. Santucci is not entitled [**64] to a merits review under the *Dodson* factors because his claims (a) involve factual questions and (b) were adequately considered by the ACCA.

a

Mr. Santucci asserts that his habeas claims satisfy *Dodson* because they are "constitutionally substantial . . . [and] are largely free of factual issues and are questions of law." Aplt.'s Opening Br. at 41. Specifically, he argues that the *trial judge's* "inappropriate propensity instruction" and "failure to give the mistake-of-fact instruction" present "substantial" constitutional errors that are "free of factual issues." Aplt.'s Reply Br. at 6-7. In that vein, he frames his claims as "relat[ing] directly to due process, fundamental fairness, the *Sixth Amendment*, and the legal efficacy of the conviction and sentence." Aplt.'s Opening Br. at 41. Mr. Santucci's argument does not survive close inspection.

That is because the overarching thrust of Mr. Santucci's appellate challenges is an attack on the ACCA's methodology in applying the *harmless error standard* vis-à-vis the two instructional errors that occurred during his court-martial—a methodology which he contends did not properly take into account the cumulative effects of the errors—rather than an attack on [**65] the ACCA's conclusions regarding the legality of the instructions, themselves. *See* Aplt.'s

Opening Br. at 14 ("As [Mr.] Santucci urged to [the] 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 [Mr.] Santucci—not evaluating each error individually and in isolation from the others."); *id.* ("To date, no court . . . has addressed the cumulative effects of these fundamental [*873] fairness errors."); *id.* at 42 (noting that the district court failed to "explain how review can be 'full' when an Article I tribunal failed [to] apply the law of 'harmless error' to the cumulative effects [of] a series of defective jury instructions and . . . mistakes by defense counsel"). *Compare* Aplt.'s App. at 57 ("The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence." (quoting *United States v. Kreutzer, 61 M.J. 293, 298 (C.A.A.F. 2005)*)), *with* Aplt.'s Opening Br. at 27 (citing to *Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)*, which establishes the same standard). *See generally* Aplt.'s Opening Br. at [**66] 32-35 (discussing cumulative error). And it makes sense that this would be so: there is no basis for Mr. Santucci to question the ACCA's consideration of the constitutionality of the instructions themselves because the court ruled in his favor.[19] In evaluating Mr. Santucci's due-process

---

[19] In addition, we note that Mr. Santucci failed to exhaust one of his key arguments—based on the mistake-of-fact instruction—by abandoning it in his petition to the CAAF. *See Nixon, 635 F. App'x*

claims, the ACCA already recognized that the military

---

at 565 (reasoning that "[l]ike a state prisoner, a military prisoner must fully exhaust his claims in the military courts before raising a claim on federal habeas review" and a petitioner thus must "raise [a claim] in his petition to the CAAF" to preserve it). *HN23*[ ] Where a petitioner fails to exhaust an issue before the CAAF, and "nothing in the record," *id.*, indicates any cause for a procedural default or actual prejudice resulting from the error, the claim is considered waived, *see id. at 565-66. See id. at 565 n.6* (holding that petitioner's arguments about an error at the intermediate military appellate court "could have and should have been raised in his petition for review to the CAAF"); *cf. Lips, 997 F.2d at 812* ("Nothing in the record before us indicates that there was any 'excuse' for either of these procedural defaults, and hence the 'cause and actual prejudice' standard was not met. Accordingly, the claim of improper cross examination will not be reviewed 'on the merits' in the present federal habeas corpus proceeding." (quoting *Watson, 782 F.2d at 145*)).

Here, Mr. Santucci raised the mistake-of-fact issue in his *Grostefon* brief to the ACCA, *see* Aplee.'s Suppl. App. at 60, but there is no indication that he renewed it in his appeal to the CAAF. *See id.* at 86-90 (Suppl. to Pet. for Grant of Review, filed Nov. 26, 2016) (raising solely an *Appointments Clause* challenge in the main supplement to the petition for review); *id.* at 92-97 (raising a challenge to the propensity instructions, the legal sufficiency of the evidence, and prejudicial arguments by the prosecution in the *Grostefon* brief while failing to mention mistake-of-fact instructions). Accordingly, his failure to renew his argument before the CAAF when he "could have and should have" raised it likely constitutes waiver. The government conceded at oral argument, however, that it failed to argue failure to exhaust or waiver. Because we affirm the denial of habeas relief on other grounds, we express no opinion on whether the government may waive its exhaustion or waiver contentions in this context. *Cf. United States v. Calderon, 428 F.3d 928, 930-31 (10th Cir. 2005)* (holding the government may waive an appeal waiver in a plea agreement).

court-martial judge erred by giving the jury unconstitutional propensity instructions and by failing to instruct the jury on Mr. Santucci's mistake-of-fact affirmative defense. *See* Aplt.'s App. at 57. Mr. Santucci's present challenge thus cannot reasonably be viewed as taking issue with the ACCA's purely legal determination that the military trial court's instructions—viewed as a whole—were unconstitutional. This conclusion is no longer in dispute.

As the district court rightly recognized in rejecting his habeas petition, Mr. Santucci argues that the court incorrectly *applied* the *harmless error* standard. *See Santucci, 2020 U.S. Dist. LEXIS 91249, 2020 WL 2735748, at *4* ("Notably, [*874] 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 [**67] 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.").

HN24[ ] A harmless-error issue is—to say the least—a factintensive one. *See Acosta v. Raemisch, 877 F.3d 918, 932 (10th Cir. 2017)* (noting that constitutional trial errors are "amenable to harmless-error analysis because [they] may be *quantitatively assessed in the context of the other evidence presented* in order to determine the effect [they] had on the trial" (emphasis added) (quoting *Brecht v. Abrahamson, 507 U.S. 619, 629, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993)*)); *United*

States v. Holly, 488 F.3d 1298, 1307 (10th Cir. 2007) ("A constitutional error is harmless and may be disregarded if 'it appears beyond a reasonable doubt that the error complained of did not *contribute* to the verdict obtained.'" (emphasis added) (quoting *Neder v. United States, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)*)); *see also* 3B Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 854 (4th ed.), Westlaw (database updated December 2022) (noting that, when applying the harmless error standard, "the court necessarily must look to the circumstances of the particular case").

Replete with contentions that the ACCA should have weighed the evidence differently in reviewing for harmless error, Mr. Santucci's briefing effectively proves the point. *See* Aplt.'s Opening Br. at 23 (arguing that the trial judge's [**68] errors were prejudicial because Mr. Santucci "testified [o]n his own behalf," "the physical evidence was inconclusive on the question of consent," and "the jury would have had two bases . . . on which to acquit [Mr.] Santucci" had the mistake-of-fact instruction issued); *id.* at 24 (arguing that "at least 13 material and uncontested points" introduced at trial demonstrated his theory that he believed TW consented and would have supported the instruction);[20] *cf. id.* at 24 (arguing that "[h]ad [the]

[20] Such points, which are not outlined in Mr. Santucci's appellate brief but are listed in his habeas petition to the district court, included TW buying drinks for Mr. Santucci and dancing with him at the bar, initiating sexual contact with Mr. Santucci afterwards, making various statements to Mr. Santucci indicating consent,

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").

Our de novo assessment of Mr. Santucci's constitutional claims thus reveals that they are unsuitable for merits review by an Article III court precisely because they present a fact-intensive challenge—centered on the ACCA's harmless error determination—that would require us to impermissibly "reevaluate the evidence" in contravention of *Dodson*'s second factor. *Burns, 346 U.S. at 142*. It is the very sort of challenge that we cannot review under both *Burns* and our own caselaw.

HN25[ ] In sum, the second *Dodson* factor, as well as *Burns* itself, indicate that we may [**69] only review issues "of law rather than of disputed fact already determined by the military tribunals." *Dodson, 917 F.2d at 1252* (emphasis omitted). Here, Mr. Santucci's disagreement with the ACCA's harmless-error assessment hinges upon how it weighed the trial evidence in determining harmlessness. Yet, it is not our role to decide whether we would have weighed [*875] the evidence of harmlessness in a different manner than the ACCA. Under the full-and-fair-consideration framework outlined above, Mr. Santucci's failure as to the second factor is sufficient to doom his claim for full merits review.

---

and performing certain sexual acts on Mr. Santucci. *See* Aplt.'s App. at 12-13.

b

Nevertheless, in addition to failing to satisfy *Dodson*'s second factor, Mr. Santucci's habeas petition falters at *Dodson*'s "most important" fourth factor. *Thomas, 625 F.3d at 671*; *see Dodson, 917 F.2d at 1253* (noting that military tribunals must give adequate consideration to the issues and apply the proper legal standards). Though the ACCA deemed the instructional errors harmless, Mr. Santucci argues that the ACCA's failure to consider the *cumulative* effects of the instructional errors when deciding that they were harmless evinced that it applied an improper legal standard. *See* Aplt.'s Opening Br. at 46. Accordingly, Mr. Santucci reasons that his claim satisfies *Dodson [**70]* 's fourth factor. *See id.* We disagree.[21]

HN26[ ] When evaluating a military court's decision, "[w]e do not 'presume a military appellate court has failed to consider all the issues presented to it before making a decision.'" *Brown v. Gray, 483 F. App'x 502, 505* (unpublished) (quoting *Thomas, 625 F.3d at 672*); *see Watson, 782 F.2d at 145* ("When an issue is briefed and argued before a military board of review . . . the military tribunal has given the claim fair

---

[21] Mr. Santucci did not exhaust this argument by failing to raise it in the CAAF. *See* Aplee.'s Suppl. App. at 92-97. Once more, the government did not identify the exhaustion issue. *See supra* note 19. Accordingly, given our resolution of this appeal—upholding the district court's denial of habeas relief for unrelated reasons—we need not examine whether the government's failure to make an exhaustion or waiver argument itself constituted waiver of such an argument.

consideration, even though its opinion summarily disposed of the issue with the mere statement that it did not consider the issue meritorious or requiring discussion."). And Mr. Santucci, himself, claims that he "urged [the] Article I tribunals" to consider "the proper [harmless error] analysis" by considering the "cumulative effects these . . . errors had on the proceedings overall." Aplt.'s Opening Br. at 14.

Thus, we may fairly infer that, insofar as the ACCA conducted a reasonably thorough evaluation of Mr. Santucci's asserted constitutional claims that it implicitly considered the cumulative effects of these asserted errors. And it is clear to us that the ACCA did conduct such a reasonably thorough evaluation—and then some.

The ACCA opinion evinces that it fully analyzed the record and the effects of the [**71] instructional errors. It acknowledged that the military judge committed the instructional errors; yet the court nevertheless offered a rationale for why those errors were harmless beyond a reasonable doubt, which relied on the evidence presented at trial, as well as the jury's findings on other charges unaffected by the instructional errors. *See, e.g.*, Aplt.'s App. at 57 (relying on "the strength of TW's testimony, corroborated by medical providers and witnesses, regarding the injuries she sustained" to conclude that "this was clearly not a situation from which appellant [i.e., Mr. Santucci] could have feasibly claimed an honest, reasonable, mistaken belief that TW was consenting to his misconduct"); *id.* (noting that Mr. Santucci only argued at trial that "TW

actually consented, not that [he] mistakenly believed she did"); *id.* (holding the failure to give the mistake-of-fact instruction as to rape was harmless because the jury *did* receive this instruction [*876] as to forcible sodomy and still convicted Mr. Santucci on this count); *id.* (concluding that the propensity instruction was harmless because there was no question "whether sexual contact occurred between TW and [Mr. Santucci]" and [**72] the evidence left "no doubt that TW was not a willing participant"); *id.* (reasoning that the propensity instruction was also harmless because it had only been used to evince Mr. Santucci's propensity to sexually assault JM, for which Mr. Santucci was *acquitted*).

Mr. Santucci points to nothing in the ACCA's analysis that causes us to question whether its thorough review encompassed his cumulative-error argument. Rather, he seeks to relitigate his contentions against a finding of harmless error that were already considered—and rejected—by the ACCA, including the improper statements by the prosecution, Aplt.'s Opening Br. at 33-34, the jury suspending deliberations to seek clarification from the trial judge on the rape and sexual assault specifications, *id.* at 34 n.3, and the strength of the evidence presented by Mr. Santucci, *id.* at 34-37. But we cannot fault the ACCA's analysis—much less subject it to full merits review—simply because it viewed this evidence differently than Mr. Santucci. In the habeas context, the district court was in no position to reevaluate evidence when it was already presented to the military court—nor are we. *See Thomas, 625 F.2d at 670.* In

sum, Mr. Santucci has not given us reason to conclude that the ACCA [**73] committed any legal error in overlooking his cumulative-error argument.

Thus, Mr. Santucci also fails to make an adequate showing as to *Dodson*'s fourth factor—*viz.*, the adequate-consideration criterion—which we have described as "the most important." *Thomas, 625 F.3d at 671*. This, too, is sufficient to sound the death knell for Mr. Santucci's argument for full merits review—predicated on the mistaken notion that the ACCA did not fully and fairly consider his claims.

III

For the foregoing reasons, we **AFFIRM** the district court's denial of Mr. Santucci's petition for habeas corpus.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

ANTHONY V. SANTUCCI,
Petitioner,

v. CASE NO. 19-3116-JWL

COMMANDANT, United States Disciplinary Barracks,
Respondent.

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 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". 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 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 (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 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 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 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 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 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 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, 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

---

[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.

whether the 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

APPENDIX C

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
CAMPANELLA, HERRING, and PENLAND
Appellate Military Judges

UNITED STATES, Appellee
v.
Private E1 ANTHONY V. SANTUCCI
United States Army, Appellant

ARMY 20140216
Headquarters, Joint Readiness Training Center and Fort Polk
Gregory A. Gross, Military Judge
Colonel Samuel A. Schubert, Staff Judge Advocate

For Appellant: Major Christopher D. Coleman, JA; Captain Amanda McNeil Williams, JA; Mr. Frank J. Spinner, Esquire (on brief); Mr. Philip D. Cave, Esquire (on supplemental brief); Captain Matthew D. Bernstein, JA.

