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United States Court of Appeals
Tenth Circuit

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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ANTHONY V. SANTUCCI,

Petitioner - Appellant,

v.

COMMANDANT, United States Disciplinary Barracks, Fort Leavenworth, Kansas,

Respondent - Appellee.

No. 20-3149

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 5:19-CV-03116-JWL)

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

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

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

HOLMES, Chief Judge.

Petitioner-Appellant Anthony Santucci appeals from the denial of his 28 U.S.C. §§ 2241 and 2243 petition for a writ of habeas corpus. In 2014, a military

jury convicted Mr. Santucci of rape, forcible sodomy, battery, and adultery. He asserts that a court-martial trial judge deprived him of his Fifth Amendment right to due process by failing to instruct the jury on an affirmative defense and issuing unconstitutional propensity instructions at his trial. The U.S. Army Court of Criminal Appeals (the "ACCA") agreed with Mr. Santucci that the court-martial tribunal erred on both issues; nevertheless, it affirmed Mr. Santucci's convictions on the basis that these errors were harmless.

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

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

I

A

Military officials charged Mr. Santucci, then an Army private stationed in Fort Polk, Louisiana, with violating Articles 120, 125, 128, and 134 of the Uniform Code of Military Justice ("UCMJ"), following allegations that he raped a woman, TW, in July of 2013. *See* 10 U.S.C. §§ 920, 925, 928, 934.[1] In 2014, a jury sitting as a general court-martial convicted Mr. Santucci on one count each of rape, sexual assault, forcible sodomy, and battery, as well as two counts of adultery.[2] Relevant to this appeal, the charges against Mr. Santucci regarding TW were tried together with other charges for sexual assault and adultery involving a second alleged victim, JM.

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[1] Military court-martial procedures are governed by the UCMJ, 10 U.S.C. §§ 801–946a. A general court-martial has jurisdiction to try military personnel for serious offenses, including rape and sexual assault. *See id.* §§ 818(c), 920. In noncapital cases, a general court-martial is tried before a military judge and eight panel members. *See id.* § 816(b)(1). As a unit, the members operate in a manner roughly similar to a jury in a civilian proceeding. *See Mendrano v. Smith*, 797 F.2d 1538, 1540–41 (10th Cir. 1986) (describing differences between trial before "panel members" and a civilian jury but noting that "the modern military court-martial proceeding bears a considerable resemblance to a civilian jury trial"); *cf.* 6 WEST'S FEDERAL ADMINISTRATIVE PRACTICE § 6474, Westlaw (database updated July 2022) ("The accused has the option of requesting trial . . . with 'members' (*the equivalent of a jury trial*)." (emphasis added)). Accordingly, for convenience, we frequently use the term "jury" in this opinion to refer to the panel members who heard the evidence and received the instructions in Mr. Santucci's trial, while remaining cognizant that military panels are not precise equivalents of civilian juries.

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

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

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

made, and elicited testimony from medical staff who treated TW for her injuries the day after the incident.

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

> The evidence has raised the issue of mistake on the part of the accused concerning whether (state the name of the alleged victim) consented to sexual intercourse in relation to the offense of rape.
>
> If the accused had an honest and mistaken belief that (state the name of the alleged victim) consented to the act of sexual intercourse**,** he is not guilty of rape if the accused's belief was reasonable.
>
> To be reasonable the belief must have been based on information, or lack of it, which would indicate to a reasonable person that (state the name of the alleged victim) was consenting to the sexual intercourse. In deciding whether the accused was under the mistaken belief that (state the name of the alleged victim) consented, you should consider the probability or improbability of the evidence presented on the matter.
>
> You should also consider the accused's (age) (education) (experience) (prior contact with (state the name of the alleged victim)) (the nature of any conversations between the 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)).

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

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

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

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

> You may also consider the evidence of such Rape for its tendency, if any, to show the accused's propensity or predisposition to engage in sexual offenses.

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

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

B

1

Mr. Santucci appealed from his conviction to the ACCA.[3] Relying on a then-recent decision issued by the Court of Appeals for the Armed Forces ("CAAF") in *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016), he challenged the propensity instruction provided in his case. In *Hills*, the CAAF reversed a defendant's rape

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

conviction after a military court-martial judge relied on MRE 413 to instruct the jury that "evidence that the accused committed a sexual assault offense . . . may have a bearing on your deliberations in relation to the other charged sexual assault offenses." *Id.* at 353 (omission in original) (emphasis omitted). The CAAF held that the propensity instruction violated due process because it "suggest[ed] that [the] conduct of which an accused is presumed innocent may be used to show a propensity to have committed other conduct of which he is presumed innocent." *Id.* at 356. Mr. Santucci argued that the ACCA should reverse in light of *Hills*, because "the prosecution took full advantage of . . . M.R.E. 413" to bolster its case. Aplee.'s Suppl. App. at 53 (Mr. Santucci's *Grostefon* Br., filed Apr. 28, 2016). In a *Grostefon* brief,[4] Mr. Santucci also challenged the military judge's failure to give the mistake-of-fact instruction for his rape charge.[5]

The ACCA considered both the propensity and mistake-of-fact instructions in its opinion, finding that they merited discussion, but no relief.[6] Reviewing the MRE 413 (i.e., propensity) instruction, the court held that *Hills* rendered the instruction

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

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

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

improper. Nevertheless, it affirmed Mr. Santucci's conviction on the ground that the trial court's decision to give the propensity instruction was harmless beyond a reasonable doubt and did not contribute to either Mr. Santucci's conviction or sentence. *See* Aplt.'s App. at 57.

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

The ACCA nevertheless also held that the military judge should have instructed the jury on the mistake-of-fact defense. *See id.* at 58 ("'Providing the panel with an incorrect instruction as to an affirmative defense is an error of constitutional magnitude' which we examine to determine if it is harmless beyond a reasonable doubt." (quoting *United States v. Chandler*, 74 M.J. 674, 685 (C.A.A.F.

2015))). But again, the court reasoned that "[w]hile *some* evidence raised the instructional requirement with respect to rape, [it was] confident beyond a reasonable doubt that [the mistake-of-fact instruction's] omission did not contribute to the verdict," *id.* at 57–58, due to the "strength of TW's testimony, corroborated by medical providers and witnesses, regarding the injuries she sustained as a result of his violence on the night in question," *id.* at 57.

The court consequently held, "[v]iewing the evidence in its entirety," that "this was clearly not a situation from which appellant could have feasibly claimed an honest, reasonable, mistaken belief that TW was consenting to his misconduct." *Id.* The ACCA found its harmlessness conclusion—based on the omission of the mistake-of-fact instruction regarding the rape charge—was bolstered by the fact that Mr. Santucci also was *convicted* of forcible sodomy even though the panel had received the mistake-of-fact instruction for that offense. Moreover, the court emphasized that Mr. Santucci's theory at trial seemed to focus on the argument that TW "actually consented, not that [Mr. Santucci] mistakenly believed she did."[7] *Id.*

Mr. Santucci further appealed to the CAAF, but principally argued that the military judge who presided over his court-martial was illegitimately appointed under the Appointments Clause. In another *Grostefon* supplement, Mr. Santucci also argued that the ACCA had incorrectly applied *Hills* to the issue of the improper

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

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

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

2

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

And, importantly for our purposes, Mr. Santucci contended that the district court could reach the merits of his claims because "constitutional protections were not observed at the trial court level or during direct appeal." *Id.* at 35. Mr. Santucci acknowledged that military courts are better suited than their civilian counterparts to assess "matters impacting good order and discipline." *Id.* at 39. But unlike claims involving "the unique nature of the military"—which provide "the basis for civilian

judicial deference"—his habeas claims, reasoned Mr. Santucci, challenge whether "constitutional safeguards were observed." *Id.* Because, in his view, "the military's 'full and fair consideration' [of those claims was] fatally flawed," *id.* at 37, an Article III court's deference to the military tribunal would be critically misplaced, *see id.* at 39.

