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-cv-3116-JWL

PETITIONER'S TRAVERSE

Cases such as *Monk v. Zelez*, 901 F.2d 885, 888 (10th Cir. 1990), and *Dodson v. Zelez*, 917 F.2d 1250, 1253 (10th Cir. 1990), demonstrate that the Tenth Circuit would encourage this Court to consider Santucci's constitutional claims, decide them, and award a writ of habeas corpus even though his claims were previously considered and rejected by Article I military tribunals.

For reasons described in Santucci's opening petition (Doc. 1) and herein, this Court should grant his petition for a writ of habeas corpus based on repeated violations of the due process clause of the Fifth Amendment in the form constitutionally defective jury instructions. Unconstitutional jury instructions led to Santucci's unlawful conviction and sentence.

The practical result of these instructional errors was to deprive Santucci of any reasonable possibility of prevailing on a mistake-of-fact defense in this fully contested trial, which this case cried out for. Reasonable jurors, properly instructed as to the mistake-of-fact defense and correct burdens of proof beyond a reasonable doubt, would have seen the purported victim's own interactions with Santucci, before, during, and after their encounter, through a far different lens than the one the trial judge unconstitutionally constructed for them.

Given repeated constitutional errors speaking directly to the cornerstones of due process, (failure to instruct the jury on a complete defense raised by the evidence and requested by counsel, that the prosecution had to disprove the affirmative defense beyond a reasonable doubt, that the jury could consider charged offenses as Santucci's disposition to violate the law by preponderant evidence, even if they jury were not convinced of Santucci's guilt beyond a reasonable doubt), this Court should find that it has no confidence in Santucci's conviction or the Article I military appellate courts' review of it. This Court should grant the petition for a writ of habeas corpus and set aside Santucci's conviction and sentence.

DISCUSSION

Application of the Tenth Circuit's decision in *Monk* demonstrates not only that this Court should review the merits of Santucci's constitutional claims, but also that Article I tribunals deprived him of due process under the Fifth Amendment in the form of unconstitutional and prejudicial (not harmless beyond a reasonable doubt) jury instructional errors.

I. Tenth Circuit Jurisprudence Weighs in Favor of Addressing and Deciding the Fifth Amendment Due Process Issues Santucci Presents

As this Court weighs its authority to reach the merits of an issue that has been considered by Article I military tribunals, the Tenth Circuit's decision in *Monk* is instructive. In *Monk*, the Tenth Circuit reversed the District of Kansas's denial of a military habeas petition brought by a Marine convicted of murdering his wife by strangulation. 901 F.2d at 886. Monk passed several polygraph exams denying his involvement in his wife's death, testified at trial in his own defense, and Article I tribunals reviewed but rejected his constitutional claims that flawed jury instructions led to his unlawful conviction and sentence. *Id.* at 888. Nevertheless, the Tenth Circuit, in reversing the District of Kansas, awarded Monk's petition for a writ of habeas corpus and concluded its

decision with the following instruction: "the writ of habeas corpus shall issue immediately." *Id.* at 894.

In determining to award the writ, the Tenth Circuit applied the leading Supreme Court case in the area of military habeas petitions filed in Article III courts, *Burns v. Wilson*, 346 U.S. 137 (1953). In *Burns*, a plurality found that "when a military decision has dealt fully and fairly with an allegation raised in that [petition for habeas corpus], it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence." 346 U.S. at 142. In the same analysis, the appellate court in *Monk* also applied Tenth Circuit precedent, *Watson v. McCotter*, 782 F.2d, 143, 144 (10th Cir. 1986) (Article III review generally limited to whether the Article I military tribunals gave full and fair consideration to each of the habeas petitioner's constitutional claims). 901 F.2d at 888.

The Tenth Circuit next reasoned that "[i]n appropriate cases, however, we will consider and decide constitutional issues that were also considered by the military courts." *Id.*, citing *Mendrano v. Smith*, 797 F.2d 1538, 1541-42 & n. 6 (10th Cir. 1986) (in pertinent part, "our cases establish that we have the power to review constitutional issues in military cases where appropriate"); *Wallis v. O'Kier*, 491 F.2d 1323, 1325 (10th Cir.), cert. denied, 419 U.S. 901, 42 L. Ed. 2d 147, 95 S. Ct. 185 (1974) ("Wallis asserted in his habeas corpus petition that he was being deprived of his liberty in violation of a right guaranteed to him by the United States Constitution. Where such a constitutional right is asserted and where it is claimed that the petitioner for the Great Writ is in custody by reason of such deprivation, the constitutional courts of the United States have the power and are under the duty to make inquiry"); and *Kennedy v. Commandant*, 377 F.2d 339, 342 (10th Cir. 1967) ("[w]e believe it is the duty of this Court to determine if the military procedure for providing assistance to those brought before a special court-martial is violative of the fundamental rights secured to all by the United States Constitution").