For Appellee: Lieutenant Colonel A.G. Courie III, JA; Major Scott L. Goble, JA; Captain Linda Chavez, JA (on brief).

30 September 2016

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

PENLAND, Judge:

A panel composed of officer and enlisted members sitting as a general court-martial convicted appellant, 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, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §§ 920, 925, 928, 934 (2012).[1] The panel sentenced appellant to a dishonorable discharge, confinement for twenty years, and forfeiture of all pay and allowances. The convening authority approved the adjudged sentence.

We review this case under Article 66(c), UCMJ. Appellant raises three assignments of error, two of which merit discussion but no relief. 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. Finally, we briefly discuss and grant relief based on an unreasonable multiplication of charges.

---

[1] In accordance with appellant's plea, the military judge found him guilty of one specification of false official statement, in violation of Article 107, UCMJ.

BACKGROUND

Appellant engaged in sexual intercourse with JM, between 19-20 April 2013, and TW on 6 July 2013. These two events led to his prosecution for, *inter alia*, sexual assault with respect to JM and rape, sexual assault, and forcible sodomy with respect to TW.[2]

Ms. JM, who was married to another soldier, testified that she first met appellant at the Paradise bar when, as she was passing by him, he grabbed her and said "[l]et me buy you a shot." After spending an evening drinking shots with appellant, her husband picked her up and took her home. Over the next week, JM and appellant exchanged texts, some of which were flirtatious. On 20 April 2013, JM agreed to hang out with appellant in his barracks room. She testified she wanted somebody to talk to, as she and her husband were having marital difficulties. Once at appellant's barracks room, the two proceeded to drink bourbon and talk. After most of the bourbon was gone, JM agreed to appellant's offer for a backrub. She testified the massage was "rough and scary." JM decided to leave, at which point appellant pushed her on his bed and exposed his penis. At some point after that, she fell asleep. JM, who by then was drunk, next remembered appellant on top of her, engaging in sexual intercourse. She was able to kick appellant off of her, and then left the barracks. She eventually made it back to her home, but couldn't remember the ride.

---

[2] The forcible sodomy occurred at the same time and place as the rape and sexual assault.

She later reported the assault to a neighbor and her husband.

At trial, appellant admitted engaging in sexual intercourse with JM, but claimed it was consensual.

On the evening of 5 July 2013, Ms. TW, who was also married to another soldier, went alone to the Paradise bar. There she first met appellant when she sat next to him at the bar. Over the course of several hours, the two had several drinks and danced. They eventually left the bar and TW offered to drive appellant home. After swerving and nearly hitting another car, TW pulled over and appellant took the wheel. TW testified she remembered little after appellant began driving. Appellant took TW to his barracks at Fort Polk. She didn't remember the ride or entering the installation. She testified the next thing she remembered was appellant carrying her up concrete stairs to his room. The following colloquy between trial counsel and TW described what happened once in the room:

> Q: Now tell us when you went into [appellant's] room, what can you remember[?]
>
> A: I remember him being on top of me and choking me. I remember being slapped in the face.
>
> Q: What else do you remember?
>
> A: I remember him saying a lot. I remember

him just choking me. It's like he wanted a reaction, but I didn't give it to him. He just looked evil. And I remember being flipped over on my stomach and—it's hard to say.

Q: Go ahead, just say it.

A: He did me in the butt. It hurt really bad.

Q: Did he put his penis anywhere else?

A: My vagina.

Q: Which one first?

A: My vagina.

Later, in describing her injuries:

Q: When he put his penis in your butt, did you suffer any injury from that?

A: I remember being in the bathroom and I was bleeding.

Q. Now did you suffer other injuries?

A: I had bruises on my arms. My face was swollen from being slapped. My head was sore, and I was hit in the head. And I had scratches on my back. I had bruises on my legs.

[. . .]

A. I was also bitten on my face and my arms.

She later reported the assault to the police.

A subsequent examination of TW by a licensed nurse noted bruises and scratches on her arms, neck, and legs, as well as teeth marks on TW's face and redness on her rectum. These injuries were documented in various government exhibits admitted by the military judge.

During his testimony, appellant admitted to engaging in vaginal and anal intercourse with TW. He characterized this interaction as "rough" sex and claimed TW consented.

At the close of evidence on findings, the military judge, without objection by either party, provided a standard Military Rule of Evidence [hereinafter Mil. R. Evid.] 413 instruction allowing the members to consider the allegations involving TW as propensity evidence in relation to the sexual assault allegation involving JM. *See* Dep't of Army, Pam. 27-9, Legal Services, Military Judges' Benchbook [hereinafter Benchbook], para. 7-13-1, n.4 (1 Jan. 2010). The military judge specified that the members could only consider such propensity evidence if they first determined by a preponderance of evidence that appellant raped TW. The government did not request, and the military judge did not provide, a similar instruction for considering the allegation involving JM as propensity evidence for the offenses involving TW.

Defense counsel requested a mistake of fact instruction with regard to TM and JW. Although the military judge did not specifically rule on the request, he did instruct the panel regarding mistake of fact with respect to the specifications of sexual assault, both of which alleged the victims were incapable of consent due to impairment, and forcible sodomy. However, the military judge did not give the mistake of fact instruction with respect to the rape allegation, Specification 1 of Charge I, which alleged appellant used unlawful force by "forcing his penis inside the vulva of [TW] with physical strength sufficient that she could not avoid or escape the sexual conduct."[3] During closing, government counsel-while arguing she did not do so-acknowledged that if TW had consented to the sexual activity, then appellant would not be guilty of using "unlawful" force. The panel convicted appellant of, *inter alia*, raping, sexually assaulting and forcibly sodomizing TW, but acquitted appellant of sexually assaulting JM.

Before sentencing deliberations, the military judge instructed the panel to consider the rape and sexual assault specifications involving TW as one for sentencing purposes.

LAW AND DISCUSSION

---

[3] The military judge correctly instructed the members that "evidence concerning consent to the sexual conduct is relevant and it must be considered in determining whether the government has proven the element that the sexual conduct was done by using unlawful force beyond a reasonable doubt."

A. Military Rule of Evidence 413 Instruction

Appellant asserts the military judge erred by instructing the members they could use the evidence of appellant's rape of TW as propensity evidence in relation to the sexual assault allegation involving JM.[4] Based on our superior court's decision in *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016), we agree.

We review a military judge's decision to admit evidence under Mil. R. Evid. 413 for an abuse of discretion. *United States v. Solomon,* 72 M.J. 176, 179 (C.A.A.F. 2013). "Whether a panel was properly instructed is a question of law we review de novo." *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008) (citation omitted). Where an instructional error rises to a constitutional dimension, we review the error to determine if it was harmless beyond a reasonable doubt. *United States v. Kreutzer*, 61 M.J. 293, 298 (C.A.A.F. 2005) (citations omitted). "The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence." *Id.* (citations and internal quotation marks omitted).

Here, the military judge's Mil. R. Evid. 413

---

[4] Appellant assigns two errors on this topic, first alleging error "in considering the specifications as propensity evidence" and, second, error regarding the "instructions on how the members were to evaluate and use the propensity evidence." For purposes of this decision, we consider them together.

instruction was improper based on our reading of *Hills*. As our superior court noted in that case, "[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." 75 M.J. at 356. We, however, find beyond a reasonable doubt that the error, under the circumstances of this case, was harmless and did not contribute to appellant's conviction or sentence.

First, the issue here was not whether sexual contact occurred between TW and appellant. Appellant admitted to having vaginal and anal intercourse with TW. The injuries suffered by TW, as corroborated by the testimony of a medical provider and other witnesses, leave no doubt that TW was not a willing participant. Her testimony credibly established, as well, that she was incapable of consenting to this conduct due to her extreme state of intoxication.

Second, the propensity instruction was uni-directional. The panel was not instructed inversely, and appellant was acquitted of sexually assaulting JM. The instruction only allowed the panel to consider appellant's rape of TW as evidence appellant had a propensity to sexually assault JM. Appellant's acquittal of sexually assaulting JM removed any risk of harm caused by the instruction. Appellant's acquittal of the assault of JM, if anything, shows the members were not confused in applying the appropriate burden of proof-beyond a reasonable doubt-as to each charged offense. JM's allegation, in

contrast to the allegations involving TW, was not supported by corroborative physical evidence.

B. Mistake of Fact Instruction

Appellant personally alleges the military judge erred by not instructing the panel on mistake of fact with respect to the rape specification. We agree. *See United States v. Willis*, 41 M.J. 435, 437 (C.A.A.F. 1995). However, we again conclude appellant suffered no prejudice. We so conclude based on the strength of TW's testimony, corroborated by medical providers and witnesses, regarding the injuries she sustained as a result of his violence on the night in question. Viewing the evidence in its entirety, 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. We also note the panel received the mistake of fact instruction with respect to the forcible sodomy specification-of which appellant now stands convicted-yet defense counsel made no argument that appellant mistakenly believed TW consented. Indeed, the defense theory throughout the trial was that TW actually consented, not that appellant mistakenly believed she did. While *some* evidence raised the instructional requirement with respect to rape, we are confident beyond a reasonable doubt that its omission did not contribute to the verdict. "Providing the panel with an incorrect instruction as to an affirmative defense is an error of constitutional magnitude" which we examine to determine if it is harmless beyond a reasonable doubt. *United States v. Chandler*, 74 M.J. 674, 685 (C.A.A.F.

2015) (citations omitted). Having done so, we find no reasonable possibility the lack of a mistake of fact instruction "'contribute[d] to the [appellant's] conviction.'" *Id.* (quoting *United States v. Davis*, 73 M.J. 268, 271 (C.A.A.F. 2014).

C. Unreasonable Multiplication of Charges

The findings, as approved by the convening authority, contain an unreasonable multiplication of charges, being the rape and sexual assault of TW (Specifications 1 and 2 of Charge I, respectively). The military judge remedied the problem, in part, by instructing the panel to consider the two offenses as one for sentencing. Perhaps exigencies of proof motivated the government's charging decision-in which case *United States v. Elespuru,* 73 M.J. 326, 329-30 (C.A.A.F. 2014), would control-but we are ill-equipped to make that determination where defense counsel made no motion for appropriate relief as to findings at trial. Therefore, appellant has forfeited the error.

Nonetheless, under our Article 66(c), UCMJ, authority to affirm only so much of the findings and sentence as "should be approved," we shall provide relief. We give great weight to our determination that under the facts and circumstances of this case, convictions for rape and sexual assault unreasonably exaggerate appellant's criminality. *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001).

CONCLUSION

Specification 2 of Charge I is conditionally set aside and DISMISSED. *See United States v. Briton*, 47 M.J. 195, 203 (C.A.A.F. 1997) (J. Effron concurring); *United States v. Hines*, 75 MJ __, 2016 CCA LEXIS 439, *7-8 fn4 (Army. Ct. Crim. App. 27 Jul. 2016); *United States v. Woods*, 21 M.J. 856, 876 (A.C.M.R. 1986). Our dismissal is conditional on Specification 2 of Charge I surviving the "final judgment" as to the legality of the proceedings. *See* Article 71(c)(1) (defining final judgment as to the legality of the proceedings).

The remaining findings of guilty are AFFIRMED.

Reassessing the sentence in accordance with the principles of *United States v. Winckelmann*, 73 M.J. 11 (C.A.A.F. 2013) and *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986), the sentence is AFFIRMED. Our decision to conditionally set aside and dismiss one specification does not change the penalty landscape. The nature of the remaining offenses captures the gravamen of appellant's crimes: raping and forcibly sodomizing TW. We have experience with the types of sentences resulting from cases such as this one, and, based on the affirmed findings of guilty, we are confident the panel would have adjudged a sentence at least as severe as that which we affirm. We further find the affirmed sentence not inappropriately severe.

All rights, privileges, and property, of which appellant has been deprived by virtue of the portion of the findings set aside by this decision are ordered

restored. *See* UCMJ art. 75(a).

Senior Judge CAMPANELLA and Judge HERRING concur.

[SEAL GRAPHIC]

FOR THE COURT:

/s/

MALCOLM H. SQUIRES, JR.
Clerk of Court

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ANTHONY V. SANTUCCI,
Petitioner,

v. Case No. 19-3116-JWL

COMMANDANT, United States Disciplinary Barracks, 1301 North Warehouse Road
Fort Leavenworth, Kansas 66027,
Respondent.

PETITION FOR A WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2241

Petitioner, by his attorneys JOSEPH, HOLLANDER & CRAFT LLC and MAHER LEGAL SERVICES PC, respectfully requests the Court to award a writ of habeas corpus pursuant to 28 U.S.C. § 2241, reverse and vacate the findings and sentence, and free Petitioner from Federal incarceration.

John N. Maher *pro hac vice*
Kevin J. Mikolashek
David Bolgiano
Don Brown
MAHER LEGAL SERVICES PC
26 South Third Street, Box 68
GENEVA, ILLINOIS 60134

Tel: (708) 468-8155
johnmaher@maherlegalservices.com

Christopher Joseph, #19778
Carrie Parker, #24988
Diane Bellquist, #20969
JOSEPH, HOLLANDER & CRAFT LLC
1508 SW Topeka Blvd.
Topeka, KS 66612-1887
(785) 234-3272 Main
(785) 234-3610 Fax
cjoseph@josephhollander.com

TABLE OF CONTENTS

W/SANTUCCI AT PARADISE BAR ON NIGHT IN QUESTION

ATTACHMENT B – DIGITAL IMAGES OF TW AT PARADISE BAR 21 DAYS AFTER ALLEGED RAPE

ATTACHMENT C – FACEBOOK POSTING OF TW IN RELATIONSHIP WITH ANTHONY CRAFT IN ALABAMA TWO MONTHS AFTER ALLEGED RAPE

ATTACHMENT D – FACEBOOK POSTING OF ANTHONY CRAFT IN RELATIONSHIP WITH TW TWO MONTHS AFTER ALLEGED RAPE

I. THE PARTIES

Petitioner Anthony V. Santucci, (Santucci) formerly Private (E-1) of Bravo Company, 1/509th Infantry Regiment, Joint Readiness Training Center, Fort Polk, Louisiana, United States Army, is incarcerated by Federal officials in the United States Disciplinary Barracks (USDB) on Fort Leavenworth, Kansas with Registration Number 93723.