The district court denied Mr. Santucci's petition. *See Santucci v. Commandant*, No. 19-3116-JWL, 2020 WL 2735748, at *4 (D. Kan. May 26, 2020). The court noted that its "review of court-martial decisions generally is limited to jurisdictional issues and to a determination of whether the military courts gave full and fair consideration to the petitioner's constitutional claims." *Id.* at *2 (citing *Fricke v. Sec'y of the Navy*, 509 F.3d 1287, 1290 (10th Cir. 2007)). Applying this standard, the court denied Mr. Santucci's request for habeas relief. *See id.* at *3–4. Specifically, focusing on the ACCA's analysis of Mr. Santucci's claims as to the mistake-of-fact and propensity instructions, as well as its conclusions of harmlessness, the district court concluded that the military courts "fully and fairly considered" Mr. Santucci's claims. *Id.* In response to Mr. Santucci's argument that the ACCA's "full and fair" consideration was constitutionally flawed because it did not assess the harmfulness of the erroneous instructions through a cumulative lens, the court explained as follows:

> The Court has considered this argument but concludes that this matter was given constitutionally adequate consideration in the military courts. Notably, the ACCA agreed that the military judge should have instructed the panel on mistake of fact and that the military judge erred in

> giving the propensity instruction. It is not the legal issue of whether the instructions were proper that is in dispute. Rather, it is the application of those findings to the evidentiary record that is the core of the argument. The military courts had the full evidentiary record and resolved the claims against petitioner. The Court finds these claims were given thorough consideration in the military courts, and this court may not re-evaluate the evidence.

Id. at *4.[8]

Mr. Santucci then filed this appeal.

II

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

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[8] Mr. Santucci also argued that he had been deprived of effective assistance of counsel in violation of his Sixth Amendment rights, pointing to "25 unreasonable errors" that his trial counsel allegedly made. Aplt.'s App. at 27; *see also id.* at 29–34 (discussing the alleged errors). Analyzing the ineffective-assistance claim, the district court held that, as in Mr. Santucci's case, "where a military court has 'summarily disposed of the issue with the mere statement that it did not consider the issue meritorious or requiring discussion,' it 'has given the claim fair consideration.'" *Santucci*, 2020 WL 2735748, at *4 (quoting *Watson v. McCotter*, 782 F.2d 143, 145 (10th Cir. 1986)).

[9] In a footnote, Mr. Santucci states that he has not renewed his Sixth Amendment claim based on ineffective assistance of counsel due to word limitations, but requests that the court "evaluate his claim as set forth in his original Petition for a Writ of Habeas Corpus which is a part of the Appendix," and states that he "stands ready to brief the issue upon the Court's instruction." Aplt.'s Opening Br. at 52 n.4. This is an insufficient argument to trigger our review. *See, e.g.*, *Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007) ("[W]e routinely have declined to consider arguments that are not raised, or are inadequately presented, in an appellant's opening brief."). Furthermore, as the government points out, Mr. Santucci "does not

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

We start by summarizing—and clarifying—the proper framework under which we review habeas claims stemming from decisions of military tribunals. We then consider and reject Mr. Santucci's contrary arguments that effectively champion a

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seem to take any issue with how the district court resolved his claim that defense counsel was ineffective." Aplee.'s Resp. Br. at 26 n.9. His failure to challenge the district court's reasoning further waives our consideration of this issue. *See Reedy v. Werholtz*, 660 F.3d 1270, 1275 (10th Cir. 2011) (declining to consider an argument that "d[id] not challenge the [district] court's reasoning"); *Nixon v. City & Cnty. of Denver*, 784 F.3d 1364, 1366 (10th Cir. 2015) ("The first task of an appellant is to explain to us why the district court's decision was wrong."). Lastly, "[i]n our adversarial system of adjudication, we follow the principle of party presentation." *United States v. Sineneng-Smith*, --- U.S. ----, 140 S. Ct. 1575, 1579 (2020). Mr. Santucci had avenues open to him to either structure his briefing to include this issue or to file a motion requesting an expansion of the word limits; he did not avail himself of these avenues. Consequently, he is limited to the arguments that he did brief and, under the party-presentation principle, we, not only will not, but "cannot make arguments for him." *United States v. Yelloweagle*, 643 F.3d 1275, 1284 (10th Cir. 2011).

different analytical framework for considering such claims. Lastly, applying the proper analytical framework, we conclude that Mr. Santucci has not shown that the military tribunals failed to consider his claims fully and fairly. And, therefore, the district court appropriately denied his claim for habeas relief.

A

1

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

As a result, "like state law," "[m]ilitary law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment." *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion). Unsurprisingly, certain substantive differences emerge from this independence. For instance, the

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

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

Moreover, collateral review of court-martial verdicts has been narrowly circumscribed. Indeed, the Supreme Court did not review a court-martial habeas case until 1879. *See Ex parte Reed*, 100 U.S. 13 (1879); *see generally* Richard D. Rosen, *Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial*, 108 MIL. L. REV. 5, 20–30 (1985) (discussing the history of collateral

challenges in the federal judiciary to military tribunal proceedings). Federal courts are empowered under 28 U.S.C. § 2241 to entertain habeas petitions from military prisoners. But "our review of court-martial proceedings is very limited." *Thomas v. U.S. Disciplinary Barracks*, 625 F.3d 667, 670 (10th Cir. 2010); *see Wolff v. United States*, 737 F.2d 877, 879 (10th Cir. 1984) ("[T]he range of inquiry in acting upon applications for habeas corpus for persons confined by sentence of military courts is more narrow than in civil cases." (quoting *Kennedy v. Commandant*, 377 F.2d 339, 342 (10th Cir. 1967))). As a testament to this deferential posture, we have said that the deference we give to military tribunals is even "greater" than that we owe "to state courts." *Thomas*, 625 F.3d at 671.

Prior to 1953, our limited review exclusively focused on determining whether the military court-martial tribunal had jurisdiction over the habeas petitioner. *See Hiatt v. Brown*, 339 U.S. 103, 111 (1950) ("It is well settled that 'by habeas corpus the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial. The single inquiry, the test, is jurisdiction.'" (quoting *United States v. Grimley*, 137 U.S. 147, 150 (1890))); *Easley v. Hunter*, 209 F.2d 483, 486 (10th Cir. 1953) ("From early times, our courts have recognized that the Constitution confers upon Congress, and not the courts, the power to provide for the trial and disposition of offenses committed by those in the armed forces and that the civil courts are limited to a consideration of the jurisdiction of courts-martial and that they have no supervisory or correcting power over their decisions."); *see also Calley v. Callaway*, 519 F.2d 184, 194 (5th Cir. 1975) (providing "[a] brief historical outline" of the

"scope of review" and noting in this regard that "Supreme Court decisions followed the jurisdictional test and emphasized that the scope of inquiry for federal courts was limited to whether the court-martial was properly constituted, whether it had jurisdiction over the person and the offense charged, and whether the sentence was authorized by law"). Under this regime, once an Article III court determined that the military court had jurisdiction, it lacked the authority to evaluate the merits of the military petitioner's case.