A. Article III Review Appropriate After Article I Considered and Rejected Claims

The Tenth Circuit held that Monk's "constitutional claim is subject to our further review because it is both 'substantial and largely free of factual questions.'" *Id.*, citing *Mendrano*, 797 F.2d at 1542 n. 6; *Calley v. Callaway*, 519 F.2d 184, 199-203 (5th Cir. 1975) ("[c]onsideration by the military of such [an issue] will not preclude judicial review[,] for the military must accord to its personnel the protections of basic constitutional rights essential to a fair trial and the guarantee of due process of law"); *Burns*, 346 U.S. at 142 ("[t]he military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights); and *Wallis*, 491 F.2d at 1325 ("where a military prisoner is in custody by reason of an alleged constitutional violation, the constitutional courts of the United States have the power and are under the duty to make inquiry").

Having determined that Monk's constitutional claim was appropriate for Article III review, mainly because it was both a substantial constitutional issue and largely free of factual questions, the Tenth Circuit turned to the merits of the offending reasonable doubt instruction the Article I judge issued to the jury in Monk's murder trial for having strangled his wife to death. The appellate court found the instruction "constitutionally defective." *Monk*, 901 F.2d at 889. The Tenth Circuit framed the issue as "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Id.*, (internal citations omitted). "This standard is met, and habeas corpus relief will be granted, if the instruction as given, in the context of the [jury] charge as a whole, could mislead the jury into finding no reasonable doubt when in fact there was some." *Id.*

B. The Offending Reasonable Doubt Instruction in *Monk*

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

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

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

Id. at 889.

The Tenth Circuit agreed with Monk that equating "reasonable doubt" with a "substantial" doubt or misgiving, and, that no reasonable doubt exists if the jury would be "willing to act" on their belief in Monk's guilt to the same extent as they would be willing to act on a belief concerning an important personal matter were "constitutionally defective." *Id.* (internal citations omitted).

C. Tenth Circuit's Harmless Beyond a Reasonable Doubt Analysis in *Monk*

Having found constitutional instructional error, the Tenth Circuit focused next on the impact the constitutional error had on the trial using the "harmless beyond a reasonable doubt"

test. *Id.* at 890. "We must now consider whether this language 'so infected' [Monk's] court-martial that his conviction violates due process." *Id.*

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

The Tenth Circuit further reasoned that other aspects of the jury instruction that were legally sound were "simply [ ] not enough in this case to overcome the possibility that the members were misled by the challenged language to impose a less stringent burden of proof on the government than is constitutionally required." *Id.*

The "constitutionally defective" instruction, according to the Tenth Circuit, contributed to Monk's conviction. "Given the circumstantial and hotly contested nature of the evidence supporting Monk's conviction, we also cannot say that this error was harmless beyond a reasonable doubt." *Id.* The Tenth Circuit reversed the District of Kansas and directed that the writ of habeas corpus for a convicted murderer be issued immediately. *Id.* at 894.

II. Application of *Monk* to Santucci's Constitutional Jury Instruction Claims

Applying *Monk* to the case at bar, the Tenth Circuit's rationale and holding guide this Court to consider and decide Santucci's constitutional jury instructional claims and issue the writ of habeas corpus. Santucci's claims, like those brought in *Monk*, merit Article III review and determination under *Burns, Watson*, *Mendrano, Wallis, Kennedy, and Calley*, each of which the appellate court in *Monk* cited as providing sufficient authority to reach the merits and decide the issues even though Article I tribunals considered and rejected Monk's constitutional claims.

Like Monk's claims, Santucci's are constitutionally substantial because they speak directly to the due process clause of the Fifth Amendment, the right to present a complete defense, and the right to have the jury instructed properly on the applicable law it is charged to apply. Santucci's jury instruction claims are largely free of factual issues and purely questions of constitutional and criminal law. *Dodson,* 917 F.2d at 1253 (10th Cir. 1990) (reversing the District of Kansas and granting habeas relief to military petitioner for constitutional challenge to jury voting procedures during sentencing).