Respondent is the senior Federal officer responsible for the Military Corrections Complex in which Santucci is confined pursuant to the findings and sentence of a US Army General-Court Martial.

The United States Army Litigation Division, United States Army Legal Services Agency, 9275 Gunston Road, Fort Belvoir, Virginia 22060, and The United States Attorney's Office for the District of Kansas, 444 S.E. Quincy, Suite 290, Topeka, Kansas 66683, represent Respondent.

II. JURISDICTION

The Court possesses subject matter jurisdiction pursuant to 28 U.S.C. § 2241, habeas corpus for military servicemembers. The Court is authorized to grant relief as law and justice require pursuant to 28 U.S.C. § 2243.

Santucci has completed direct military review pursuant to Article 66, 10 U.S.C. § 866 and Article 67, Uniform Code of Military Justice (UCMJ), 10 U.S.C §

867 and seeks collateral civilian review of his court-martial convictions and sentence.

On September 27, 2017, the US Army Court of Criminal Appeals (Army Court), denied each of Santucci's assignments of error brought pursuant to 10 U.S.C. 866.

On February 15, 2018, pursuant to 10 U.S.C. § 867, the US Court of Appeals for the Armed Forces (CAAF) granted Santucci's Petition for a Grant of Review but summarily affirmed the convictions and sentence in the same action. *United States v. Santucci*, ARMY 20130743.[1]

On June 28, 2018, the United States Supreme Court denied Santucci's Petition for a Writ of

---

[1] 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. 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 CAAF, consisting of five civilian judges appointed by the President. 10 U.S.C. § 867. Review at the second level is largely discretionary. *Id*. 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).

Certiorari brought pursuant to 28 U.S.C. § 1259.[2]

III. VENUE

Because Santucci is confined by Federal officials in Leavenworth, Kansas, venue is proper in this district pursuant to 28 U.S.C. § 2241.

IV. PROCEDURAL HISTORY

This case raises four main constitutional issues in the context of a private sexual encounter between adults after a night of drinking and dancing in a local bar.

First, the trial judge refused to deliver a defense-requested instruction that the jury could have used to find Santucci not guilty of raping TW (mistake of fact).

Second, the trial judge issued an unconstitutional propensity instruction which diluted the prosecution's standard of proof beyond a reasonable doubt to merely a preponderance of the evidence. Both errors contributed to Santucci's convictions and sentence.

Third, defense counsel unreasonably made 25 errors which deprived Santucci of the effective assistance of counsel in violation of the Sixth Amendment.

---

[2] The *Abdirahman* petition for certiorari (which contained Santucci's petition for certiorari consolidated with 167 others) was denied on June 28, 2018.

Fourth, Article I military courts failed to fully and fairly evaluate Santucci's constitutional claims by declining to apply prevailing legal precedents and misapplying its Article 66, UCMJ plenary review authority by ignoring significant evidence of record favorable to the defense.

On February 19, 2014, and March 19 – 21, 2014, 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 (concerning TW), 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.

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 relating to TW) 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.

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

The United States Supreme Court denied certiorari on June 28, 2018.

V. STATEMENT OF FACTS

Santucci was 21-years-old at the time of the incidents giving rise to this case. He is a native of Canfield, Ohio, born in 1991, who joined the Army one year after high school and spent the next two years serving on Fort Polk, Louisiana, in the Infantry.

On the afternoon of July 5, 2013, 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 a mother to four, TW informed him that she was in the process of getting a divorce. (R. at 370).

A color digital image of TW dancing with Santucci at the Paradise Bar on the night in question

is enclosed as Attachment A. 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, as she told Santucci, she was self-conscious about her C-section scar.

Santucci performed oral sex on TW, which she enjoyed, given her "moans of pleasure." (R. at 327-28). In the "missionary" vaginal sexual position, TW dug her nails into Santucci's back and buttocks and observed 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 allowed Santucci to insert his thumb into her anus, then spit on his penis and inserted it into her anus. (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, the two momentarily stopped sexual contact and cleaned up in the bathroom, 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, then he was not guilty of rape. Such evidence included:

(1) TW's buying drinks for Santucci,

(2) TW's dancing with him provocatively on the

pole;

(3) while kissing him;

(4) grabbing his crotch while dancing;

(5) asking to go to Santucci's room to "play;"

(6) telling Santucci to take his clothes off;

(7) taking her own clothes off;

(8) leaving her shirt on because of a C-section scar;

(9) performing oral sex on Santucci;

(10) getting on top of Santucci for vaginal sex;

(11) telling him he had a "swimmer's butt;"

(12) dressing herself; and

(13) kissing him goodbye (which makes no sense after a rape).

Although the trial judge did not instruct on the mistake of fact defense, he did 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 trial judge informed that the jury could, based on preponderant evidence of

raping TW, conclude that Santucci was predisposed to commit sexual offenses. As the trial judge wrongly instructed:

> 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).

During closing argument, the prosecutor reminded the jury that the trial judge issued this instruction, and that the standard of proof was "by a preponderance of the evidence."

> ...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).

VI. SUMMARY OF SANTUCCI'S PETITION

The first constitutional errors presented involve the trial judge's unconstitutional instructions, which deprived Santucci of his constitutional right to a fair trial and a complete defense. Pursuant to Rule for Courts-Martial (RCM) 916, if a special (affirmative) defense is reasonably raised by the evidence, the judge has a duty to instruct the jury on the defense. *United States v. Davis*, 53 M.J. 202, 205 (C.A.A.F. 2000). For at least the 13 reasons listed above, the evidence at trial reasonably raised the mistake of fact defense – that Santucci (who testified in his own behalf) was honestly and reasonably mistaken as to TW's consent or apparent consent to sex.

Defense counsel asked the trial judge to issue the instruction to the jury, but the trial judge refused, thereby depriving Santucci of a constitutional right of having the judge tell the jury that if they believed Santucci, based on at least 13 undisputed facts bearing on consent and mistake of fact, they could find

Santucci not guilty of raping TW. Santucci's counsel was consequently unable to use the mistake of fact defense forcefully in his closing summation, compounding the trial judge's constitutional trial error and unfairly prejudicing Santucci.

Adding to the mistake of fact instructional error, the trial judge issued an unconstitutional "propensity" instruction informing the jury that if they believed, by a preponderance of the evidence, that Santucci raped TW, the jury could find him guilty of sexually assaulting JM. The trial judge went on to tell the jury it could consider, by preponderant evidence that Santucci raped TW, the "tendency, if any, to show the accused's propensity or predisposition to engage in sexual offenses."

Propensity instructions like these have been flatly rejected as unconstitutional. *United States v. Hills*, 75 M.J. 350, 356 (C.A.A.F. 2016) ("It 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.").

On appeal, the Army Court failed to apply prevailing legal standards to these instructional errors and found neither unfair nor constitutional prejudice. The Army Court did so by mistakenly examining each instructional error individually rather than testing, as is required, the effects all instructional errors had on Santucci's constitutional right to a fair trial with a properly instructed jury – a jury empowered with a

substantial basis to acquit (mistake of fact), limited to applying the correct legal standard (beyond a reasonable doubt, not a preponderance of the evidence), and unauthorized to use propensity evidence. *See*, *e.g.*, *United States v. MacDonald*, 73 M.J. 426, 434 (CAAF 2014).

In addition to the unconstitutional instructional errors, Santucci's next claim arises from counsel's deficient pretrial investigation and preparation, which deprived Santucci of the effective assistance of counsel at trial, citing at least 25 unreasonable errors.

Not only did counsel fail to move to compel the trial judge to issue the mistake of fact instruction in connection with TW, but he also failed to object to the trial judge's giving the unconstitutional propensity instruction. Further, as is more fully explained below, reasonable counsel would have more fully investigated the evidentiary leads in order to make tactical decisions within the range of permissible, non-prejudicial options. That did not occur here, in violation of the Sixth Amendment.

VII. CLAIMS AND ARGUMENTS IN SUPPORT

A. ARTICLE I MILITARY COURTS FAILED TO PROVIDE A DEFENSE REQUESTED JURY INSTRUCTION ON THE AFFIRMATIVE DEFENSE OF MISTAKE OF FACT FOR RAPE, WRONGFULLY GAVE AN UNCONSTITUTIONAL PROPENSITY INSTRUCTION, THEN COMPOUNDED THE CONSTITUTIONAL

ERRORS BY FAILING TO EXAMINE THE CUMULATIVE EFFECTS THE INSTRUCTIONAL ERRORS HAD ON STANTUCCI'S RIGHT TO A FAIR TRIAL AND TO PRESENT A COMPLETE DEFENSE

Providing the jury with an incorrect instruction as to an affirmative defense is "an error of constitutional magnitude." *United States v. Chandler*, 74 M.J. 674, 685 (CAAF 2015). An honest and reasonable mistake of fact to the victim's consent is a defense to rape. *United States v. Hibbard*, 58 M.J. 71 (2003); *United States v. Taylor*, 26 M.J. 127 (CMA 1988); *United States v. Carr*, 18 M.J. 297 (C.M.A. 1984); *United States v. Davis*, 27 M.J. 543 (ACMR 1988); *United States v. True*, 41 M.J. 424 (1995) (mistake of fact as to victim's consent to intercourse cannot be predicated upon accused's negligence; mistake must be honest and reasonable); *United States v. Parker*, 54 M.J. 700 (Army Ct. Crim. App. 2000) (evidence factually insufficient to sustain conviction where accused claimed he mistakenly believed that the victim consented to intercourse and sodomy where she and the accused engaged in a consensual relationship for several months before the first alleged rape, she sent mixed signals to the accused about their relationship and the relationship included consensual sexual acts).

A defendant is entitled to an instruction on a defense that is supported by the evidence and the law. *United States v. Sparks*, 791 F.3d 1188, 1193 (10th Cir. 2015), citing *United States v. Haney*, 318 F.3d 1161,

1163 (10th Cir. 2003). More specifically, a defendant is entitled to an instruction on an affirmative defense if he can point to evidence supporting each element of that defense. *United States v. Al-Rekabi*, 454 F.3d 1113, 1121-22 (10th Cir. 2006). In habeas review cases, the district court reviews the failure of a trial court to issue an instruction *sua sponte* for the denial of fundamental fairness and due process. *Spears v. Mullin*, 343 F.3d 1215, 1244 (10th Cir. 2003).

1. The Trial Judge Failed to Tell the Jury That If They Believed Santucci Honestly and Reasonably Believed TW Consented, He Is Not Guilty of Rape

A military judge is required to give requested instructions "as may be necessary and which are properly requested by a party." RCM 920(e)(7); *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (CMA 1993). During a hearing outside the presence of the jury, the defense asked the trial judge to deliver the "mistake of fact" affirmative defense instruction for the Article 120, 125 (sodomy), and 128 (assault) offenses. (R. at 456). In response, the trial judge noted that he would consider granting the defense request, but made no findings as to the most serious offense, Article 120, Rape. (R. at 458). In the end, the trial judge did not instruct the jury that mistake of fact is an affirmative defense to the most serious crime alleged – raping TW.

"Whether a [jury] was properly instructed is a question of law [reviewed] *de novo*." *United States v. Ober*, 66 M.J. 393, 405 (CAAF 2008). Where an

instructional error rises to a constitutional dimension, a reviewing court analyzes the error to determine if it was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967); *see also United States v. Kreutzer*, 61 M.J. 293, 298 (CAAF 2005). "The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence." *Id.*

Although the accused need not testify in order to warrant the instruction, there must be some evidence introduced during the trial "to which the [jury] could attach credit" to the proposition that the accused both honestly and reasonably believed the victim consented. *See United States v. Davis*, 75 MJ 537 (Army Ct. Crim. App. 2015). If there is any doubt as to whether special defense is in issue, the doubt shall be resolved in favor of appellant. *Davis,* 53 M.J. at 205 (citing *United States v. Steinruck,* 11 M.J. 322, 324 (CMA 1981)).

In this case, the Army Court agreed that the trial judge erred in not providing this instruction to the jury. The following is the mistake of fact instruction that the trial judge should have tailored based on the evidence of mistake of fact and consent, and read to the jury:

> 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 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. 27-9, MILITARY JUDGES BENCHBOOK, page 493 (emphasis added).

However, the Army Court found that Santucci was not prejudiced by the trial judge's failure to issue the instruction. The Army Court reached this erroneous conclusion even though the error is one of "constitutional magnitude." The substantially unfair prejudice, however, is readily seen because the jury was not made aware that it could find Santucci not-guilty of rape if the jury found credible the evidence offered at trial that Santucci honestly and reasonably believed TW consented.

The trial judge should have inserted at least the following evidence into the standard "mistake of fact" instruction, read it to the jury, and defense counsel could have then argued it to the jury as a compelling basis for findings of not guilty:

(1) buying drinks for Santucci,

(2) dancing with him provocatively on the pole;

(3) while kissing him;

(4) grabbing his crotch while dancing;

(5) asking to go to Santucci's room to "play;"

(6) telling Santucci to take his clothes off;

(7) taking her own clothes off;

(8) leaving her shirt on because of a C-section scar;

(9) performing oral sex on Santucci;

(10) getting on top of Santucci for vaginal sex;

(11) telling him he had a "swimmer's butt;"

(12) dressing herself; and

(13) kissing him goodbye after sex.