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

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

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

Noting that "[t]he Framers expressly entrusted" Congress with the task of determining the "precise balance to . . . str[ike]" between "the rights of men in the armed forces" and the "demands of discipline and duty," a plurality of the Court reasoned that Congress's passage of the UCMJ in the aftermath of World War II had reaffirmed military courts' responsibility "to protect a person from a violation of his constitutional rights." *Id.* at 140–42. The plurality recognized that, although Congress continued to vest the federal civil courts with jurisdiction over habeas corpus applications from court-martial convictions, "*even more than in state [habeas] corpus cases*, it would be in disregard of the statutory scheme if the federal civil courts failed to take account of the prior proceedings—of the fair determinations of the military tribunals after all military remedies have been exhausted." *Id.* at 142 (emphasis added).

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

courts manifestly refused to consider those claims, the District Court was empowered to review them de novo." *Id.*

Applying this standard, the *Burns* plurality noted that the Staff Judge Advocate, the Board of Review in the office of the Judge Advocate General, the Judicial Council in the Judge Advocate General's office (with the benefit of briefing and oral argument), and the Judge Advocate General all reviewed petitioners' challenges. *See id.* at 144. The military tribunals "concluded that petitioners had been accorded a complete opportunity to establish the authenticity of their allegations, and had failed." *Id.* Those facts "ma[de] it plain that the military courts . . . heard petitioners out on every significant allegation" that they were then presenting to the Supreme Court. *Id.* For that reason, said the *Burns* plurality, "it [was] *not* the duty of the civil courts simply to repeat that process—to re-examine and reweigh each item of evidence of the occurrence of events which tend to prove or disprove one of the allegations in the applications for habeas corpus." *Id.* (emphasis added). Rather, the plurality reasoned that "[i]t is the limited function of the civil courts to determine whether the military [courts] have given fair consideration to each of these claims." *Id.* The plurality concluded that "due regard for the limitations on a civil court's power" precluded it from meeting petitioners' "demand [for] an[other] opportunity to make a new record, to prove de novo in the District

Court precisely the case which they failed to prove in the military courts."[10] *Id.* at 146.

Under the plurality decision in *Burns*, the scope of our habeas review expressly reaches beyond jurisdictional questions to an assessment of whether a full merits review is (at the very least) authorized because the military justice system has failed to give full and fair consideration to the petitioner's claims.[11] *See id.* at 142. Nevertheless, nearly forty years later, in *Dodson v. Zelez*, 917 F.2d 1250 (10th Cir.

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

[11] In treating *Burns*'s full-and-fair-consideration standard as the principal criterion by which we assess military habeas claims, our decision in *Dodson v. Zelez*, 917 F.2d 1250 (10th Cir. 1990) made clear—even though not explicitly so—that *Burns*'s plurality decision governs our review and should be deemed controlling. *See id.* at 1252 (discussing *Burns* and collecting cases in which we discussed or quoted *Burns*). The Fifth Circuit's analysis in *Calley v. Callaway*, 519 F.2d 184 (5th Cir. 1975)—the seminal decision that *Dodson* looked to—provides support for this view. Specifically, *Calley* faithfully applied *Burns*'s "scope of review," *id.* at 198, in the face of scholarly criticism that the plurality decision lacked "precedential value," *id.* at 197 n.18. In any event, by stating that "[w]e are . . . required to apply the standard outlined by the Supreme Court in *Burns*," our decision just three years later in *Roberts v. Callahan*, 321 F.3d 994 (10th Cir. 2003), erased any doubt that *Burns* supplies in this circuit the operative and controlling foundation for our review of military habeas claims, *id.* at 996—a proposition as to which both parties agree, *see* Aplt.'s Opening Br. at 1 ("The district judge erred by refusing to apply Supreme Court *precedent* in *Burns v. Wilson* . . . ." (emphasis added)); Aplee. Br. at 16 (describing *Burns* as the operative framework for our review).

1990), we acknowledged that our interpretation of "the language in *Burns*"—as expressed in our post-*Burns* decisions—"ha[d] been anything but clear." *Id.* at 1252. Most of our cases following *Burns*, we explained, "simply quoted the *Burns* language and held that no review of a petition for habeas corpus was possible when the defendant's claims were fully and fairly considered by the military courts." *Id.* (collecting cases). Others "were more specific and held that we could not review *factual disputes* if they had been fully and fairly considered by the military courts." *Id.* (collecting cases). In yet another decision—*Monk v. Zelez*, 901 F.2d 885 (10th Cir. 1990) (per curiam)—we "held that review was proper when the constitutional claim was both 'substantial and largely free of factual questions.'" *Dodson*, 917 F.2d at 1252 (quoting *Monk*, 901 F.2d at 888).

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

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

Id. at 1252–53 (omissions in original) (emphasis omitted) (citations omitted).

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

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

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

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

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

By contrast, *Dodson* rejected claims that failed to satisfy each of the four factors—that is, we declined to conduct a full merits review of those claims because each of the four factors did not weigh in Mr. Dodson's favor and left undisturbed the military tribunal's determinations. For instance, this was our approach with respect

to Mr. Dodson's jury-composition claim where we concluded, in effect, that it did not satisfy the second *Dodson* factor: we refused to characterize it as "substantial," in light of our (and the Supreme Court's) consistent refusal "to apply the [S]ixth [A]mendment right to a jury trial in the court-martial setting" and further held that Mr. Dodson "ma[de] no substantial constitutional claim that due process was violated" by the jury's composition. *Id.* at 1253–54. This failing as to the second factor was seemingly sufficient for us to conclude that the military tribunal's "summary affirmance was appropriate . . . and fulfilled the full and fair consideration requirement." *Id.* at 1254.

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

Accordingly, both explicitly and implicitly, *Dodson* illustrates the principle that—as a necessary condition for full merits review—a petitioner must demonstrate that the resolution of each of the *Dodson* factors weighs in the petitioner's favor. And, notably, a petitioner's favorable showing regarding the first and second *Dodson* factors (i.e., substantial constitutional claim and issue of law rather than of disputed

fact, respectively)—though necessary—is not sufficient to set the table for full merits review.

Furthermore, our caselaw after—and even before *Dodson*—bolsters the inference that—at least in substance—the satisfaction of the four factors that *Dodson* highlights has been a necessary predicate for full merits review of military habeas claims. *See Thomas*, 625 F.3d at 670 ("To assess the fairness of the consideration, our review of a military conviction is appropriate *only* if the . . . four [*Dodson*] conditions are met." (emphasis added)); *Lips v. Commandant*, 997 F.2d 808, 811 (10th Cir. 1993) (noting "that [a merits] review by a federal district court of a military conviction is appropriate *only* if the . . . four [*Dodson*] conditions are met" (emphasis added)); *Hubbard v. Berrong*, 7 F.3d 1045, 1993 WL 415268, at *2 (10th Cir. 1993) (unpublished table decision) ("If the [federal habeas claim] was raised before the military courts, [the] four [*Dodson*] conditions *must* be met before a district court's habeas review of a military decision is appropriate." (emphasis added)); *accord Calley*, 519 F.2d at 199 (concluding "from an extensive research of the case law" that the satisfaction of the "four principal" factors, which *Dodson* later adopted, is "*necessary*" for the "federal courts to review [on the merits] military convictions of a habeas petition" (emphasis added)); *Fletcher v. Outlaw*, 578 F.3d 274, 278 (5th Cir. 2009) (noting that "review of a military conviction is appropriate *only* if [the] four [*Calley*] conditions are met" (emphasis added)); *see also Khan v. Hart*, 943 F.2d 1261, 1263 (10th Cir. 1991) (finding all four factors satisfied where the petitioner raised a non-delegation doctrine question that did not turn on disputed

