IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ANTHONY V. SANTUCCI, Petitioner, v. COMMANDANT, United States Disciplinary Barracks, 1301 North Warehouse Road Fort Leavenworth, Kansas 66027, Respondent.	Case No. 19-3116-JWL

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.

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TABLE OF CONTENTS

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 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.

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[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).

[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]

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

[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).

"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,

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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