Had the jury known it could find Santucci not guilty if they believed Santucci mistook these facts for consent or the appearance of consent, the jury may very well have acquitted Santucci of raping TW. But the jury was not instructed that it had the legal authority to find him not guilty under a mistake of fact as to consent.

The Army Court side-stepped this critical point by simply ignoring these 13 undisputed facts bearing on consent. That is, it considered none of these factors on the all-important elemental question of consent and affirmative defense of mistake of fact. Instead, the Army Court dismissed this argument, supporting its conclusion by noting that the defense theory at trial was that TW ***actually*** consented, not that Santucci mistakenly believed she did, as evidence of no prejudicial error.

What the Army Court overlooked, though, is the well-established point that the trial judge's duty to instruct is not determined by the defense's theory of the case, rather, by the evidence adduced. *See United*

States v. McMonagle, 38 M.J. 53 (CMA 1993) (instruction not determined by defense theory);

Even so, the Army Court ignored that Santucci could have argued ***both*** scenarios to the jury, *i.e.,* that TW actually consented, but if she had not, it appeared to Santucci that she had in fact consented – as part of his fundamental due process right to present a complete defense.

Had the instruction been given, defense counsel would have been empowered to make a more compelling closing argument to the jury, for example, listing off the reasonable facts bearing on consent and the mistake of fact defense noted above and invoking the language of the instruction. Consider: "members of the jury, his Honor instructed you a moment ago that if Santucci honestly and reasonably believed that TW consented to sex, he is not guilty of rape. Accordingly, you must acquit Santucci of rape. Let us review the evidence showing the he honestly and reasonably believed TW consented…." That never happened, but it should have in order to comply with the Constitution. Nor did the Army Court include this scenario in its affirmance.

The trial judge's failure to issue the instruction bearing on an affirmative defense not only misinformed the jury of how they were entitled to view the evidence favorably to Santucci on the most important question before them, but also deprived Santucci's defense counsel with the ability to argue more powerfully for an acquittal based on a mistake of

fact.

In other words, the trial court's unfairly prejudicial error deprived Santucci of this potent defense, misled the members of the jury, and seriously impaired his ability to defend himself before the jury through the effective presentation of his argument.

What is more, the Army Court also overlooked its own precedent in *United States v. Hearn,* 66 M.J. 770 (Army Ct. Crim. App. 2008) (judge's failure to deliver instruction on a special defense was prejudicial legal error which required the findings and sentence to be set aside).

Had the jury been properly instructed and found Santucci not guilty of raping TW because of mistake of fact as to consent, the most serious offense related to her, it stands to reason that the jury would have returned verdicts of not guilty concerning all lesser physical offenses connected to TW. Said another way, if the jury found that TW actually consented or that Santucci believed she consented as to the rape, then that finding stood to extend to each of the other offenses subsumed within the rape, to include the sodomy and assault. *See* U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES BENCHBOOK (Jury Instructions), Article 120, page 492, "NOTE 12: Mistake of fact to consent—completed rapes. An honest and reasonable mistake of fact as to the victim's consent is a defense to rape. *United States v. Carr,* 18 M.J. 297 (CMA 1984), *United States v. Taylor,* 26 M.J. 127 (CMA 1988)*, and United States v. Peel,* 29

M.J. 235 (CMA 1989); Article 125, page 697, "NOTE 12: Mistake of fact as to consent—completed forcible sodomy; Article 128, page 738, NOTE 12: Consent as a Defense to Assault Consummated by a Battery.

The Army Court failed to assess these valid points demonstrating clear prejudice favoring reversable error in its Article 66, UCMJ plenary review to determine if the findings and sentence were correct in law and fact. *See, e.g., United States v. Gamble*, 27 M.J. 298 (CMA 1988) (reversible error not to instruct on mistake of fact in rape prosecution); *United States v. Bankston*, 57 M.J. 786 (Army Ct. Crim. App. 2002) (reversible error in giving erroneous instruction on mistake of fact defense); *United States v. Johnson*, 25 M.J. 691 (A.C.M.R. 1987) (reversible error not to give instruction on affirmative defense of mistake of fact in rape case where facts giving rise to the defense were "closely interwoven" with issues of consent and force in a closely contested race).

Had the jury been properly instructed and found Santucci not guilty of raping TW because she actually consented, or that Santucci honestly and reasonably believed she consented, or both, that finding of consent for the most serious offense stood to logically flow downward to the lesser physical offenses, as discussed more fully above.

2. The Trial Judge Gave an Unconstitutional Propensity Instruction to the Jury That It Could Find by Preponderant Evidence That Santucci

Raped TW, Then Use That Finding as Evidence He Sexually Assaulted JM and Had a Propensity or Predisposition to Engage in Sexual Offenses

Compounding the constitutional error concerning the mistake of fact jury instruction, the trial judge erred again when he instructed the jury that it could consider preponderant evidence of Santucci's having raped TW as propensity evidence on the question of whether he sexually assaulted JM. (R. at 476-77).

This instruction was improper. "It 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." *Hills*, 75 M.J. at 356. The relevant portion the instruction is as follows:

> 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).

Although the Army Court found that the trial judge's having issued this instruction to the jury was error, and rose to a constitutional dimension, it drew inferences from the prosecution's litigation narrative, rather than those of the actual record of trial, to find ostensible justification that the errant instruction did not contribute to Santucci's convictions and sentence.

At least nine reasons demonstrate that the instruction was not harmless beyond a reasonable doubt, and that the instruction did indeed contribute to Santucci's convictions and sentence. *Chapman*, 386 U.S. at 24 (before a Federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt).

First, nowhere did the Army Court evaluate the unconstitutional burden-diluting effects of authorizing the jury to determine Santucci's criminal culpability

regarding TW under a preponderance of the evidence standard, clearly below the constitutionally-required "beyond a reasonable doubt standard. In *Hills*, 75 M.J. at 350, the court held that the use of sexual offense evidence for propensity purposes as between charged offenses was unconstitutional because it undermined the presumption of innocence and diluted the government's burden of proving charged offenses beyond a reasonable doubt.

Second, the Army Court did not analyze the unfairly prejudicial and unconstitutional propensity instruction in conjunction with the trial judge's having failed to instruct that the jury could acquit Santucci if he honestly and reasonably believed TW consented. The instruction given (propensity), unlawfully authorized the jury to convict in violation of the Constitution, while at the same time, the instruction not given (mistake of fact) did not alert the jury that it could acquit.

Stated differently, had the propensity instruction ***not*** been given, and the mistake of fact instruction been properly given, the jury's deliberations stood to be altogether different, resulting in an acquittal. The jury would ***not*** have been authorized to compare the evidence in connection with both victims for propensity. But the jury would have been authorized to find Santucci not guilty of rape, something the jury never knew.

The combination of instructional errors unfairly stacked the deck against Santucci and for the

prosecution by telling the jury it could consider evidence about TW for Santucci's "predisposition to commit sexual offenses," but not that it could acquit Santucci of raping TW based on mistake of fact. The Army Court did not conduct this analysis, and thus, review of this constitutional question was neither full nor fair. There is reasonable doubt that the instructional errors contributed to Santucci's conviction and sentence.

Third, the propensity instruction can be seen as the trial judge tacitly validating the offenses involving TW. After all, he told the jury that they did not have to believe the TW offenses were proven beyond a reasonable doubt, that they could use the TW offenses to find additional criminality against Santucci, and informed the jury it could draw conclusions against Santucci that did not comply with the correct prosecutorial burden of proof.

Fourth, the Army Court relied squarely, albeit wrongly, on the fact there was sexual contact between Santucci and TW for its own conclusion of "no doubt that TW was not a willing participant." The constitutional problem with the Army Court's logic, however, is that Santucci was entitled to an instruction on mistake of fact, which was admittedly not given. It was for the jury (or rather, a jury that had been properly instructed), not the Army Court, to determine if Santucci honestly and reasonably believed TW consented or appeared to consent. Nor did the Army Court embrace TW's credibility issues (*e.g.*, the evening before the incident, she told her husband she

was going for a candy bar, but instead, she went to the Paradise Bar and drank).

Fifth, the Army Court found no unfair prejudice as a result of the faulty propensity instruction based on the fact that the jury found Santucci not guilty of sexually assaulting JM. The Army Court's illogical and incomplete way of thinking is seen by the trial judge's having instructed the jury to use preponderant evidence of TW's rape not just for propensity to sexually assault JM, but also "for its tendency, if any, to show the accused's propensity or predisposition to engage in sexual offenses." (R. at 476-77).

Put another way, the trial judge told the jury it could consider evidence of raping TW for any predisposition to engage in any sexual offenses, not just that involving JM.

Sixth, there is no indication that the Army Court considered any of the 13 factors noted above on the question of consent and mistake of fact, which it was dutybound to do as part of a full and fair Article 66, UCMJ plenary review.

Seventh, the Army Court failed to analyze the unfairly prejudicial effect of the prosecutor's urging the jury to use the propensity evidence during closing argument. (R. at 482). After reminding the jury that the judge just instructed them to follow the propensity instruction, 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).

The persuasive position of a prosecutor, representative of a sovereign, drawing upon the trial judge's unconstitutional instruction to encourage the jury to follow the instruction for an unconstitutional purpose and measure the evidence by an unconstitutional standard cannot be understated. But the Army Court did not touch it. Had the Army Court considered the prosecutor's comments to the jury, it would have been dutybound to find reversable error.

Eighth, the Army Court failed to evaluate the impact of the propensity instruction had on the jury in terms of setting conditions for a "split the baby" verdict given the lower evidentiary standard of proof and the instruction to consider evidence of an offense against TW as a predisposition to commit sexual offenses.[3]

---

[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, facts the Army Court did not address. (R. at 525-26).

Ninth, the Army Court did not evaluate the 911 call TW made, which the prosecution claimed during its closing argument was the "best evidence" against consent. (R. at 491-92). However, TW did not call saying "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. A rape victim that calls 911 is going to lead with I was raped not I want a "morning after pill."

The Army Court ignored and failed to discuss how these instructional errors, each of which are constitutional, compounded one another. In so doing, the Army Court failed to fully and fairly consider the claims Santucci has raised with respect to the trial judge's jury instructions.

B. COUNSEL'S FAILURE TO PREPARE SUFFICIENTLY RENDERED HIS PERFORMANCE AT TRIAL DEFICIENT RESULTING IN ACTUAL PREJUDICE TO STANTUCCI IN VIOLATION OF THE SIXTH AMENDMET AND THE SUPREME COURT'S HOLDING IN *STRICKLAND V. WASHINGTON*

Trial counsel committed over 25 unreasonable errors which caused Santucci substantial and unfair prejudice and thereby deprived him of the effective assistance of counsel at trial and upon appeal.

1. Sixth Amendment Prevailing Standards for Effective Assistance of Counsel

"Claims of ineffective assistance of counsel are reviewed *de novo*." *United States v. Gooch*, 69 M.J. 353, 362 (C.A.A.F. 2011) (internal citations omitted). In evaluating allegations of ineffective assistance of counsel, this Court applies the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

In *Strickland*, the Supreme Court found that the Sixth Amendment entitles criminal defendants to the "effective assistance of counsel"— that is, representation that does not fall "below an objective standard of reasonableness" in light of "prevailing professional norms." *Strickland*, 466 U.S. at 686. Review of an attorney's representation is "highly deferential" to the attorney's performance and employs "a strong presumption" that counsel's conduct falls within the wide range of professionally competent assistance. *Id*. at 688-89.

The Court of Appeals for the Armed Forces has applied this standard to courts-martial, noting that to prevail on a claim of ineffective assistance of counsel, an appellant must demonstrate: 1) that his counsel's performance was deficient; and 2) that this deficiency resulted in prejudice. *United States v. Green*, 68 M.J. 360, 361-62 (C.A.A.F. 2010).

This Court judges the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. *Strickland*, 466 U.S. at 690. In making that determination, this Court considers the totality of the circumstances, bearing in mind "counsel's function, as elaborated in

prevailing professional norms, is to make the adversarial testing process work . . . [and] recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.*

"At the heart of an effective defense is an adequate investigation. Without sufficient investigation, a defense attorney, no matter how intelligent or persuasive in court, renders deficient performance and jeopardizes his client's defense." *Richter v. Hickman,* 578 F.3d 944, 946 (9th Cir. 2009); *United States v. Scott,* 24 M.J. 186, 192 (C.M.A. 1987) (finding ineffective assistance of counsel when defense counsel failed to conduct adequate pretrial investigation).

"In many cases, '[p]retrial investigation is ... the most critical stage of a lawyer's preparation.'" *House v. Balkcom,* 725 F.2d 608, 618 (11th Cir. 1984). In *Balkcom*, a habeas petitioner claimed that there was no investigation, no interviewing of witnesses, no preparation of a defense, no discovery, no visiting of the crime scene, and no trial preparation. The court found that knowledge of the crime scene may have helped defense counsel in the preparation of the defense, and certainly would have informed the direct examination of the Petitioner himself at trial. *Id.*; *see also United States v. Boone*, 49 M.J. 187, 196 (C.A.A.F. 1998) (ineffective assistance of counsel can occur during sentencing when counsel fail to introduce evidence that would be of value to the accused in

extenuation and mitigation).

Cases in various appellate and district courts underscore the importance of defense counsel conducting a robust examination. All stand for the proposition that effective assistance of counsel requires more than relying on the government's production of the results of its own investigation. For instance, In *Kimmelman v. Morrison*, 477 U.S. 365 (1986), the Supreme Court held that counsel's failure to conduct discovery on the mistaken belief that the prosecution had an obligation to turn over inculpatory evidence resulted in deficient performance. Moreover, Circuit Courts of Appeals readily set aside convictions when defense counsel's investigation has fallen short of constitutional standards.