facts, lacked any special military concerns, and where the adequacy of the Court of Military Appeals's consideration was not "indicate[d]" by its "formulary order"); *Monk*, 901 F.2d at 888, 892–93 (conducting a merits review where the petitioner presented a substantial constitutional claim largely free of factual questions that the military tribunals arguably did not adequately consider and where no special military considerations were present); *cf. Dixon v. United States*, 237 F.2d 509, 510 (10th Cir. 1956) (declining to conduct a merits review where a military tribunal "fully considered" the petitioner's fact-free, substantial constitutional claim, namely, "whether the [petitioner's] confession was voluntary," with no special military considerations noted); *Lundy v. Zelez*, 908 F.2d 593, 595 (10th Cir. 1990) (per curiam) (declining to conduct a full merits review of the petitioner's constitutional due process claim where the petitioner failed to "allege that the Judge Advocate General failed to give fair consideration to his issue"); *Watson v. McCotter*, 782 F.2d 143, 145 n.3 (10th Cir. 1986) (affirming the dismissal of the petitioner's habeas claim because it presented "a mixed question of law and fact" that the military tribunals adequately considered).

Indeed, our cases have borne out the uncontroversial observation we made in *Roberts v. Callahan* that, though each factor's importance will vary case-by-case, satisfaction of each factor is nonetheless critical to the invocation of our merits review.[12] *See* 321 F.3d at 996–97. Putting the matter differently, petitioners' failure

[12] As an example of that proposition, we hypothesized in *Roberts* that "the first factor—the substantiality of the constitutional dimension—may appear in some

to show that even one factor weighs in their favor is fatal to their efforts to secure full merits review. And we note that this is especially so, when the factor in question is one that we have described as "the most important," that is, the fourth, adequate-consideration factor. *Thomas*, 625 F.3d at 671 (emphasizing that "the fourth consideration"—the adequacy of the military tribunal's consideration—is "the most important" and concluding that the petitioner's failure to show *in*adequate consideration was determinative without discussion of the other factors).

Moreover, it is important to underscore that in the instances where petitioners have demonstrated that, in substance, all four *Dodson* factors weigh in their favor as to their asserted claims—thus rendering those claims eligible for full merits review—federal courts in our circuit consistently have proceeded to conduct such a review.[13] *See, e.g.*, *Khan*, 943 F.2d at 1263; *Monk*, 901 F.2d at 888, 892–93; *Huschak v. Gray*,

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cases to provide little guidance as to whether the military courts gave the case full and fair consideration." 321 F.3d at 996–97. Nevertheless, we explained that "[t]his factor is important . . . as a reminder that we will *only* review habeas corpus petitions from the military courts that raise substantial constitutional issues." *Id.* at 997 (emphasis added).

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

642 F. Supp. 2d 1268, 1275 n.3, 1276–82 (D. Kan. 2009) (reviewing the petitioner's habeas claims on the merits where, substantively, the claims were substantial and free of factual dispute, no special military considerations were noted, and "there was no consideration whatsoever of petitioner's claims by the military courts"); *Jefferson v. Berrong*, 783 F. Supp. 1304, 1306–08 (D. Kan. 1992) (reviewing the petitioner's ineffective assistance of counsel claim on the merits where, in the district court's estimation, all four *Dodson* factors were satisfied); *see also Young v. Belcher*, No. 12-3061-RDR, 2013 WL 1308308, at *4 (D. Kan. Mar. 27, 2013) (noting that a merits review is "appropriate only if" the four *Dodson* factors are satisfied (quoting *Thomas*, 625 F.3d at 670)); *Condon v. Horton*, No. 19-3192-JWL, 2020 WL 508949, at *2 (D. Kan. Jan. 31, 2020) (same); *Oliver v. Commandant*, No. 18-3055-JWL, 2018 WL 3575675, at *3 (D. Kan. July 25, 2018) (same).

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

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

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

2

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

Santucci raised had received 'full and fair' consideration by the military courts, Article III courts may nonetheless reach the merits of those issues so long as they are constitutional in nature."); *id.* at 6 ("[T]hough the Commandant and the district court rely primarily on *Dodson* and the 'full and fair' consideration analysis, *this is but one factor [to] be considered*." (emphasis added)). Thus, Mr. Santucci argues that—quite apart from the full-and-fair-consideration framework and *Dodson*, which we have clarified *supra*—courts are permitted to conduct a full merits review of petitioners' claims when they involve substantial constitutional issues, and the district court committed reversible error by not doing so here. As the foregoing discussion suggests, we believe that this argument is misguided. More specifically, it is irreconcilable with *Burns* and also unsupported by our pre-*Dodson* precedent.

Mr. Santucci's second argument bears some resemblance to his first in that it, too, elevates the primacy of constitutional questions in shaping the scope of our review. But rather than abandon *Dodson* and the full-and-fair-consideration framework that *Dodson* illuminates, Mr. Santucci posits that the presence of a substantial constitutional issue that is largely free of factual issues is, standing alone, sufficient to trigger our full merits review under *Dodson*'s full-and-fair-consideration framework. *See* Aplt.'s Opening Br. at 51 (arguing that, under the *Dodson* test, "when it comes to constitutional protections, the Article III courts should not be prevented from reviewing the decisions by the military that result in convictions and confinement").

In other words, Mr. Santucci, in effect, rejects the proposition that petitioners must demonstrate that all four of the *Dodson* factors weigh in their favor to be eligible for full merits review; he believes it is sufficient to trigger such review for petitioners to show that they satisfy, in substance, the first two *Dodson* factors—that is, they show that their claim raises a substantial constitutional issue that is largely free of factual disputes. As Mr. Santucci reasons, for *Dodson* to be consistent with our earlier precedent, the presence of such a substantial constitutional issue must be sufficient for purposes of triggering full merits review. *See* Aplt.'s Reply Br. at 6 (noting that our pre-*Dodson* precedent is "good law" and "demonstrate[s] that the Article III courts must determine whether the constitutional issues presented are substantial and largely free of factual issues").

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

a

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

inquire whether there were substantial constitutional issues raised in his habeas petition. And, if so—to avoid reversible error—the court needed to conduct a full merits review of them.

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

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

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

Nor does our precedent require a contrary conclusion. In construing our precedent, we note that the proper approach is to "read general language in judicial opinions . . . as referring in context to circumstances similar to the circumstances then before the Court and *not* referring to quite different circumstances that the Court was not then considering." *Illinois v. Lidster*, 540 U.S. 419, 424 (2004) (emphasis

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

added); *see also Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 399 (1821) ("[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision."); *United States v. Herrera*, 51 F.4th 1226, 1282 (10th Cir. 2022) ("We often interpret general language in cases 'as referring in context to circumstances then before the Court.'" (quoting *Lidster*, 540 U.S. at 424)). Moreover, we "must endeavor to interpret our cases in a manner that permits them to coexist harmoniously with overarching and controlling Supreme Court precedent and with each other." *United States v. Hansen*, 929 F.3d 1238, 1254 (10th Cir. 2019); *see* Bryan A. Garner et al., THE LAW OF JUDICIAL PRECEDENT 300 (2016) (noting that "decisions of equal authority" [i.e., from the same court] that appear to be "discordant" "should be harmonized" "[i]f at all possible" (bold-face font omitted)).