A. Article I Refusal to Issue the Requested Mistake-of-Fact Instruction

The opportunity to plead and prove an affirmative defense and have the court issue instructions to the jury on that exonerating defense is a fundamental component of due process. *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) (a criminal accused is entitled to an instruction on a defense that is supported by the evidence and the law). More specifically, an accused 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).

If the requested mistake-of-fact instruction were given in this fully contested rape trial where there was one eyewitness for the prosecution, Santucci testified on his own behalf and the physical evidence was inconclusive on the question of consent, the jury would have had a legal basis, spoken directly from the judge and provided in writing for the jury's use in the deliberation room, on which to acquit Santucci. (R. at 521; "[b]ailiff, if you would please, give the president a copy of the instructions"). The requested instructions were neither delivered orally nor given to

the jury in writing for their use in deliberating – even though, as demonstrated more fully in his opening petition, at least 13 material and uncontested points supported delivery of the instruction. (Doc. 1 at 5-6).

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

Accordingly, the failure to deliver the requested instruction not only deprived Santucci of due process because the judge did not tell the jury that he could be found not guilty on those grounds – a first violation of due process, but the failure also diminished the prosecution's obligation to disprove the affirmative defense beyond a reasonable doubt – a second violation of due process. The jury never knew of either of these essential components of the law in the case they were to resolve. Consequently, the Article I tribunal misled the jury to decide the case on other than constitutional fundamental fairness and due process grounds.

For ease of reference, the mistake-of-fact instruction that the Article I tribunal should have tailored based on the evidence of mistake-of-fact and consent adduced at trial, (Doc. 1, 5-6), read to the jury, and given to the jury in writing for use in the deliberation room, is reproduced here:

> ***An honest and reasonable mistake-of-fact as to the victim's consent is a defense to rape.*** If a mistake-of-fact is in issue, give the following instructions.
>
> The evidence has raised the issue of mistake on the part of 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 JUDGE'S BENCHBOOK, pgs. 493-493 (emphasis added).

Upon direct review, the Article I tribunal agreed that sufficient defense evidence was introduced at trial to support delivery of the instruction, and, that the instruction should have been given. The Article I tribunal only rejected Santucci's claim that the failure was not harmless beyond a reasonable doubt. *United States v. Santucci*, 2016 CCA LEXIS 594 * 11 (Army Ct. Crim. App. 30 Sept. 2016) (unpub).

What the Article I tribunal overlooked, however, was the shifting effect of the affirmative defense, placing upon the prosecution the burden to disprove beyond a reasonable doubt, the existence of the mistake-of-fact. *Id.* The practical result: Santucci stands in judgment before the jury without instructions that his defense can result in acquittal and the jury never knew that the prosecution had the burden to disprove the affirmative defense Santucci raised.

B. Harmless Beyond a Reasonable Doubt Analysis

Removing a basis for complete acquittal from the jury's consideration cannot be harmless beyond a reasonable doubt. Nor can failing to instruct the jury that the prosecution bore the burden to disprove, beyond a reasonable doubt, that the mistake-of-fact defense did not exist.

Although required, at no time did the jury hear the judge use the following words favoring Santucci, fundamental fairness, and due process: "members of the jury, as the judge presiding over these proceedings, I hereby instruct you that the evidence has raised the issue of mistake on the part of the Santucci concerning whether TW consented to sexual intercourse in relation to the offense of rape. If Santucci had an honest and mistaken belief that TW consented to the act of sexual intercourse***, he is not guilty of rape if Santucci's belief was reasonable.*** You may consider the following 13 points when you determine whether Santucci had an honest and reasonable mistake (insert facts from Doc. 1, 5-6)." Legally and intuitively, these instructions, if issued, stood to even out the playing field dramatically, which due process contemplates, and even tip the scale in favor of Santucci with the return of not guilty verdicts.

Nor did the jury have the judge's written instructions for use in the deliberation room that in order to convict, the jury must first find that the prosecution proved that mistake-of-fact did not exist beyond a reasonable doubt.

Refusing to give the defense instructions together with its burden-shifting effect contributed to Santucci's conviction and sentence. The instructions would have painted Santucci in the eyes of the jury in an altogether different and more favorable light – not as a rapist, rather, as a young soldier who, based on at least 13 undisputed points (Doc. 1, 5-6), honestly and reasonably believed TW consented the sexual encounter. These failures misled the jury into

finding no reasonable doubt, when had they been correctly and fully instructed, they "possibly" may have concluded "there was some." *Monk*, 901 F.2d at 890.