For instance, in *Soffar v. Dretke*, 368 F.3d 441 (5th Cir. 2004), defense counsel failed to interview the only known eyewitness to a felony murder. In *Turner v. Duncan*, counsel delivered only minimal efforts to prepare. 158 F.3d 449 (9th Cir. 1998). Likewise, a habeas petition was granted where defense counsel was aware of police reports where witnesses made comments favorable to the accused, as the names and addresses of the witnesses were available to defense counsel, yet he made no effort to locate or interview them. *Sullivan v. Fairman*, 819 F.2d 1382 (7th Cir. 1987). *See also Harris v. Reed*, 894 F.2d 871 (7th Cir. 1990); *United States v. Gray*, 878 F.2d 702 (3rd Cir. 1989); *Wade v. Armontrout*, 798 F.2d 304 (8th Cir. 1986).

2. Counsel Made At Least 25 Unreasonable Errors

The defense counsel conducted an incomplete investigation and accordingly, cannot be entitled to tactical deference for trial decisions, as demonstrated by the following 25 unreasonable failures.

1. Both TW and her husband stated that she had so much anxiety that she could barely leave the house. However, defense counsel did not locate or use color digital images on Facebook (which were publicly available) of TW a mere 21 days after the alleged rape at the same Paradise bar drinking what looks like hard liquor with 2 men from Santucci's Platoon (neither of whom is her husband). Copies of these images are attached as Exhibit A.

Not only did defense counsel unreasonably fail to locate these relevant images bearing on the central facts of the case, counsel failed to interview the men depicted in the images to determine what, if anything, happened after they left the Paradise bar.

2. Both TW's husband and the prosecutor stated that she had to move back to Alabama and take their children due to her anxiety and inability to stay at Ft. Polk. (R. at 533; 548). However, defense counsel failed to discover social media (publicly available via Facebook) that, as of September 13, 2013, TW was in a relationship with Alabama resident Anthony Craft just two months after the alleged rape. Anthony Craft's Facebook page likewise indicated that he was

in a relationship with TW. Copies of these images are included as Attachments C and D.

3. Not only did counsel unreasonably fail to discover this readily available information, counsel also failed to interview Anthony Craft or develop his testimony for use in cross-examining TW at trial.

4. To the extent trial counsel did not recognize the importance of social media leads as part of a responsible and professional pretrial investigation, the prosecution offered Santucci's Facebook pages into evidence, which surely should have alerted the defense to the value of pursuing social media to prepare the defense(s).

5. The defense unreasonably failed to develop evidentiary leads using cameras on Fort Polk. For example, a picture of TW's vehicle going into the main gate was offered at trial. However, the defense did not pursue what other security cameras may have been available on the night in question to numbers of reasons, not the least of which is TW's demeanor upon leaving Santucci's room or driving off Fort Polk at the security gate.

6. The defense unreasonably failed to seek and secure a background check of TW or her husband to determine what if any information could have been helpful to defend against the Charges. For example, a history of hospitalizations could have presented an alternative cause of injury defense.

7. The defense unreasonably failed to determine with whom TW was speaking on the phone when paramedics arrived. No one asked with whom she was speaking or interviewed that person. That this investigatory lead was not pursued degrades the reliability of TW's testimony – she could have talking with somebody to coach her into what to say.

8. The defense counsel interviewed no neighbors or others in proximity on the night in question.

9. During *voir dire*, defense did not object to any of the jurors, four of whom knew someone or had someone close to them that was sexually assaulted. Three were in the same chain of command (meaning that they evaluated one another) and the prosecutor was legal counsel in another matter for one juror. The defense neither developed nor made any challenges for cause.

10. At trial, cross-examination of the prosecution's witnesses was deficient by largely parroting back the witness's direct-examination answers. Indeed, the defense declined to cross-examine TW's husband at all, which must be unreasonable in a significant rape case where Santucci faced potential life behind bars.

11. What is more, cross-examination of TW merely confirmed her direct examination answers, which essentially allowed her to testify twice, unfairly abdicating the adversarial process and substantially prejudicing Santucci before the jury. For example, TW

stated at trial that she remembers being carried up the stairs to Santucci's room, however later she said that she did not remember going to the room at all. Defense counsel failed to point out this inconsistency on the likely one of, if not the most important night in TW's life (being raped).

12. Another example involves TW and her husband's testimony that she rarely drinks and if she does it is an occasional glass of wine. However, on the stand, TW testified that she usually drinks Yeager. Counsel did not address this as it would be another point bearing on credibility.

13. Due to counsel's lack of preparation and due diligence, counsel was not prepared to effectively cross-examine TW or her husband. Another example involves TW's decision not to authorize a DNA swab. There is a diagram of the perineal area, but a seemingly important answer was her reasoning to avoid the DNA swab. Although TW allowed an exam for STDs, she did not authorize a DNA swab to determine to determine identity of her sexual partner.

14. The prosecution offered damning evidence through the Emergency Room nurse. She testified that seven hours after the alleged rape, TW's anus was still dilated and she had a bowel movement on the table. What defense counsel unreasonably failed to introduce, however, was TW's use of Klonopin and Tramadol for nerve damage due to childbirth. Counsel asked no questions about what type of nerve damage and where it is located – TW may have had issues with the

perineum due to this and not do the anal intercourse, which directly negates evocative prosecutorial evidence and provides an alternative source of injury.

15. Moreover, counsel did not offer widely-accepted medical evidence that the anus does not stay dilated several hours after anal intercourse to the degree that one is incontinent of stool. Stated differently, the defense did not bring in any other professionals i.e. nurse or doctors to discuss contradict the prosecution's showing, the effect being the ape was more violent than it was which caused this prolonged dilation. The defense unreasonably failed to dispel these implications or develop that the dilation could have been the result of medication after childbirth complications.

16. Further, the prosecution elicited testimony that TW had bite marks rather than "hickeys" on her neck. But defense counsel unreasonably failed to cross-examine the emergency room nurse on the foundation for her conclusion, nor did the defense offer a medical professional to contradict the testimony of violence.

17. Nor did the defense point out that investigatory protocol was not followed regarding pictures to be taken after the incident. Initial pictures were taken that showed minimal scratches and bruising. The protocol is to take the pictures at 24, 48 and 72 hours, which was not done. The prosecution did not enter the pictures into evidence, likely because they did not show much. The defense did place the pictures into evidence. However, the only witness as to

the severity of the bruises was TW's husband.

18. Had the defense properly investigated, cross-examination of TW's husband could have revealed his dishonesty as to the real reason TW moved to Alabama (for a new man not to get away from the anxiety associated with the rape), and, digital images of slight bruising contradicting his testimony as to the severity of the bruising. But the defense did not ask him a single question on cross-examination.

19. The prosecution played the 911 tape multiple times. TW kept saying she wanted the morning after pill over and over. The operator kept saying words like victim and assault and kept asking who assaulted her. Playing this several times was prejudicial and no objections were made by the defense. This was not mentioned in the cross-examination of TW as to why she was not saying she was assaulted and just that she wanted the morning after pill.

20. Counsel unreasonably failed to expose inconsistencies in the prosecution's lead witness, TW, bearing on her credibility. For example, at the hospital emergency room, TW had stated that her husband had been abusive in the past. Later, at trial, she testified to abuse by past boyfriends, and that it was by a boyfriend 10 years ago and not her husband who abused her. The defense did not go over this on cross examination.

21. The unreasonable failure to prepare rendered counsel unable to effectively question TW to show that

taking Klonopin and Tramadol with alcohol causes hysteria and anxiety, which would account for her actions when she got home and being hysterical on the 911 call.

22. Counsel's unreasonable failure to move to sever the trial of the offenses related to JM from those related to TW set conditions for the trial judge to instruct the jury that propensity evidence relating to JM could be considered on the unrelated offense involving TW, which apparently resulted in the jury's "splitting the baby" verdict finding Santucci not guilty of those offenses related to JM but guilty of those offenses related to TW.

23. Defense counsel unreasonably failed to object to the trial judge's propensity instruction.

24. Defense counsel unreasonably failed to urge the trial judge to issue the mistake of fact instruction as an affirmative defense.

25. Defense counsel unreasonably failed to object to the prosecution's pretrial motions to pre-admit Prosecution Exhibits 1 – 14 and 20 – 25, missing opportunities to cross-examine witnesses outside the presence of the jury during a pretrial motions hearing and force the prosecution to lay appropriate foundations to admit evidence unfavorable to Santucci.

VIII. THIS ARTICLE III COURT MAY REACH AND DECIDE SANTUCCI'S CONSTITUTIONAL CLAIMS THAT WERE NEITHER FULLY NOR

FAIRLY REVIEWED BEFORE ARTICLE I MILITARY COURTS-MARTIAL.

This Court is authorized to reach and determine the merits of Santucci' 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. In *Burns v. Wilson*, 346 U.S. 137 (1953), the Supreme Court made clear that civilian habeas review of military decisions is altogether proper when constitutional deprivations resulted in unfair proceedings or unreliable results, and consequently unjust confinement. In *Burns*, 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.

Burns, 346 U.S. at 142.

Although determinations made in military proceedings are final and binding on all courts, 10 U.S.C. § 876 (2012), the district courts' jurisdiction

over a petition for habeas from a military prisoner is not displaced. *Schlesinger v. Councilman*, 420 U.S. 738, 745 (1975) (taking note of the binding nature of court-martial decisions on civil courts, but also 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).

Where constitutional protections were not observed at the trial court level or during direct appeal, the Federal habeas court is empowered to address those claims. *Monk v. Zelez*, 901 F.2d 885, 893 (10th Cir. 1990) ("The writ of habeas corpus shall issue immediately."); *Burns*, 346 U.S. at 139 (explaining that Federal civil courts have jurisdiction over habeas petitions alleging the proceedings "denied them basic rights guaranteed by the Constitution"); *Dodson v. Zelez*, 917 F.2d 1250, 1252 (10th Cir. 1990) (federal jurisdiction to review court-martial proceedings requires "[t]he asserted error . . . be of substantial constitutional dimension."); *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 Tenth Circuit uses a four-part test to determine whether a Federal habeas court should reach the merits of a constitutional challenge to a court-martial conviction or sentence: (1) whether the

asserted error is of substantial constitutional dimension; (2) whether the issue is one of law rather than one of disputed fact previously determined by a military tribunal; (3) whether military considerations warrant different treatment of the constitutional claim(s); and (4) whether the military courts gave adequate consideration to the issues involved and applied proper legal standards. *Mendrano v. Smith,* 797 F. 2d 1538, 1542 n.6 (10th Cir. 1986) ("our cases establish that we have the power to review constitutional issues in military cases where appropriate."); *Monk*, 901 F.2d at 888 (constitutional claim is subject to our further review because it is both "substantial and largely free of factual questions.").

In *Monk*, the Tenth Circuit favorably cited *Calley v. Callaway*, 519 F.2d 184, 199-203 (5th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976). *Id*. "Consideration 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." *Calley*, 519 F.2d at 203.

This Court has discretion to determine if Santucci's claims were fully and fairly considered by the military, reach the merits, and award the writ. In *Dodson,* 917 F.2d at 1252, the Court noted that a district judge has a "large amount of discretion" when determining whether a military habeas petitioner's claims were fully and fairly considered on direct appeal: "[w]e recognize that these factors still place a large amount of discretion in the hands of the federal

courts." Turning to the definition of full and fair consideration, the Tenth Circuit in *Watson* 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 v. McCotter, 782 F.2d 143, 144 (10th Cir.), *cert. denied*, 476 U S. 1184 (1986) (internal citations omitted).

Consequently, the applicable federal habeas statutes, 28 U.S.C. § 2241 and 28 U.S.C. § 2243, and the Supreme Court and Tenth Circuit precedents in *Burns*, *Watson, Mendrano*, *Monk*, and *Dodson*, *supra*,

authorize Article III courts to reach the merits of constitutional habeas challenges arising from Article I courts-martial and issue the writ -- even when the issue was briefed and decided by the military before arriving in Federal court.

Put another way, none of the applicable legal authorities requires the Federal civilian judiciary to follow an Article I court's constitutional determinations lock-step. To the contrary, *Burns*, (on which the Tenth Circuit's decision in *Watson* is based), specifically states that review is narrow, not foreclosed, and Article III review is appropriate where "military review was legally inadequate to resolve the claims which they have urged upon the civil courts." *Burns*, 346 U.S. at 146.

The instant case falls within the permissible scope of review. This is especially so where, like here, the military's "full and fair consideration" is fatally flawed. Military review cannot be "full" where pivotal evidence was not evaluated and material evidence was misstated. Nor can review be "fair" where Supreme Court precedents interpreting the Fifth and Sixth Amendments in a Federal criminal trial were misapplied. As the Tenth Circuit 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."

Examples where the court correctly determined that the military had not given a petitioner's claims

full and fair consideration, and thus reviewed the merits of a military habeas petitioner's claims in the Tenth Circuit include: *Mendrano*, 797 F.2d at 1541-42 ("full review of petitioner's claim is especially appropriate here" in context of Due Process and Sixth Amendment right to jury trial); *Wallis v. O'Kier*, 491 F.2d 1323, 1325 (10th Cir.), *cert. denied*, 419 U.S. 901, (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 v. Commandant, U.S. Disciplinary*, 377 F.2d 339, 342 (10th Cir. 1967) ("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."); and *Monk*, 901 F.2d at 888 (reviewing reasonable doubt instruction and granting petitioner's request for a writ).