Mr. Santucci looks to *Wallis v. O'Kier*, 491 F.2d 1323 (10th Cir. 1974), and *Kennedy v. Commandant*, 377 F.2d 339 (10th Cir. 1967), for the proposition that, irrespective of whether the military tribunal provided full and fair consideration, Article III courts have a "duty" to review substantial constitutional issues presented by military petitioners—which frequently, it seems, means constitutional issues that are free of fact-bound disputes. *See Wallis*, 491 F.2d at 1325 ("Where such a constitutional right is asserted and where it is claimed that the petitioner for the Great Writ is in custody by reason of such deprivation, the constitutional courts of the United States have the power and are under the duty to make inquiry."); *Kennedy*,

377 F.2d at 342 ("We believe it is the duty of this Court to determine if the military procedure for providing assistance to those brought before a special court-martial is violative of the fundamental rights secured to all by the United States Constitution."). However, we are not persuaded by Mr. Santucci's argument.

At the outset, it is important to underscore that these cases were decided before we undertook the effort in *Dodson* to harmonize our precedent with the controlling Supreme Court authority of *Burns*. As part and parcel of that endeavor, we carefully scrutinized our prior caselaw and shed important light on the contours of our review. In that process, we recognized that some of our prior precedent—including *Wallis*—may have relied on unannounced factors that did not squarely fit within the *Burns* framework, in that those cases deemed "review of constitutional claims in habeas corpus petitions . . . proper without *really* saying when and why." *Dodson*, 917 F.2d at 1252 (emphasis added). With the clarifying benefit of *Dodson* and our subsequent caselaw, we are better situated now to resolve—with clearly defined, explicit factors—Mr. Santucci's appeal in a manner consonant with *Burns*.

In any event, read carefully and within their respective contexts, *see Lidster*, 540 U.S. at 424, neither *Kennedy* nor *Wallis* supports Mr. Santucci's ambitious reading. As we see it, we used the term "duty" in both *Kennedy* and *Wallis* as signifying in distinct but related ways our recognition that, after *Burns*, Article III habeas courts are no longer limited to reviewing questions related to the jurisdiction of military courts. Relatedly, we understand those decisions as merely highlighting that federal courts are statutorily vested with a responsibility—that is, a "duty"—to

inquire into whether a full merits review is necessary and appropriate in *specific* cases regarding the merits of *particular* alleged constitutional violations and, if so, to perform such a review. We do not read these two cases as adopting some broad rule that, in every case—or, even more specifically, every case involving constitutional issues—that Article III courts have a "duty" to conduct a full merits review of military tribunals' decisions—irrespective of whether the tribunals provided full and fair consideration.

In this regard, in *Kennedy*, we observed that—even though "the range of inquiry in acting upon applications for habeas corpus from persons confined by sentence of military courts is more narrow than in civil cases"—"[i]f *Burns* . . . accomplished nothing else, it 'conclusively rejected the concept . . . that habeas corpus review should be restricted to questions of formal jurisdiction.'" *Kennedy*, 377 F.2d at 342 (citation omitted) (first quoting *Suttles v. Davis*, 215 F.2d 760, 761 (10th Cir. 1954); and then quoting *Gibbs v. Blackwell*, 354 F.2d 469, 471 (5th Cir. 1965)).

Furthermore, effectively anticipating our later adoption of *Dodson*'s second factor—excluding fact-bound issues from our review—we stated that "[w]here the constitutional issue involves a factual determination, ... [i]t is *not* our *duty* to re-examine and reweigh each item of evidence which tends to prove or disprove the allegations in the petition for habeas corpus." *Id.* (emphases added); *see also Dodson*, 917 F.2d at 1252 (referencing the second factor—that "[t]he issue must be one of law rather than of disputed fact already determined by the military

tribunals"—and noting that the four factors adopted therein, though not "clearly expressed," were "found in our prior cases" (emphasis omitted)). In other words, we communicated that the leeway to extend our review beyond jurisdictional issues that *Burns* recognized did not come with a responsibility (i.e., a duty) to engage in full merits review of fact-bound constitutional issues.

Yet, notably, as to the obverse circumstances, involving the presence of constitutional issues *not* freighted with disputed factual issues, we announced no general rule that we have a duty of full merits review. That is, we did not hold that such a duty of review exists concerning *every* constitutional issue largely free of factual disputes. Instead, we simply turned to the task of examining the petitioner's particular constitutional claims, which implicated the Fifth and Sixth Amendments.[15] And it was following this assessment of the specific nature and magnitude of the petitioner's claims that we stated the following: "We believe it is the duty of this Court to 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." *Id.*

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

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

Citing *Kennedy*, *Wallis*'s use of the term "duty" likewise does not purport to establish a universal obligation of Article III habeas courts to conduct full merits review of constitutional issues—even ones largely free of factual disputes—without regard to whether the military courts have given full and fair consideration to those issues. *See Wallis*, 491 F.2d at 1325. Instead, like *Kennedy*, we read *Wallis* to implicitly speak of the propriety—in light of the limited leeway for review beyond jurisdictional issues that *Burns* recognized—of exercising full merits review of the *particular* constitutional issues raised in a *specific* case. In that regard, the *Wallis* panel was particularly concerned with addressing the government's argument that "this is a case where military tribunals have given full and fair consideration to the issue presented and that, since this has been done, the district court and this Court are *without jurisdiction* to review the merits of the cause." *Id.* (emphasis added). Though not citing *Burns*, the panel's response was consistent with *Burns*'s guidance

that the real question in the military-habeas context is not one of "power at all" (i.e., the court's jurisdiction) because the statute, 28 U.S.C. § 2241, confers that; rather, at issue is "the manner in which the Court should proceed to exercise its power." *Burns*, 346 U.S. at 139.

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

Admittedly, the import of our pre-*Dodson* cases is not entirely pellucid because, as we noted in *Dodson*, when electing to conduct a full merits review of constitutional issues in the military habeas context, these cases sometimes do not "really say[] . . . why." 917 F.2d at 1252. However, our careful study of the two pre-*Dodson* cases that Mr. Santucci relies on—*Kennedy* and *Wallis*—permits us to say this much: they do not stand for the broad proposition that Mr. Santucci advances and thus do not avail him. In other words, they do not oblige federal habeas courts, like the district court here, to conduct a full merits review in every instance in which petitioners present to them substantial constitutional issues—even where those issues

are largely free of factual disputes—irrespective of whether the military courts previously have given full and fair consideration to those issues. Accordingly, Mr. Santucci's argument to this effect does not give us pause or cause us to deviate from the full-and-fair-consideration framework that we have outlined and clarified above.

b

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

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

Stated otherwise, Mr. Santucci contends that—viewed through the proper prism of our harmonized precedent—his presentation of such largely fact-free, substantial constitutional issues was sufficient, without more, to oblige the district court here to conduct a full merits review of those issues. *See id.* (positing that "substantial questions of constitutional law, largely free of factual questions, fall[] directly within the standard of review set forth in" *Dodson* and our pre-*Dodson* precedent); *id.* at 10–11 (arguing that our *Dodson* and pre-*Dodson* precedent "uniformly hold that substantial questions of constitutional law largely free of factual issues brought under federal habeas pursuant to Section 2241 should be actually determined by Article III courts"). In other words, because his claims are "largely free of factual issues and purely questions of constitutional and criminal law," *id.* at 23, Mr. Santucci insists that the district court was "dutybound" to fully adjudicate his constitutional claims, *see id.* at 43, 48.[16]

[16] Mr. Santucci further contends that, as to such issues, federal habeas courts at least possess the "*discretion*" to conduct a full merits review of them. Aplt.'s Opening Br. at 48 (emphasis added). The substance of Mr. Santucci's argument in his Opening Brief regarding the district court's ostensible discretion to review constitutional claims is not altogether clear, and he declines to develop it further in his Reply Brief. *Compare id.* (arguing that the "full and fair consideration" standard "leaves the Article III trial judge with the discretion to reach the merits [of a claim] and determine if constitutional protections were correctly considered and

In advancing his argument, Mr. Santucci points to several of our precedents, most notably, *Monk*. He contends that *Monk* "instructs that even where Article I

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applied"); *id.* at 54 (arguing that "district courts in this Circuit possess the discretion, and in those cases where the constitutional issues are 'substantial and largely free of factual issues,' the duty, to adjudicate the merits of claims military petitioners bring"), *with* Aplt.'s Reply Br. 2–8 (making arguments but not mentioning habeas courts' ostensible discretion to conduct full merits review).