In *Monk*, the prejudicial finding, (*i.e.*, not harmless beyond a reasonable doubt), was the dilution of the prosecution's burden of proof beyond a reasonable doubt that was not cured by the rest of the jury instructions that were legally correct. At least in *Monk*, the required instruction was delivered, albeit using constitutionally defective language. *Id.* Here, the required instructions were not issued at all, which violates Santucci's due process right to be heard and to present a complete defense. The refusal to deliver the mistake-of-fact defense instructions, like the ill-fated instruction in *Monk*, also diluted the prosecution's burden of having to disprove the affirmative defense beyond a reasonable doubt in this case. The jury here never knew the prosecution had that burden.

This Court cannot be confident that these failures, leaving Santucci stripped of the legal instructions from the judge to the jury that the evidence he adduced at trial was a complete defense, and the prosecution was duty-bound to disprove it before he could be found guilty, is not harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967) (once constitutional error has been established, the prosecution bears the burden of proving that the error did not contribute to the conviction).

Additional support for granting the writ in this case based on the failure to issue the defense-requested instructions can be found in other Federal circuits. *See, e.g., Harris v. Alexander,* 548 F.3d 200 (2nd Cir. 2008) (trial court violated due process by refusing to instruct jury on accused's theory of the case); *Jackson v. Edwards*, 404 F.3d 612 (2nd Cir. 2005) (trial court's denial of defense request for instruction on affirmative defense violated due process); *Cockerham v. Cain*, 283 F.3d 657 (5th Cir. 2002) (habeas granted where jury instructions could have been understood to allow conviction without proof beyond a reasonable doubt); *Barker v.*

Yukins, 199 F.3d 867 (6th Cir. 1999) (habeas granted where judge refused to give requested affirmative defense instruction violated due process).

D. Unconstitutional Propensity and Burden Diluting Jury Instructions Given

The unconstitutional instructions that were actually given, that the jury could compare one charged offense with another charged offense, and find by a preponderance of the evidence Santucci's propensity or disposition to commit sexual offenses, ***even if you [the jury was] not convinced beyond a reasonable doubt about that the accused is guilty of that offense***, further diluted the prosecution's burden to prove each element of each offense beyond a reasonable doubt. *United States v. Hills*, 75 M.J. 350, 356 (C.A.A.F. 2016) (instructions like these have been flatly rejected as unconstitutional). The Article I tribunal agreed that the propensity instructions at issue were unconstitutional, but again, erroneously found the error harmless beyond a reasonable doubt. *United States v. Santucci*, 2016 CCA LEXIS 594 * 8-9 (Army Ct. Crim. App. 30 Sept. 2016) (unpub.).

Delivering oral instructions from the bench which diminished the prosecution's constitutional burden of proof and authorized inferences of propensity to commit sexual misconduct cannot be harmless beyond a reasonable doubt. The Article I trial judge worsened the mistake-of-fact constitutional errors he refused to deliver by issuing pro-prosecution propensity and burden-reducing instructions. He authorized the jury to consider conduct of which Santucci is presumed innocent to show a propensity, by a preponderance of the evidence, to have committed other conduct of which he is also presumed innocent, ***even if they were not convinced beyond a reasonable doubt that the accused is guilty of that offense***. These instructions are unconstitutional, violations of due process, and contributed to Santucci's convictions and sentence.

Reproducing the constitutionally offending instructions here emphasizes just how unfairly the trial judge stacked the deck against Santucci – relieving the prosecution of its burden to prove

each element of each offense beyond a reasonable doubt when he authorized the jury members to compare charged offenses with each other, by preponderant evidence and "more likely than not," to show Santucci's "propensity or predisposition to engage in sexual offenses," "even if [the jury] are not convinced beyond a reasonable doubt about that the accused is guilty of that offense:"

> 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).

Constitutional and criminal law do not permit the prosecution to show propensity by relying on the very acts the prosecution needs to prove beyond a reasonable doubt in the same case. Additionally, language such as "more likely than not," "even if you are not convinced beyond a reasonable doubt that the accused is guilty," and "tendency to show the accused's propensity or predisposition to engage in sexual offenses," is surely constitutional due process error.

These instructions both undermined the sacrosanct presumption of innocence and created a significant risk that the jury convicted Santucci based on evidence that did not establish his guilt beyond a reasonable doubt. The conflicting standards of proof and contradictory statements about the bearing that one charged offense could have on another, as well as the unconstitutional

language diminishing the prosecution's constitutional burden of proof, degrade any confidence that the errors were harmless beyond a reasonable doubt.