That this Court may determine the merits of Santucci's claims is further shown by looking to the purpose of the military justice system and the basis for Article III deference to Article I courts-martial. To be sure, Article III courts ought to defer to the military courts insofar as "[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," and that federal courts have "had no role in [military law] development"). The military courts are surely better equipped than the civilian courts in their analysis of the Manual for Courts- Martial or matters impacting good order and discipline.

But this is not the case where the habeas issues involve fundamental constitutional guarantees applicable to all citizens involving capital murder and potential life in prison. Whether a prosecutor and his investigators complied with the Fifth Amendment's Due Process obligations, or a defense counsel fulfilled his duties under the Sixth Amendment's standard for effective assistance of counsel at trial, or whether a military appellate court conducted a meaningful review to ensure constitutional safeguards were observed, has nothing to do with the unique nature of the military as a distinct society -- the basis for civilian judicial deference.

The Fifth and Sixth Amendments apply equally in both the military and civilian settings, unaffected by the military's unique position in American society. Indeed, it is incumbent upon the district court to

examine whether the constitutional rulings of a military court conform to prevailing Supreme Court standards. *Kauffman v. Secretary of the Air Force*, 415 F.2d 991, 997 (9th Cir. 1969).

Accordingly, there is no reason to defer to the military courts where, as here, the habeas claims involve application of the Constitution during trial and appeal. Congress and the Supreme Court have defined Article III review of military convictions to be appropriate in situations where military courts denied a servicemember "basic rights guaranteed by the Constitution." *Burns*, 346 U.S. at 139. Here, each of Santucci's five habeas grounds involve constitutional rulings of military courts which do not conform to prevailing Supreme Court standards and were thus neither fully nor fairly reviewed. In this case, the Court may evaluate the merits and award the writ.

IX. PRAYER FOR RELIEF

WHEREFORE, Petitioner Anthony V. Santucci respectfully prays that the Court:

1) Award the writ, reverse, overturn, and vacate his convictions and sentence in their entirety with prejudice;

2) Grant such other relief as may be appropriate and to dispose of this matter as law and justice require, 28 U.S.C. § 2243; or alternatively,

3) Pursuant to Rule 5 of the Rules Governing

Section 2254 Cases in the United States District Courts (Habeas Rules), order the Respondents to produce the transcript of trial, the transcript of all post-conviction hearings (before the Army Court and the CAAF), other relevant records in the case, file its answer, motion, or other response, and afford Petitioner the opportunity to reply to the Respondents' answer;

4) Order discovery on behalf of Petitioner pursuant to Habeas Rule 6;

5) Order expansion of the record pursuant to Habeas Rule 7;

6) Conduct a hearing at which evidence may be offered concerning the factual allegations of the Petition; and

7) Grant such other relief as may be appropriate and to dispose of this matter as law and justice require. 28 U.S.C. § 2243.

Respectfully submitted,

Anthony V. Santucci

By: /s/ Christopher Joseph
Attorneys for Petitioner

John N. Maher *pro hac vice*
Kevin J. Mikolashek
David Bolgiano

Don Brown
MAHER LEGAL SERVICES PC
26 South 3rd Street, Number 68
GENEVA, ILLINOIS 60134
Tel: (708) 468-8155
johnmaher@maherlegalservices.com

Christopher Joseph, #19778
Carrie Parker, #24988
Diane Bellquist, #20969
JOSEPH, HOLLANDER & CRAFT LLC
1508 SW Topeka Blvd.
Topeka, KS 66612-1887
(785) 234-3272 Main
(785) 234-3610 Fax
cjoseph@josephhollander.com
cparker@josephhollander.com
dbellquist@josephhollander.com

VERIFICATION

Pursuant to 28 U.S.C. § 2242, Petitioner Anthony V. Santucci's application for a Writ of Habeas Corpus is in writing and signed and verified by his attorneys acting on his behalf.

CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2019, I electronically transmitted Petitioner Anthony V. Santucci' Petition for a Writ of Habeas Corpus Under 28 U.S.C. § 2241, to the Clerk's Office using the CM/ECF System for filing, forwarding to a judge

pursuant to the Court's assignment procedure per Habeas Rule 4, and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants: United States Attorney for the District of Kansas.

By: /s/ Christopher Joseph
Christopher Joseph

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES,
Appellee

v.

Anthony V. Santucci
Private (E-1)
U. S. Army,
Appellant

PETITION FOR GRANT OF REVIEW

Crim. App. No. 20140216

USCA Dkt. No. /AR

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

The undersigned counsel, on behalf of Appellant, hereby petitions the United States Court of Appeals for the Armed Forces for a grant of review of the decision of the Army Court of Criminal Appeals, on appeal under Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866, pursuant to the provisions of

Article 67(a)(3), Uniform Code of Military Justice, 10 U.S.C. § 867(a)(3) (2006).

Respectfully submitted,

/s/
Philip D. Cave
U.S.C.A.A.F. Bar No. 22647
Law Office
1318 Princess St.
Alexandria, VA 22314
703-298-9562
mljucmj@court-martial.com

Matthew D. Bernstein
Captain, Judge Advocate
Appellate Defense Counsel
Office: (703) 693-0713
DSN: (312) 223-0713

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was delivered to the Court, and the Appellate Government Division on 26 November 2016.

/s/
Philip D. Cave

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES
Appellee

v.

Anthony V. Santucci
Private (E-1)
United States Army
Appellant

SUPPLEMENT TO PETITION FOR REVIEW

Crim. App. No. 20140216

USCA Dkt. No. _____/AR

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Issues Presented

I.

WHETHER ACCEPTANCE OF APPOINTMENT AS A CMCR JUDGE TERMINATED THE MILITARY COMMISSION OF JUDGE HERRING.

II.

WHETHER, AS AN APPOINTED JUDGE OF THE CMCR, JUDGE HERRING DID NOT MEET THE UCMJ DEFINITION OF APPELLATE MILITARY JUDGE.

III.

WHETHER THE ASSIGNMENT OF INFERIOR OFFICERS AND PRINCIPAL OFFICERS TO A SINGLE JUDICIAL TRIBUNAL ITSELF VIOLATED THE APPOINTMENTS CLAUSE.

Statement of Statutory Jurisdiction

Because the convening authority approved a sentence that included a punitive discharge and more than one year of confinement, the U.S. Army Court of Criminal Appeals (ACCA) had jurisdiction over Private Santucci's case under Article 66(b)(1), Uniform Code of Military Justice (UCMJ). 10 U.S.C. §866(b)(1)(2012). Private Santucci now invokes this Court's jurisdiction under Article 67, UCMJ. 10 U.S.C. § 867 (2012).

Statement of the Case

On 21 February and 19-21 March 2014, a mixed panel of officer and enlisted members, sitting as a general court-martial, convicted Private Santucci, contrary to his pleas, of one specification of rape and one specification of sexual assault; in violation of Artie-le 120, Uniform Code of Military Justice

[hereinafter UCMJ], 10 U.S.C. § 920, of one specification of forcible sodomy, in violation of Article 125, UCMJ, 10 U.S.C. § 925, of one specification of assault consummated by a battery (by exceptions), in violation of Article 128, UCMJ, 10 U.S.C. § 928, and of two specifications of adultery in violation of Article 134, UCMJ, 10 U.S.C. § 934. (R. at 528).

Before sentencing, the military judge instructed the members to treat the findings of guilty of rape and sexual assault as a single offense. (R. at 544-545). Private Santucci was also found guilty, pursuant to a plea of guilty, of one specification of false official statement, in violation of Article 107, UCMJ, 10 U.S.C. § 907.

Private Santucci was sentenced to total forfeitures of all pay and allowances, to confinement for twenty (20) years and to be discharged with a dishonorable discharge. (R. at 565). On 16 October 2014, the convening authority approved the sentence as adjudged. (Action).

On 30 September 2016, the ACCA conditionally set-aside and dismissed Specification 2 of Charge I, and affirmed the remaining findings of guilt. The court reassessed the sentence and affirmed it as not inappropriately severe. Slip op. at 7.

Statement of Facts

The charges and specifications of which Private Santucci was found guilty revolve around his

interactions with two different women, TMC-W and JLM. A 22-year-old soldier, he met both women, who were older than him and married, on different dates at Paradise Club, a local bar near Fort Polk. (R. at 314-315, 323). It is uncontested that he engaged in sexual relations with both women, independently and on separate occasions, in his dorm room. (R. at 317-320, 325-326, 328-332). While he was charged with sexually assaulting both of them, he was acquitted of sexually assaulting JLM. (R. at 528-529). He was found guilty, however, of committing adultery with both women. (Id.).

Private Santucci testified in his defense, denying all the assaultive behavior. (R. at 320-321, 327-332). He admitted that he knew both women were married at the time he believed he was engaging in consensual sexual activity with them. (R. at 316, 334). According to PVT Santucci, both women told him they were getting divorced. (R. at 370).

Reasons for Granting Review

This court has previously granted a petition asserting an Appointments Clause error. Appellant respectfully requests this court also grant his petition. *See e.g.*, *United States v. Birdsong*, No. 16-0719/AR (C.A.A.F. 21 November 2016).

In addition, the attached Appendix sets forth various assignments of error raised personally by Appellant.

Respectfully submitted,

/s/
Philip D. Cave
U.S.C.A.A.F. Bar No. 22647
Law Office
1318 Princess St.
Alexandria, VA 22314
703-298-9562
mljucmj@court-martial.com

Matthew D. Bernstein
Captain, Judge Advocate
Appellate Defense Counsel
Office: (703) 693-0713

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was delivered to the Court, and the Appellate Government Division on 26 November 2016.

/s/
Philip D. Cave

APPENDIX

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), Appellant, through appellate defense counsel, personally requests that this Court consider the following matters:

1. THE COURT BELOW ERRED IN APPLYING *HILLS* TO APPELLANT'S CASE.

2. THE EVIDENCE IS NOT LEGALLY SUFFICIENT TO SUPPORT A FINDING OF GUILTY TO SPECIFICATION 1 AND 2 OF CHARGE I, OF CHARGE II, AND OF CHARGE III.

3. THE PROSECUTION ENGAGED IN PREJUDICIAL ARGUMENT DURING FINDINGS.

A. The prosecution had successfully excluded mention of sex offender registration on the merits. Despite the military judge's admonition, the prosecution itself brought up the issue, even though there was no evidence of sex offender registration adduced. (R. 483.) And on rebuttal the prosecution again argued sex offender registration as motive for Appellant to lie. (R. 515.)

B. The trial counsel improperly invoked sexual assault response training. (R. 488, 490.) And, The Trial Counsel argued facts not in evidence when discussing sexual assault training, and arguing that the members should consider what they know and have learned from that training. (R. 490.)

C. During argument about bruising, Trial

Counsel asked the members to put themselves into the witnesses position, and thereby improperly invoked the "golden rule." (R. 485.)

D. The Trial Counsel argued facts not in evidence when discussing sexual assault training, and arguing that the members should consider what they know and have learned from that training. (R. 490.)

E. The military judge erred in overruling an objection to testimony of Mrs. KG. The defense objected based on relevance and potential for prejudice. (R. 185.) The military judge failed to conduct a proper balance under Mil. R. Evict. 403, and indicated, "How much probative value, I don't know, but I don't see any prejudice to the accused either." (R. 187.)

F. At various points during trial counsel cross-examination of Appellant, the TC was trying to get him to say who was lying; and this wasn't objected to. At one point the military judge himself discussed this with TC. (R. 353.) However, the defense failed to ask for and the judge failed to give a curative instruction, which was prejudicial.

4. Without objection, the members of the court-martial were permitted to depart their impartial role by the defense counsel and military judge when the members engaged in questioning of Appellant during his testimony. (R. 365-374.) The same happened with Specialist Kelly. (R. 396-400.) This questioning of the defense contrasts with few questions for the

prosecution witnesses. The clear perception is that the prosecution witnesses were to be believed and the accused interrogated. And the failure to object was ineffective assistance of counsel.

5. The evidence is not legally sufficient to prove the terminal elements of adultery beyond reasonable doubt.

6. Two enlisted members were rated by the senior member and they were not challenged. And the failure to object was ineffective assistance of counsel. It was error to have members. reason. (R. 129.) In addition, four of the jurors had people close to them, related to them or who were sexually assaulted themselves, three of the jurors were in the same chain of command, and one juror was a financial advisor to the prosecutor in the past. The defense counsel were ineffective in failing to conduct an adequate voir dire and make appropriate challenges for at least implied bias.

7. The defense counsel were ineffective because: they failed to conduct an adequate investigation into the circumstances of the case, to include an interview of neighbors, obtaining video from the gate to base which may have shown the various persons involved in the allegations; they failed to have expert assistance from a SANE.

8. At trial the nurse from the hospital testified that on exam, the anus was still dilated at approximately 10 am. She was incontinent of stool at that time. A SANE, a nurse, would know that it is not normal for the anus

to remain dilated several hours after anal sex, and that incontinence is a rare occurrence following anal sex. Incontinence would be more common in someone who has frequent anal sex or was penetrated by a very large item, much bigger than a penis. It should also be noted that she told someone that she takes Tramadol for pain due to nerve damage from giving birth to her last child. This would be an alternate reason for anal dilation. Defense counsel were ineffective for failing to have the SANE testify about these matters.

9. During the trial, First Lt. Ariel Espinosa said "She was raped when she was on the stand. This should not have been allowed and swayed the jury's opinion of Appellant. (R. 294.)

10. The prosecution claimed during the entire trial that Appellant made the "victim" so distraught about this that she could not go anywhere because she was so terrified. Yet 20 days later, there is a picture of her at the same bar where she was allegedly assaulted, drinking hard liquor with 2 men who are not her husband, and she was still married. My defense counsel did not pursue any of her activities after the alleged assault. Further, the prosecution as well as the "victim" claimed that she was so scared for her life that she had to move to Alabama. However, there is proof on her Facebook page that she was in a relationship with another man since 9/13/13 and moved to Alabama where he lives in October 2013. She was still married at that time. According to her Facebook and this man's Facebook, they are still in a relationship. The defense counsel did not explore these

inconsistencies.