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

In any event, Mr. Santucci identifies no authority in support of his position that the district court has "discretion" to consider habeas claims on their merits even if a military tribunal has fully and fairly considered the claim. *See* FED. R. APP. P. 28(a)(8)(A) (requiring Appellant to support his contentions "with citations to the authorities . . . on which the appellant relies"). Nor does he develop his discretion argument beyond what we have quoted, *supra*, and "[w]e are not . . . in the business of making arguments" for him. *Lounds v. Lincare, Inc.*, 812 F.3d 1208, 1227 (10th Cir. 2015); *see Yelloweagle*, 643 F.3d at 1284 (noting that we cannot "make arguments for" a litigant); *cf. United States v. Lamirand*, 669 F.3d 1091, 1099 n.7 (10th Cir. 2012) ("[T]he argument is not adequately presented to us. [The defendant] does not even identify this distinct argument in his statement of appellate issues, much less elaborate in the brief on its substantive premises. Instead, [the defendant] puts forward only a couple of stray sentences in his briefs and does not cite to any authority that even remotely supports the argument."). Accordingly, to the extent Mr. Santucci argues that an Article III court's authority to hear military habeas claims is discretionary, we deem it waived under our briefing-waiver doctrine.

military tribunals considered constitutional claims, Article III courts are the final arbiters of whether the proceedings complied with the Constitution." *Id.* at 16 (bold-face font omitted). In his view, *Monk* illustrates that a military tribunal's adequate consideration of a petitioner's claim—which corresponds to *Dodson*'s fourth factor—does not preclude an Article III court's review of the claim's merits where the claim concerns a substantial constitutional issue "largely free of factual questions." *Id.* at 19 (quoting *Monk*, 901 F.2d at 888).

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

As the party seeking relief, Mr. Santucci bears the ultimate burden of persuasion, and with that in mind, we now turn to *Monk*, as well as the other cases he

cites, to see if his alternative argument has merit. *See Beeler v. Crouse*, 332 F.2d 783, 783 (10th Cir. 1964) (per curiam) ("Habeas corpus is a civil proceeding and the burden is upon the petitioner to show by a preponderance of the evidence that he is entitled to relief."); *cf. Hawkins v. Schwan's Home Serv., Inc.*, 778 F.3d 877, 894 (10th Cir. 2015) ("[T]he plaintiff always bears the ultimate burden of persuasion."). After carefully studying *Monk* and our other pre-*Dodson* precedent, we are unmoved by Mr. Santucci's contention that the presence of certain constitutional questions, standing alone, is sufficient to trigger full merits review. In fact, the case upon which Mr. Santucci relies most heavily—*Monk*—is entirely consistent with the full-and-fair-consideration framework we have elucidated today.

In *Monk*—decided before we formalized the *Dodson* framework—we reversed a district court's denial of habeas relief to a military petitioner who argued that a jury instruction equating "substantial doubt" with reasonable doubt had prejudiced the defendant in his military trial. 901 F.2d at 889–91. Mr. Monk's claim was both "substantial and largely free of factual questions," and we did not identify any special military considerations counseling against review. *Id.* at 888 (quoting *Mendrano v. Smith*, 797 F.2d 1538, 1542 n.6 (10th Cir. 1986)). That is, viewed through the lens of *Dodson*, we determined that Mr. Monk's claim clearly reflected a substantial constitutional issue that was largely free of factual questions, in satisfaction of the first two factors, and that the third factor relating to special military considerations also weighed in Mr. Monk's favor. *See Dodson*, 917 F.2d at 1252–53.

However, we acknowledged that a military court had "considered [Mr.] Monk's claim that the military judge's reasonable doubt instruction deprived him of his right to due process." *Monk*, 901 F.2d at 888. Despite that, we deemed it appropriate to "consider and decide [the] constitutional issues that were also considered by the military courts." *Id.* Mr. Santucci makes much of our decision to review Mr. Monk's claim on the merits—despite the military tribunal's prior consideration—viewing it as definitive proof that the presence of constitutional claims that are substantial and largely free of factual issues is sufficient to trigger full merits review by a federal habeas court.

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

[17] *Monk*'s citation to our decision in *Mendrano*—another case upon which Mr. Santucci relies—bolsters our reading of *Monk*, *viz.*, our view that the *Monk* panel's decision to conduct a full merits review turned on the inadequacy of the military tribunal's consideration. *See Monk*, 901 F.2d at 888. As in *Monk*, in *Mendrano*, the government failed to argue that the military tribunals fully and fairly considered the petitioner's claim and, instead, responded to the claim on the merits. *See id.* at 892–93 (reviewing the government's arguments); *Mendrano*, 797 F.2d at 1542 n.6. In *Mendrano*, we effectively condemned the decision-making of the

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

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

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military courts with faint praise by noting that "the military courts gave *at least some* consideration to petitioner's Fifth and Sixth Amendment claims." 797 F.2d at 1542 n.6 (emphasis added); *see Dodson*, 917 F.2d at 1263 n.1 (Anderson, J., dissenting) (noting, without objection from the majority, that "no full consideration had been given to the claim by the military courts" in *Mendrano*). It was in the context of such a negative assessment of the character of the military courts' consideration—as well as the government's failure to "argue that full and fair consideration by the military courts makes judicial review inappropriate"—that we concluded that it was proper to conduct a full merits review of the petitioner's general "constitutional issues." *Mendrano*, 797 F.2d at 1542 n.6. *Monk*'s citation to *Mendrano* thus lends credence to our view that the decision to conduct full merits review in *Monk* turned on the *in*adequacy of the military tribunals' consideration; in other words, the citation suggests that the *Monk* panel viewed *Mendrano* as presenting a like circumstance of inadequate consideration by the military courts.