E. Application of *Monk* to Unconstitutional Propensity Instructions

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

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

Following the analysis in *Monk*, surely lowering the prosecution's burden of proof to even less of an evidentiary threshold than the "substantial" evidence standard found unconstitutional and prejudicial is constitutional and prejudicial error. Similarly, the "willing to act" language found unconstitutional and prejudicial in *Monk* is not as misleading or confusing as instructing the jury that, "even if you are not convinced beyond a reasonable doubt that the accused is guilty," it can consider charged conduct for its "tendency to show the accused's propensity or predisposition to engage in sexual offenses." This unconstitutional language substantiates that the jury applied a less stringent burden of proof on the prosecution than is constitutionally required.

Additional support for granting the writ in this case based on the unconstitutional lowering of the standard of proof can also be found in other Federal circuits. *See, e.g., Riley v. McDaniel*, 786 F.3d 719 (9th Cir. 2015) (habeas granted where jury instruction relieved the state of its burden

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

F. Cumulative Effects of Instructional Errors

In *Monk*, there was but a single instruction. But here, the analysis embraces the harmfulness of the propensity instructions together with the Article I tribunal's knowing declination to issue the mistake-of-fact defense and its required evidentiary burden shift to the prosecution. The instructions given (propensity and dilution of beyond a reasonable doubt), unlawfully authorized the jury to convict in violation of the Constitution, while at the same time, the instructions not given (mistake-of-fact and burden shift) did not alert the jury that it could acquit and that the jury had to acquit if the prosecution failed to disprove the mistake-of-fact beyond a reasonable doubt. Stated differently, had the propensity instruction been withheld, and the mistake-of-fact instruction properly issued, the jury's deliberations stood to be altogether different, resulting in an acquittal.

Although raised in his opening petition for a writ of habeas corpus that the Article I appellate court did not evaluate the effect of all jury instructional errors on Santucci's trial (Doc.

1, 8; 17), absent from the Commandant's Answer and Return is any rebuttal on this point of law bearing on due process. Also absent from the Commandant's Answer and Return is discussion of the prosecution's having invoked the unconstitutional instructions to urge the jury to decide the case by a preponderance of the evidence on the question of whether the instructional errors were harmless beyond a reasonable doubt.

Review of a portion of the prosecution's summation in this case reveals just how tactically advantageous the propensity and prosecutorial burden diluting instructions were viewed by the government. After having reminded the jury that the judge just instructed them to follow the propensity and lesser evidentiary burden of preponderant evidence instructions, the prosecutor 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 the sovereign, drawing upon the trial judge's unconstitutional instructions to encourage the jury to follow the erroneous instructions for an unconstitutional purpose and measure the evidence by an unconstitutional standard proves that the propensity instructions were not harmless beyond a reasonable doubt and led to Santucci's conviction and sentence.

Of note, what is absent from the prosecutor's summation, is his attempt to convince the jury that Santucci's "honest but mistaken belief" that TW consented, *i.e.*, mistake-of-fact, did not

exist beyond a reasonable doubt. The instructions given, and the instructions withheld "could mislead the jury into finding no reasonable doubt when "in fact there was some."[1]

Santucci pled not guilty and requested trial by jury. There was only one eyewitness, who initially did not seek to press charges. (R. at 310). Santucci contested TW's testimony by taking the stand in his own defense. The physical evidence was inconclusive on the question of consent. TW called 911 but did not state, "I was just raped and assaulted." Rather, she called asking for a "morning after pill" and repeatedly said she could not have any more children. Seemingly, a rape victim who calls 911 will report the heinous violent act committed against her, not merely request "morning after pill." At the emergency room, TW initially declined a Sexual Assault Nurse Exam. (R. at 299). Instead, she asked for a prophylactic, sexually transmitted disease test and a "morning after pill." *Id*. Even though offered, TW did not consent to a DNA swab. (R. at 308).

The facts recounted above were before the jury. Had the mistake-of-fact instruction been given, the prosecution held to its burden to disprove the mistake-of-fact defense, and the Article I judge refrained from issuing the unconstitutional propensity and burden-diluting instructions lessening the prosecution's obligation to prove each and every element beyond a reasonable doubt, the scale may have tipped in Santucci's favor in the deliberation room. Stated differently, the judge's unconstitutional instructions "possibly" clouded the jury's assessment of the evidence adduced, which is not harmless beyond a reasonable doubt according to *Monk*, 901 F.2d at 890.