11. The trial counsel made a misleading argument, in regards to Appellant placing his hands on her neck while in the missionary position, I was choking the life out of her according to the trial counsel. He attributes this to Appellant's full body weight on her neck. That is physically impossible. The only way for that to be possible, would be if Appellant was doing a hand stand on her neck. In the missionary position, most of your weight is on your mid body and legs. Defense counsel did not challenge this clearly improper argument.

12. Defense counsel failed to adequately challenge inconsistencies in the complaining witnesses testimony. The "victim" said she found out about her husband taking her pills because he told her. However, he stated under oath that she caught him and slapped him. At Pg. 272 20-27, the "victim" states she remembers being carried up the stairs. But on pg. 283-7, she says she doesn't remember going to the room at all. At Pg. 274 6-7, the "victim" states she had scratches from me on her back. The only way she could have scratches on her back would be if she was on top and the sex was in fact consensual. Further, the evidence of any alleged bruising was inadequate and inconsistent. The prosecution admits that their own investigators didn't even do their job right. When photographing the alleged "bruises and scratches", the protocol is to take pictures at the time of the reported assault, 24 hrs. and 48 hrs. and 72 hrs. later. They only took the initial pictures later that morning of the alleged assault. Their main argument during the

entire trial was that I assaulted. The prosecution had the alleged victim's husband as well as investigators say that she had all these marks on her, yet the prosecution could not offer the photos. The defense had to offer the initial Page 13 of 14 photos. This was because they showed nothing but light scratches and hickies that could be expected with consensual sex. Therefore, there is no evidence to back the prosecution's main argument. Also, First Lt. Ariel Espinosa stated that the morning the photos were taken, the “victim" had bruises on her arm that "were very serious in color" and "very deep bruises on her neck. Yet the photographs do not show any of that.

* * *

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

CALVIN R. GIBBS,
Petitioner,

v. Case No. 20-3041-JWL

COMMANDANT,
United States Disciplinary Barracks,
Respondent.

ORDER

In this habeas corpus action under 28 U.S.C. § 2241, the Court stayed proceedings until the Tenth Circuit had decided three cases involving the issue of a district court's standard for reviewing a military court conviction. The Tenth Circuit has now ruled in those cases. *See Page v. Commandant*, 844 F. App'x 78 (10th Cir. 2021) (unpub. op.); *Santucci v. Commandant*, 66 F.4th 844 (10th Cir. 2023); *Bales v. Commandant*, 2023 WL 3374118 (10th Cir. May 11, 2023) (unpub. op.). Petitioner (through counsel) has informed the Court, however, that the petitioners in *Santucci* and *Bales* intend to seek review of those decisions in the Supreme Court, and he therefore moves to extend the stay until any further appeals in those two cases have been completed. Because respondent does not oppose the motion, the Court will

extend the stay.

IT IS THEREFFORE ORDERED BY THE COURT THAT petitioner's unopposed motion to extend the stay (Doc. # 24) is hereby **granted**, and the stay previously ordered in this case is hereby extended until further order of the Court. The parties shall notify the Court when any further appeals in *Santucci* and *Bales* are completed.

IT IS SO ORDERED.

Dated this 5th day of July, 2023, in Kansas City, Kansas.

/s/ John W. Lungstrum
Hon. John W. Lungstrum
United States District Judge

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
WESTERN DIVISION

RICHARD M. CAMACHO,
Petitioner,

v. No. 5:20-HC-2189-M

The Honorable Ryan McCarthy,
Secretary of the Army,
Respondent.

[DRAFT] ORDER

Before the Court is Petitioner Richard M. Camacho's ("Camacho") Second Unopposed Motion to Stay the proceedings pending decisions the U.S. Court of Appeals for the Tenth Circuit ("Tenth Circuit") issued interpreting the law applicable to his matter.

Those decisions from the Tenth Circuit are presently pending Petitions for Writs of Certiorari to the United States Supreme Court.

The Court has considered the unopposed motion and the reasons stated therein and hereby GRANTS the unopposed motion.

Counsel for the Petitioner is ordered to inform this Court and counsel for the Respondent when the United States Supreme Court concludes both matters as set forth and discussed in Petitioner's Unopposed Motion to Continue Stay.

SO ORDERED,

_____
Richard E. Myers II
Chief, United States District Judge

This __ day of July, 2023.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
WESTERN DIVISION

RICHARD M. CAMACHO,
Petitioner,

v. No. 5:20-HC-2189-M

The Honorable Ryan McCarthy,
Secretary of the Army,
Respondent.

PETITIONER'S INTERIM STATUS REPORT AND UNOPPOSED MOTION TO CONTINUE STAY OF PROCEEDINGS PENDING UNITED STATES SUPREME COURT DECISIONS

Petitioner Richard M. Camacho ("Camacho"), by and through his undersigned attorneys, respectfully submits this Interim Status Report and respectful request that this Court continue to stay the proceedings in this case pending the outcome of two cases decided by the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit"), in Denver, Colorado, which are presently being appealed to the United States Supreme Court in Washington, D.C.

Although the Tenth Circuit denied each

Petitioner's appeals, work is underway to prepare and file Petitions for a Writ of Certiorari to the United States Supreme Court.

The two military habeas actions brought pursuant to 28 USC §§ 2241 and 2243 and originally filed in the District of Kansas were decided before the Tenth Circuit Court of Appeals: *Santucci v. Commandant*, D. Kan. 19-CV-03116-JWL, 10CCA 20-3149; and *Bales v. Commandant,* D. Kan. 19-cv-03112-JWL, 10CCA 20-3167. These cases formed a substantial basis for this Court's having granted the original stay.

The Petitioner-Appellant in each of these cases is preparing a Petition for a Writ of Certiorari ("Petition") to the United States Supreme Court ("Supreme Court") challenging each decision in *Santucci* and *Bales* the Tenth Circuit issued, the former being published, the latter being unpublished.

Santucci's Petition is due to the Supreme Court July 24, 2023.

Bales's Petition is due to the Supreme Court August 9, 2023.

The Tenth Circuit and/or the US Supreme Court decisions will provide persuasive and potentially mandatory precedent and guidance regarding the scope of review an Article III court must undertake when asked to examine an Article I military tribunal's constitutional rulings, including what constitutes "full

and fair review" by an Article I military tribunal, what constitutes "inadequate review" by an Article I tribunal, and by what standards an Article III court evaluates "full and fair review" in the context of a military petitioner's 28 U.S.C. §§ 2241 and 2243 petition for collateral review under Habeas Corpus.

Counsel for the parties met and conferred via email on June 29, 2023. Counsel for the Respondent authorized Camacho to represent to this Court that the Secretary of the Army takes no position and will file no responsive papers in light of this motion.

BACKGROUND

The case at bar is a habeas action brought pursuant to 28 USC §§ 2241 and 2243 challenging the constitutional determinations Article I military tribunals made during trial and direct appeal. Seeking the expertise of Article III review as the final arbiter of the Constitution, Camacho filed his Petition for Writ of Habeas Corpus on October 6, 2020. (Doc. 1). The Respondent moved to dismiss Camacho's Petition based upon Fed. R. Civ. P. 12(b)(1) and 12(b)(6) on January 12, 2022. (Docs, 16 and 17 motion and memorandum in support respectively). Camacho opposed the motion to dismiss on February 26, 2022 (Doc.22) and the Respondent filed his Reply on April 27, 2022 (Doc. 27).

In their briefings to date, the Petitioner and the Respondent dispute the scope of review an Article III court must undertake when asked to examine an

Article I military tribunal's constitutional rulings—and, particularly, what constitutes "full and fair" or "adequate" review. (*See* Docs. 1 & 27). The Respondent advocates for a narrower scope than does the Petitioner, in this case.

ARGUMENTS AND AUTHORITIES

It is within the discretion of the Court whether to grant a motion to stay. *Reed v. Bennett*, 312 F.3d 1190, 1193 n.2 (10th Cir. 2002). "The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 879 (1998).

The interests of justice and judicial economy would be best served by staying this action pending the Supreme Court's decisions in *Santucci* and *Bales*.

The near precise legal and constitutional issues in *Santucci* and *Bales* stand to apply to this Court's consideration of Camacho's request for relief and are potentially dispositive, as they may determine whether this Court grants discovery, holds a hearing on the Petition, and whether the Court will reach the merits of the Petitioner's constitutional claims.

Knowing the Supreme Court will soon provide guidance on these critical legal issues, it makes sense to conserve the time and resources of the parties and the Court until that guidance is issued. The interests

of justice are served by this Court examining the Petitioner's claims under the proper legal standards in the first instance.

Furthermore, the Respondent will suffer no prejudice as a result of the stay. Respondent's counsel Assistant United States Attorney ("AUSA") Mathew Fesask advises the Respondent takes no position on this motion to stay nor will Respondent file any responsive papers to this motion to stay the proceedings.

John N. Maher, *special counsel* for the Petitioner, is lead counsel for the Petitioners- Appellants in *Santucci* and *Bales* before the Supreme Court, and is, therefore, able to provide updates on the progress of each appellate action as requested or directed by this Court.

CONCLUSION

WHEREFORE, Camacho respectfully requests this Court stay the proceedings pending the decisions in *Santucci* and *Bales*, *supra*, before the Supreme Court of the United States.

Respectfully submitted,

/s/John N. Maher
MAHER LEGAL SERVICES PC
17101 71st Avenue
Tinley Park, Illinois 60477
Tel: (708) 468-8155

Fax: (708) 781-9693
john@maherlegalservices.com
kevin@maherlegalservices.com
Special Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2023, I electronically transmitted the foregoing to the Clerk's Office using the CM/ECF System for filing.

By: /s/John N. Maher

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

CLINT A. LORANCE,
Petitioner,

v. Case No. 19-cv-3232-JWL

COMMANDANT, United States Disciplinary
Barracks, 1301 North Warehouse Road
Fort Leavenworth, Kansas 66027,
Respondent.

UNOPPOSED MOTION TO
STAY PROCEEDINGS

Petitioner Clint A. Lorance, by and through his undersigned attorneys, respectfully requests that the Court continue to stay the proceedings in this case pending the outcome of two cases decided by the United States Court of Appeals for the Tenth Circuit and now being brought to the United States Supreme Court for similar reasons supporting the original stay.

The decisions in those two cases will provide binding precedent regarding the review an Article III court must undertake when asked to examine an Article I military court's constitutional rulings, including what constitutes "full and fair review" by an Article I court and/or how an Article III court

evaluates "full and fair review."

BACKGROUND

This is a habeas action brought pursuant to 28 USC §§ 2241 and 2243 challenging the constitutional determinations Article I military tribunals made during trial and direct appeal. Seeking the expertise of Article III review as the final arbiter of the Constitution, Lorance filed his Petition for Writ of Habeas Corpus on November 12, 2019. (Doc. 1). The Respondent moved to dismiss, this Court granted the motion, (Docs, 18,. 19); and Lorance appealed to the United States Court of Appeals for the Tenth Circuit, which reversed and remanded to this Court for further proceedings. (Doc. 25). On December 16, 2021, Respondent, pursuant to this Court's order, filed her Answer and Return. (Doc. 27).

In their briefings to date, the Petitioner and the Respondent dispute the scope of review an Article III court must undertake when asked to examine an Article I military tribunal's constitutional rulings—and, particularly, what constitutes "full and fair" or "adequate" review. (*See* Docs. 1 & 27). The Respondent advocates for a narrower scope than does the Petitioner, in this case.

Two military habeas actions brought pursuant to 28 USC §§ 2241 and 2243 and originally filed in this Court were decided before the Tenth Circuit Court of Appeals: *Santucci v. Commandant*, D. Kan. 19-CV-03116-JWL, 10CCA 20-3149; and *Bales v.*

Commandant, D. Kan. 19-cv-03112-JWL, 10CCA 20-3167.

The Respondent briefed this Court on July 3, 2023.

Also on July 3, 2023, undersigned counsel conferred, and counsel for the Respondent informed that the Respondent does not oppose continuation of the stay.

July 4, 2023, was a national holiday.

On July 5, 2023, the Court lifted the stay and directed the parties to resume litigation.

The Petitioner-Appellant in each of these cases is preparing a Petition for a Writ of Certiorari ("Petition") to the United States Supreme Court ("Supreme Court") challenging each decision in *Santucci* and *Bales* the Tenth Circuit issued, the former being published, the latter being unpublished.

Santucci's Petition is due to the Supreme Court July 24, 2023.

Bales's Petition is due to the Supreme Court August 9, 2023.

ARGUMENTS AND AUTHORITIES

It is within the discretion of the Court whether to grant a motion to stay. *Reed v. Bennett*, 312 F.3d 1190,

1193 n.2 (10th Cir. 2002). "The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 879 (1998).

The interests of justice and judicial economy would be best served by staying this action pending the Supreme Court's decisions in *Santucci* and *Bales*.

Although the Tenth Circuit has addressed, in Santucci and Bales, the scope of an Article III court's inquiry into an Article I tribunal's constitutional rulings, what constitutes full and fair review, what comprises "adequate" review, and, potentially, how an Article III court tests to determine whether an Article I provided full and fair and adequate review of constitutional questions largely free of factual issues, there remains another potential level of judicial (Article III) review before the Supreme Court.

These precise legal issues apply to this Court's consideration of Lorance's request for relief and are potentially dispositive, as they may determine whether this Court grants discovery pursuant to the holds a hearing on the Petition and whether the Court will reach the merits of the Petitioner's constitutional claims. Knowing the Supreme Court will grant/deny certiorari will soon provide guidance on these critical legal issues, it makes sense to conserve the time and resources of the parties and the Court until that guidance is issued. The interests of justice are served

by this Court examining the Petitioner's claims under the proper legal standards in the first instance.