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

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

Relatedly, it should be clear from our explication of the *Monk* panel's analysis that its decision is congruent with—rather than antithetical to—our requisite, four-factor *Dodson* framework. That is so because, in substance, all four of the *Dodson* factors were present when we engaged in full merits review. In other words, the outcome in *Monk* is entirely consistent with the full-and-fair-consideration

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

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

Further, besides *Monk*, Mr. Santucci broadly contends that our decisions in "*Dodson*, *Dickson*, *Dixon*, *Kennedy*, *Lips*, *Lundy*, *McCotter*, and *Wallis* . . . uniformly hold that substantial questions of constitutional law largely free of factual issues" are

sufficient to equip an Article III court with the authority to conduct a full merits review. Aplt.'s Opening Br. at 10–11. We need not dwell long on these other cases that Mr. Santucci cites, however. First of all, Mr. Santucci does not even provide a complete citation for the "*Dickson*" case, *see id.* at 1, 10, and we cannot find any relevant case in our circuit by that name. Accordingly, we do not consider it further. *See* FED. R. APP. P. 28(a)(8)(A) (requiring Appellant to support his contentions "with citations to the authorities . . . on which the appellant relies"). Furthermore, apart from our decision in *Dodson*—which we have shown he misunderstands—Mr. Santucci never discusses the holdings of these cases. S*ee* Aplt.'s Opening Br. at 1, 10, 13, 18, 19, 23, 48, 49. Moreover, his reliance on *Kennedy* and *Wallis*—as to his second argument here—is confined to alluding to the passing references in those cases to the Article III court's "duty" to consider military habeas claims, *see id.* at 13, 18–19—references that we have already addressed in the immediately preceding subsection and found unavailing for Mr. Santucci. As we have said, "'[c]ursory statements, without supporting analysis and case law' are inadequate to preserve an issue." *Burke v. Regalado*, 935 F.3d 960, 1014 (10th Cir. 2019) (quoting *Bronson v. Swensen*, 500 F.3d 1099, 1105 (10th Cir. 2007)). Because Mr. Santucci fails to develop a fulsome argument with respect to the holdings of these cases—and because "[w]e cannot make a party's arguments for him," *United States v. Kravchuk*, 335 F.3d 1147, 1153 (10th Cir. 2003)—we decline to consider Mr. Santucci's broad, unsupported assertions regarding them further.

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

Specifically, whereas *Monk* illustrates the availability of Article III merits review where all four factors are satisfied, *Burns* underscores that such review is out of reach where a petitioner fails to meet all four factors. As in *Monk*, several of the claims at issue in *Burns* were undeniably of substantial constitutional stature and largely free of factual issues. *See Burns*, 346 U.S. at 142 (describing the "serious charges" set forth in petitioners' habeas applications, including allegations of unconstitutional imprisonment, coerced confessions, and denial of counsel of choice); *see also Calley*, 519 F.2d at 200 (describing the constitutional claims raised in *Burns* as the kind of "pure issues of constitutional law, unentangled with an appraisal of a special set of facts" that Article III courts sitting in habeas may review (first quoting *Shaw v. United States*, 357 F.2d 949, 954 (Ct. Cl. 1966); and then citing *Burns*, 346 U.S. at 142, 145, 146)).

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

Thus, viewing *Burns* through the prism of *Dodson*'s four factors leads us to the following conclusion: though the petitioners had effectively satisfied the first three factors—that is, each of those factors weighed in their favor—*Burns* nevertheless concluded that full merits review was inappropriate because the military courts had adequately considered the substantial constitutional issues before them. That is, because all four factors that *Dodson* subsequently highlighted were not present, petitioners could not secure full merits review. Or stated otherwise, contrary to Mr. Santucci's contention here, even though the *Burns* petitioners presented substantial constitutional issues largely free of factual issues, that was not sufficient to secure full merits review from the Article III court. Instead, consistent with the requisite four-factor framework we have described, *Burns* effectively refused to conduct full merits review because all four factors were not present. Thus, the Court's decision in *Burns*, in effect, coheres with the requisite, four-factor *Dodson* framework we have

outlined, which supports our conclusion that *Monk* and the other pre-*Dodson* caselaw upon which Mr. Santucci relies should be read as being congruent with that framework, too.

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

B

Our framework clarified, "[w]e review the district court's denial of habeas relief de novo," and address Mr. Santucci's remaining arguments. *Fricke*, 509 F.3d at 1289. First, Mr. Santucci argues that the district court's failure to cite to *Dodson* represented an "erroneous[] . . . overly narrow view of its review authority," and asks us to reverse and remand on that basis. Aplt.'s Opening Br. at 38 (bold-face font omitted). We decline that request: the district court expressly invoked the full-and-fair-consideration framework of *Burns*—which *Dodson*'s reasoning is both predicated on and clarifies—and it is that *Burns* framework that is the ultimate touchstone of a federal habeas court's analysis. Second, we conclude that Mr. Santucci's claims do not satisfy the four-part *Dodson* test. Reviewing Mr. Santucci's claims on the merits would require an impermissible reweighing of the evidence (i.e.,

Dodson factor 2). Furthermore, the military tribunals adequately considered Mr. Santucci's claims (i.e., *Dodson* factor 4). Because Mr. Santucci fails to satisfy those two factors of the *Dodson* test—when he must demonstrate that all four factors weigh in his favor—we hold that the district court did not err in declining to review his claims on the merits.

1

Mr. Santucci faults the district court for interpreting its review authority too narrowly. *See id.* In its decision, the district court did not explicitly cite to *Dodson* when analyzing Mr. Santucci's challenges; instead, it framed the issue as whether the ACCA had "fully and fairly considered" each constitutional error. *See Santucci*, 2020 WL 2735748, at *2–4. Mr. Santucci argues that in declining to explicitly discuss the *Dodson* factors, the district court incorrectly concluded that its "hands were tied": that is, it simply offered a "recitation of the bare facts and conclusions reached by the [ACCA], followed by the conclusion that the [ACCA]'s consideration of the issues had been full and fair." Aplt.'s Reply Br. at 1. He contends that the district court's failure to apply *Dodson* represented an "erroneous[] . . . overly narrow view of its review authority." Aplt.'s Opening Br. at 38 (bold-face font omitted).

As an initial matter, we hold that the district court's explicit reliance on the "full and fair consideration" standard, without citing *Dodson*, was not itself a legal error because, as we already explained, *Dodson* "merely develops our understanding of full and fair consideration" and "aids our determination of whether the federal court may reach the merits of the case." *Roberts*, 321 F.3d at 997; *see also Squire v.*

Ledwith, 674 F. App'x 823, 827 (10th Cir. 2017) (unpublished) (explaining that "the four-factor test is not a separate, independent inquiry from the full-and-fair consideration standard, but rather it is 'an aid in determining whether the claims were fully and fairly considered'" (quoting *Roberts*, 321 F.3d at 997)). Thus, though the district court failed to cite *Dodson*, its identification of the full-and-fair-consideration standard when formulating its standard of review—as well as its citations to other controlling cases, one of which explicitly refers to *Dodson*'s four-part framework (i.e., *Thomas*, 625 F.3d at 670)—confirms that it did not adopt an overly narrow view of its authority. [18] *See Santucci*, 2020 WL 2735748, at *2. Accordingly, we reject Mr. Santucci's first argument.

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

Mr. Santucci also attempts to distinguish our published decision in *Thomas*, which the district court cited, on the grounds that the *Thomas* court "resolved the case based on 28 U.S.C. § 2253(a), not Section 2241 as [Mr.] Santucci invokes." Aplt. Opening Br. at 43–44. But the district court's decision that we reviewed in *Thomas* was itself reviewing a Section 2241 petition. *See Thomas*, 625 F.3d at 668–69. In any event, this appears to be a distinction without a difference. The proposition from *Thomas* that the district court cited when reviewing Mr. Santucci's

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

a

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

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

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claims—that "[a] federal habeas court's review of court-martial proceedings is narrow," *Santucci*, 2020 WL 2735748, at *2 (citing *Thomas*, 625 F.3d at 670)—stems from *Burns* itself, *see* 346 U.S. at 139 ("[I]n military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in civil cases.").

legality of the instructions, themselves. *See* Aplt.'s Opening Br. at 14 ("As [Mr.] Santucci urged to [the] Article I tribunals and before the district judge below, the proper analysis, which has never been conducted, is the cumulative effects these due process errors had on the proceedings overall to accurately gauge the prejudice to [Mr.] Santucci—not evaluating each error individually and in isolation from the others."); *id.* ("To date, no court . . . has addressed the cumulative effects of these fundamental fairness errors."); *id.* at 42 (noting that the district court failed to "explain how review can be 'full' when an Article I tribunal failed [to] apply the law of 'harmless error' to the cumulative effects [of] a series of defective jury instructions and . . . mistakes by defense counsel"). *Compare* Aplt.'s App. at 57 ("The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence." (quoting *United States v. Kreutzer*, 61 M.J. 293, 298 (C.A.A.F. 2005))), *with* Aplt.'s Opening Br. at 27 (citing to *Chapman v. California*, 386 U.S. 18, 24 (1967), which establishes the same standard). *See generally* Aplt.'s Opening Br. at 32–35 (discussing cumulative error).