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

G. Monk Passed a Polygraph Examination, as Did Santucci

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

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

For example, the examiner, with over 44-years' experience as an investigator and former Naval Criminal Investigative Service (NCIS) Special Agent, asked, Santucci, "did you have to use any force to have sex with TW in your barracks room?" Santucci responded in the negative. When the examiner asked whether TW, in Santucci's room, stated, "take your shit off," meaning his clothes, Santucci replied in the affirmative. When the examiner asked, "did TW tell you to stop at any time while having sex with her," Santucci replied in the negative.

The polygrapher's analysis is reproduced here, but a full copy of his report and *curriculum vitae* is the subject of Santucci's motion to expand the record filed concurrently with this Traverse.

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

> Following **SANTUCCI**'s polygraph examination, his collected polygraph charts were reviewed and evaluated. It was the opinion of the undersigned polygraph examiner that **SANTUCCI** was truthful in his responses to the relevant questions. Before **SANTUCCI** departed the testing site he was informed of the analysis and advised that he passed his polygraph examination. **SANTUCCI**'s polygraph examination was evaluated **NO DECEPTION INDICATED**.

See Santucci's Motion to Expand the Record, Ex. A (emphasis in original).

The unconstitutional jury instructions, speaking to fundamental due process guaranteed by the Fifth Amendment, produced an unfair proceeding and an unreliable result. Following the rationale and holding of the Tenth Circuit in *Monk*, *supra*, and the cases cited therein, any of the instructional errors on its own so infected the entire trial that the resulting conviction violates due process. The cumulative effects of all instructional errors leave no doubt that the jury applied the wrong standards.[2]

III. Santucci Was Deprived of the Sixth Amendment Right to Effective Counsel

As discussed more fully in his opening petition, Santucci's counsel made no fewer than 25 errors that, when viewed in their totality, deprived him of the important constitutional right to effective assistance of counsel at trial.

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[2] Had the jury acquitted Santucci on the most severe offense during the encounter with TW, rape, it stands to reason that the jury would have believed him such that there could likewise be no sexual assault, forcible sodomy, or simple assault. Stated differently, the jury would have determined that the entire encounter was either consensual pursuant to Santucci's testimony, that Santucci honestly but mistakenly believed TW consented, or both, the idea being that TW either consented to the entire encounter or that Santucci honestly believed she consented to the entire encounter. *See, e.g.*, *United States v. Feldkamp*, No. ACM 38493, 2015 CCA LEXIS 172, at *13 (A.F. Ct. Crim. App. May 1, 2015) ("[w]e assume for the purposes of our analysis that mistake-of-fact as to consent may be an allowable instruction for a charge of sexual assault); *United States v. Zachary*, 61 M.J. 813 (A. Ct. Crim. App. 2005) (noting that "courts have applied mistake-of-fact to forcible sodomy); *United States v. Johnson*, 54 M.J. 67, 69 (C.A.A.F. 2000) (mistake-of-fact as to consent is a defense to assault consummated by a battery); U.S. Dep't of the Army Pam. 27-9, MILITARY JUDGES BENCHBOOK, p. 790 (mistake-of-fact applies to adultery).

When reviewing Santucci's claims in their entirety, *de novo* as questions of law, it becomes clear that two of the main constitutional protections designed to bring about a proceeding compliant with the Constitution and a result that is legally trustworthy, were absent: the Fifth Amendment for the reasons discussed above, and the Sixth Amendment as discussed in Santucci's opening petition.

Santucci preserved this claim before Article I tribunals and respectfully requests the Court to consider it together with his three due process claims as bearing on the unconstitutional trial and resultant unconstitutional conviction and sentence.

CONCLUSION

Had the jury been properly instructed, Santucci might very well have been acquitted. This Court, charged with determining whether the military courts gave "full and fair" consideration to Santucci's constitutional claims, has before it a jury verdict in which no reasonable jurist could have confidence. *Monk, supra*. Accordingly, "law and justice," by operation of 28 U.S.C. § 2243, oblige this Court to protect and defend not only the Constitution and Santucci's individual liberties, but also execute Congress's intent, by operation of 28 U.S.C. § 2241, guided by *Monk*, to reach the merits of Santucci's due process claims that the jury instructions were unconstitutional and prejudicial, and grant the petition for a writ of habeas corpus.

Respectfully submitted,

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By: /s/ Christopher M. Joseph
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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2020, I electronically transmitted Petitioner Anthony V. Santucci's Traverse to the Clerk's Office using the CM/ECF System for filing and service.

By: /s/ Christopher M. Joseph