Furthermore, the Respondent will suffer no prejudice as a result of the stay. Respondent's counsel AUSA Jared Maag advises the Respondent has **no objection** to the Petitioner's request to stay the proceedings.

John N. Maher, *pro hac vice* counsel for the Petitioner, is lead counsel for the Petitioners-Appellants in *Santucci* and *Bales*, and is, therefore, familiar with all deadlines and dates applicable in the Petition. He will be able to provide updates on the progress of each appellate action as requested or directed by the Court.

Respectfully submitted,

By: /s/ John N. Maher
John N. Maher *pro hac vice*
Kevin J. Mikolashek
MAHER LEGAL SERVICES PC
17101 71st Avenue
TINLEY PARK, ILLINOIS 60477
Tel: (708) 468-8155
Fax: (708) 781-9693
john@maherlegalservices.com
kevin@maherlegalservices.com

By: /s/ Christopher M. Joseph
Christopher M. Joseph, #19778
Carrie E. Parker, #24988

Diane L. Bellquist, #20969
JOSEPH, HOLLANDER & CRAFT LLC
1508 SW Topeka Blvd.
Topeka, KS 66612-1887
(785) 234-3272 Main
(785) 234-3610 Fax
cjoseph@josephhollander.com

CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2023, I electronically transmitted the foregoing to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing.

By: /s/ Christopher Joseph
Christopher Joseph, #19778

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JACK K. NORRIS, III,
Petitioner,

v. Case No. 20-cv-03066-JWL

COMMANDANT, United States Disciplinary Barracks, 1301 North Warehouse Road
Fort Leavenworth, Kansas 66027,
Respondent.

UNOPPOSED MOTION TO STAY PROCEEDINGS

Petitioner Jack K. Norris, III, by and through his undersigned attorneys, respectfully requests that the Court stay proceedings in this case pending the outcome of three cases currently before the United States Court of Appeals for the Tenth Circuit because decisions in those cases will provide binding precedent regarding the review an Article III court must undertake when asked to examine an Article I court's constitutional rulings, including what constitutes "full and fair review" by an Article I court and/or how an Article III court evaluates "full and fair review."

Background

This is a military habeas action brought pursuant to 28 USC §§ 2241 and 2243. Petitioner Norris filed his Petition for Writ of Habeas Corpus February 27, 2020. Doc. 1. The Respondent filed her Answer and Return May 14, 2020. The Petitioner's Traverse is presently due November 27, 2020. *See* Doc. 15. In their briefing to date, the Petitioner and the Respondent dispute the scope of review an Article III court must undertake within the Tenth Circuit when asked to examine an Article I military court's constitutional rulings—and, particularly, what constitutes "full and fair review." *See* Docs. 1 & 9. The Respondent advocates for a narrower scope than does the Petitioner.

Three military habeas actions brought pursuant to 28 USC §§ 2241 and 2243 and originally filed in this Court are now on appeal before the Tenth Circuit Court of Appeals: *Page v. Commandant*, D. Kan. 9-CV-03020-JWL, 10CCA 20-3005; *Santucci v. Commandant*, D. Kan. 19- CV-03116-JWL, 10CCA 20-3149; and *Bales v. Commandant,* D. Kan. 19-cv-03112-JWL, 10CCA 20-3167. The Petitioner-Appellant in each of these cases has asked or will ask the Tenth Circuit to clarify the standard an Article III court must apply when asked to examine an Article I military court's constitutional rulings—and, particularly, what constitutes "full and fair review." The Petitioner-Appellant in each of these cases has asked or will ask the Tenth Circuit to construe the applicable law more broadly than advocated by the

Respondent in this case.

Page v. Commandant, 10CCA 20-3005, has been fully briefed by the parties (Petitioner- Appellant's reply brief was filed September 22, 2020). Briefing has begun in *Santucci v. Commandant*, 10CCA 20-3149, with the Petitioner-Appellant submitting his opening brief September 21, 2020. *Bales v. Commandant*, 10CCA 20-3167, has been docketed, and the Petitioner-Appellant's brief is presently due December 7, 2020.

Arguments & Authorities

It is within the discretion of the Court whether to grant a motion to stay. *Reed v. Bennett*, 312 F.3d 1190, 1193 n.2 (10th Cir. 2002). "The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 879 (1998).

The interests of justice and judicial economy would be best served by staying this action pending the Tenth Circuit's decisions in *Santucci, Page,* and *Bales*. Those decisions will address the scope of an Article III court's inquiry into an Article I court's constitutional rulings, what constitutes full and fair review, and, potentially, how an Article III court determines whether an Article I court provided full and fair review. These precise legal issues apply to this Court's consideration of the Petitioner Norris's request

for relief and are potentially dispositive, as they may determine whether this Court holds a hearing on the Petition and whether the Court will reach the merits of the Petitioner's constitutional claims. Knowing the Tenth Circuit will soon provide guidance on these critical legal issues, it makes sense to conserve the time and resources of the parties and the Court until that guidance is issued. The interests of justice are served by this Court examining the Petitioner's claims under the proper legal standards in the first instance.

Furthermore, the Respondent will suffer no prejudice as a result of the stay. Respondent's counsel, AUSA Jared Maag, advises the Respondent has **no objection** to the Petitioner's request to stay the proceedings.

John N. Maher, *pro hac vice* counsel for the Petitioner, is lead counsel for the Petitioners-Appellants in *Santucci*, *Page,* and *Bales*, and is, therefore, familiar with all deadlines and dates applicable in the appeals. He will be able to provide updates on the progress of each appellate action as requested or directed by the Court.

Respectfully submitted,

By: /s/ John N. Maher
John N. Maher *pro hac vice*
Kevin J. Mikolashek
MAHER LEGAL SERVICES PC
26 Third Street, Box 68

GENEVA, ILLINOIS 60134
Tel: (708) 468-8155
john@maherlegalservices.com
kevin@maherlegalservices.com

By: /s/ Christopher M. Joseph
Christopher M. Joseph, #19778
Carrie E. Parker, #24988
Diane L. Bellquist, #20969
JOSEPH, HOLLANDER & CRAFT LLC
1508 SW Topeka Blvd.
Topeka, KS 66612-1887
(785) 234-3272 Main
(785) 234-3610 Fax
cjoseph@josephhollander.com

CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2020, I electronically transmitted the foregoing to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing.

By: /s/ Christopher Joseph
Christopher Joseph, #19778

APPENDIX L

[EXCERPTS]

#2642735

TO THE HONORABLE
THE SECRETARY OF WAR

REPORT OF
U.S. WAR DEPARTMENT
ADVISORY COMMITTEE ON MILITARY JUSTICE

13 December 1946

TABLE OF CONTENTS

U.S. War Dept. Advisory Committee on
Military Justice

TO THE HONORABLE
THE SECRETARY OF WAR:

REPORT OF ADVISORY COMMITI'EE ON MILITARY JUSTICE

I. INTRODUCTION

On 25 March 1946, this Committee was appointsd by War Department Memorandum No. 25-46, reading as follows:

Memo 25-46

MEMORANDUM
No.. 25-46

WAR DEPARTMENT
Washington 25, D.C., 25 March 1946

WAR DEPARTMENT ADVISORY COMMITTEE
ON MILITARY JUSTICE

1. An Advisory Committee, whose membership has been nominated by the American Bar Association, is established in the Office of the Secretary of war to consist of the following members:

Mr. Arthur T. Vanderbilt, Newark, New Jersey, Chairman
Mr. Justice Alexander Holtzoff, Washington, D. C., Secretary
Mr. Walter P. Armstrong, Memphis, Tennessee
Honorable Frederick E. Crane, New York, New York
Mr. Joseph W. Henderson, Philadelphia, Pennsylvania
Mr. William T. Joyner, Raleigh, North Carolina
Mr. Jacob M. Lashly, St. Louis, Missouri
U. S. Circuit Judge Morris A. Soper, Baltimore, Maryland
Mr. Floyd E. Thompson, Chicago, Illinois

2. The function of the Committee will be to study the administration of military justice within the Army and the Army's courts-martial system, and to make recommendations to the Secretary of War as to changes in existing laws, regulations, and practices which the Committee considers necessary or appropriate to improve the administration of military justice in the Army.

3. The Committee is to have full freedom of action in the accomplishment of its mission and is authorized to hold such hearings and call such witnesses as it may deem desirable, and to call upon the Office of the Under Secretary of War, The Judge Advocate General, and any other appropriate agency of the War Department for information or assistance needed in the conduct of its activities.

(AG 334 (22 Mar 46))

BY ORDER OF THE SECRETARY OF WAR:

DWIGHT D. EISENHOWER
Chief of Staff

OFFICIAL:
EDWARD F. WITSELL
Major General
The Adjutant General

* * *

[Page 5]

...courts; and yet it is perfectly clear that there were available to the Army a sufficient number of competent men with legal training to have staffed all of the courts everywhere. The failure to produce these legally trained men for court members or officers was due primarily to failure to make proper plans for the courts. Indeed high ranking officers have expressed a reluctance to make use of civilian trained lawyers in the Army system. We were told that more than 25,000 lawyers applied for commissions in the Judge Advocate General's Department, but the applications were not received with favor. At the beginning of the war the Army was relying on the hope, which proved illusory, that some 500 judge advocates in the Officers' Reserve Corps would prove sufficient. The Judge Advocate General's School was established February 6, 1942, but the Officers' Candidate School was not activated until March, 1943, and while the schools did good work they were insufficient to fill the need. It is quite

certain that the Army planning organization very badly underestimated the number of legally trained men needed in the Judge Advocate General's Department.

The starving of the Army's legal branch and other evidence convince us that high Army circles did not properly evaluate the importance of the system of justice to be established in a large army drafted from the American people; and that this oversight occurred the more easily because of the traditional fear of Army men that adherence to legal methods, even in courts-martial, would impede the military effort in time of war. A high military commander pressed by the awful responsibilities of his position and the need for speedy action has no sympathy with legal obstructions and delays, and is prone to regard the courts-martial primarily as instruments for enforcing discipline by instilling fear and inflicting punishment, and he does not always perceive that the more closely he can adhere to civilian standards of justice, the more likely he will be to maintain the respect and the morale of troops , recently drawn from the body of the people.

Some of the critics of the Army system err on the other side and demand the meticulous preservation of the safeguards of the civil courts in the administration of justice in the courts of the.Army. We reject this view for we think there is a middle ground between the viewpoint of the lawyer and the viewpoint of the general. A civilian entering the army must of course surrender many of the safeguards which protect his

civilian liberties. The Army commander must be ready to retain all of the safeguards which are consistent with the operation of the army and the winning of the war. 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 the 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. He must realize the truth of what was well said by Lord Birkenhead in commenting on the British system of military justice that "where the risks of doing one's duty is so great, it is inevitable that discipline should seek to attach equal risks to the failure to do it."

On the other hand the commander of an American army must realize that he is dealing with men whose initiative, ingenuity, and independent self-respect have made them the best soldiers in the world. Nothing can be worse for their morale than the belief that the game is not being played according to the rules...

* * *

[Page 7]

...their decisions. It is not suggested that all commanders adopted this practice but its prevalence was not denied and indeed in some instances was freely admitted. The close association between the commanding general, the staff judge advocate, and the officers of his division made it easy for the members of

the court to acquaint themselves with the views of the commanding officer. Ordinarily in the late war a general court was appointed by the major general of a division from the officers in his command, and in due course their judgment was reviewed by him. Not infrequently the members of the court were given to understand that in case of a conviction they should, impose the maximum sentence provided in the statute so that the general, who had no power to increase a sentence, might fix it to suit his own ideas. Not infrequently the general reprimanded the members of a court for an acquittal or an insufficient sentence. Sometimes the reproof was oral and sometimes in writing by way of what the Army has come to know as a "skin-letter." For example, one lieutenant general of unquestioned capacity voluntarily testified that he wrote a stinging letter of rebuke to the members of a court who had imposed a sentence of five years upon a soldier who deserted his division while in training in the United States. The general was incensed because the sentence was not twenty-five years and considered it his duty to chastise the court for extreme leniency.

There were inatances in which counsel were appointed to defend an accused who :possessed little competence for the task, especially when comparedwith that of the prosecuting officer; and there were instances in which it was believed that the well-known attitude of the commander minimized the independence and vigor of the defense. There is no doubt that defendants' counsel were frequently incompetent and the tendency of the commander in certain units to influence the courts led not

unreasonably to the suspicion that a competent and vigorous defense was not desired. Communications received in answer to questionnaires from generals, judge advocates, and enlisted men introduced the following results in answer to the question, "To what extent are court-martials under the domination of convening authority?": Of forty-nine generals, fourteen replied that the courts were dominated and thirty-five that they were seldom dominated. Of forty-five judge advocates, seventeen replied that the courts were dominated and twenty-eight that they were seldom dominated. Of twenty-nine enlisted men, twenty-two replied that the courts were dominated and seven that they were seldom dominated.

So far as the committee is informed, no steps have been taken in the Army to check or prohibit commanding officers in the exercise of their power and influence to control the courts. Indeed the general attitude is expressed by the maxim that discipline is a function of command. Undoubtedly there was in many instances an honest conviction that since the appointing authority was responsible for the welfare and lives of his men, he also had the power to punish them, and consequently the courts appointed by him should carry out his will. We think that this attitude is completely wrong and subversive of morale; and that it is necessary to take definite steps to guard against the breakdown of the system at this point by making such action contrary to the Articles of War or regulations and by protecting the courts from the influence of the officers who authorize and conduct the prosecution. To this end we recommend:

1. The Manual for Courts-Martial, United States Army, should provide that it is improper and unlawful for any person to attempt to influence the...

* * *