And it makes sense that this would be so: there is no basis for Mr. Santucci to question the ACCA's consideration of the constitutionality of the instructions themselves because the court ruled in his favor.[19] In evaluating Mr. Santucci's due-

[19] In addition, we note that Mr. Santucci failed to exhaust one of his key arguments—based on the mistake-of-fact instruction—by abandoning it in his petition to the CAAF. *See Nixon*, 635 F. App'x at 565 (reasoning that "[l]ike a state prisoner, a military prisoner must fully exhaust his claims in the military courts

process claims, the ACCA already recognized that the military court-martial judge erred by giving the jury unconstitutional propensity instructions and by failing to instruct the jury on Mr. Santucci's mistake-of-fact affirmative defense. *See* Aplt.'s App. at 57. Mr. Santucci's present challenge thus cannot reasonably be viewed as taking issue with the ACCA's purely legal determination that the military trial court's

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

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

instructions—viewed as a whole—were unconstitutional. This conclusion is no longer in dispute.

As the district court rightly recognized in rejecting his habeas petition, Mr. Santucci argues that the court incorrectly *applied* the *harmless error* standard. *See Santucci*, 2020 WL 2735748, at *4 ("Notably, the ACCA agreed that the military judge should have instructed the panel on mistake of fact and that the military judge erred in giving the propensity instruction. It is not the legal issue of whether the instructions were proper that is in dispute. Rather, it is the application of those findings to the evidentiary record that is the core of the argument.").

A harmless-error issue is—to say the least—a fact-intensive one. *See Acosta v. Raemisch*, 877 F.3d 918, 932 (10th Cir. 2017) (noting that constitutional trial errors are "amenable to harmless-error analysis because [they] may be *quantitatively assessed in the context of the other evidence presented* in order to determine the effect [they] had on the trial" (emphasis added) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 629 (1993))); *United States v. Holly*, 488 F.3d 1298, 1307 (10th Cir. 2007) ("A constitutional error is harmless and may be disregarded if 'it appears beyond a reasonable doubt that the error complained of did not *contribute* to the verdict obtained.'" (emphasis added) (quoting *Neder v. United States*, 527 U.S. 1, 15 (1999))); *see also* 3B Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 854 (4th ed.), Westlaw (database updated December 2022) (noting that, when applying the harmless error standard, "the court necessarily must look to the circumstances of the particular case").

Replete with contentions that the ACCA should have weighed the evidence differently in reviewing for harmless error, Mr. Santucci's briefing effectively proves the point. *See* Aplt.'s Opening Br. at 23 (arguing that the trial judge's errors were prejudicial because Mr. Santucci "testified [o]n his own behalf," "the physical evidence was inconclusive on the question of consent," and "the jury would have had two bases . . . on which to acquit [Mr.] Santucci" had the mistake-of-fact instruction issued); *id.* at 24 (arguing that "at least 13 material and uncontested points" introduced at trial demonstrated his theory that he believed TW consented and would have supported the instruction);[20] *cf. id.* at 24 (arguing that "[h]ad [the] instruction issued, it would have triggered another instruction that the burden shifted to the prosecution to prove, beyond a reasonable doubt, that there was no mistake-of-fact").

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

[20] Such points, which are not outlined in Mr. Santucci's appellate brief but are listed in his habeas petition to the district court, included TW buying drinks for Mr. Santucci and dancing with him at the bar, initiating sexual contact with Mr. Santucci afterwards, making various statements to Mr. Santucci indicating consent, and performing certain sexual acts on Mr. Santucci. *See* Aplt.'s App. at 12–13.

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

b

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

[21] Mr. Santucci did not exhaust this argument by failing to raise it in the CAAF. *See* Aplee.'s Suppl. App. at 92–97. Once more, the government did not identify the exhaustion issue. *See supra* note 19. Accordingly, given our resolution of this appeal—upholding the district court's denial of habeas relief for unrelated

When evaluating a military court's decision, "[w]e do not 'presume a military appellate court has failed to consider all the issues presented to it before making a decision.'" *Brown v. Gray*, 483 F. App'x 502, 505 (unpublished) (quoting *Thomas*, 625 F.3d at 672); *see Watson*, 782 F.2d at 145 ("When an issue is briefed and argued before a military board of review . . . the military tribunal has given the claim fair consideration, even though its opinion summarily disposed of the issue with the mere statement that it did not consider the issue meritorious or requiring discussion."). And Mr. Santucci, himself, claims that he "urged [the] Article I tribunals" to consider "the proper [harmless error] analysis" by considering the "cumulative effects these . . . errors had on the proceedings overall." Aplt.'s Opening Br. at 14.

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

The ACCA opinion evinces that it fully analyzed the record and the effects of the instructional errors. It acknowledged that the military judge committed the instructional errors; yet the court nevertheless offered a rationale for why those errors were harmless beyond a reasonable doubt, which relied on the evidence presented at trial, as well as the jury's findings on other charges unaffected by the instructional

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reasons—we need not examine whether the government's failure to make an exhaustion or waiver argument itself constituted waiver of such an argument.

errors. *See, e.g.*, Aplt.'s App. at 57 (relying on "the strength of TW's testimony, corroborated by medical providers and witnesses, regarding the injuries she sustained" to conclude that "this was clearly not a situation from which appellant [i.e., Mr. Santucci] could have feasibly claimed an honest, reasonable, mistaken belief that TW was consenting to his misconduct"); *id.* (noting that Mr. Santucci only argued at trial that "TW actually consented, not that [he] mistakenly believed she did"); *id.* (holding the failure to give the mistake-of-fact instruction as to rape was harmless because the jury *did* receive this instruction as to forcible sodomy and still convicted Mr. Santucci on this count); *id.* (concluding that the propensity instruction was harmless because there was no question "whether sexual contact occurred between TW and [Mr. Santucci]" and the evidence left "no doubt that TW was not a willing participant"); *id.* (reasoning that the propensity instruction was also harmless because it had only been used to evince Mr. Santucci's propensity to sexually assault JM, for which Mr. Santucci was *acquitted*).

Mr. Santucci points to nothing in the ACCA's analysis that causes us to question whether its thorough review encompassed his cumulative-error argument. Rather, he seeks to relitigate his contentions against a finding of harmless error that were already considered—and rejected—by the ACCA, including the improper statements by the prosecution, Aplt.'s Opening Br. at 33–34, the jury suspending deliberations to seek clarification from the trial judge on the rape and sexual assault specifications, *id.* at 34 n.3, and the strength of the evidence presented by Mr. Santucci, *id.* at 34–37. But we cannot fault the ACCA's analysis—much less subject

it to full merits review—simply because it viewed this evidence differently than Mr. Santucci. In the habeas context, the district court was in no position to reevaluate evidence when it was already presented to the military court—nor are we. *See Thomas*, 625 F.2d at 670. In sum, Mr. Santucci has not given us reason to conclude that the ACCA committed any legal error in overlooking his cumulative-error argument.

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

III

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