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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

CODY DANIEL BOND,  
Petitioner,  
v.  
JUDDSON M. KIRK, CDR-CO NCBM,  
Respondent.

Case No.: 20cv1816 DMS (JLB)

**ORDER DENYING PETITION FOR  
WRIT OF HABEAS CORPUS**

On September 14, 2020, Petitioner Cody Daniel Bond filed the present habeas corpus petition pursuant to 28 U.S.C. § 2241.<sup>1</sup> On November 18, 2020, Respondent filed his response to the Petition, and on December 2, 2020, Petitioner filed his reply. After reviewing the parties’ briefs and the record on file herein, the Petition is denied for the reasons set out below.

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<sup>1</sup> When the Petition was filed, Petitioner was in the brig at Marine Corps Air Station Miramar, thus the filing in this Court. It appears Petitioner has since been released on supervision to Bryce Hartgrave, a federal probation officer in Cocoa, Florida. (ECF No. 7.)

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**I.**

**BACKGROUND**

The facts underlying this case are set out in detail in the June 7, 2017 Opinion of the United States Air Force Court of Criminal Appeals (“AFCCA”). (ECF No. 1 at 28-44.<sup>2</sup>) Briefly stated, Petitioner engaged in nonconsensual sexual intercourse with KB, then Petitioner’s wife, who, at the time, was two months post-partum. (*Id.* at 30.) It appears that after this incident, Petitioner and KB got into several arguments over their finances. (*Id.*) At the time, Petitioner and KB were living with KB’s parents, both of whom eventually became involved in these arguments. (*Id.*) During one of these arguments, Petitioner told KB, “you’re lucky I don’t have my gun right now.” (*Id.*) In a subsequent discussion with one of his co-workers, Petitioner made similar remarks about wanting to harm KB, which the co-worker reported to their supervisor. (*Id.* at 31.)

As a result of these events and others, Petitioner was charged with sexually assaulting KB (on two occasions), communicating a threat (on three occasions), and making a worthless check. (*Id.* at 24-25.) Petitioner pleaded guilty to making a worthless check, and was tried by a general court-martial on the other charges.<sup>3</sup> The members of the court-martial found Petitioner guilty of one specification of sexual assault, and two specifications of communicating a threat. Petitioner was found not-guilty on the other two specifications. The members of the court-martial sentenced Petitioner to a dishonorable discharge, confinement for ten years, and reduction to E-1.

Petitioner appealed his convictions to the AFCCA where he raised a number of arguments concerning the sufficiency of the evidence and errors on the part of the military judge. (*Id.* at 29.) The AFCCA set aside one of the specifications of communicating a threat on the ground the evidence was insufficient to support that specification, but

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<sup>2</sup> The page number cited here and throughout this Order are the page numbers assigned by the Court’s CM/ECF system.

<sup>3</sup> The trial took place on Joint Base San Antonio – Lackland Air Force Base in Texas.

1 otherwise affirmed the findings against Petitioner. (*Id.* at 32-36.) With that set aside, the  
2 AFCCA modified Petitioner’s sentence to include confinement for a term of eight years  
3 and six months. (*Id.* at 43.) The other two aspects of the sentence were unchanged. (*Id.*)

4 Petitioner then filed a petition for review with the United States Court of Appeals  
5 for the Armed Forces, which was denied. (*Id.* at 45.)

6 More than four years after the General Court-Martial Order issued, Petitioner  
7 submitted a petition for a new trial to the Office of the Judge Advocate General (“OJAG”)  
8 pursuant to Article 73, Uniform Code of Military Justice (“UCMJ”). (*Id.* at 46.) In a letter  
9 to Petitioner dated February 7, 2020, the OJAG stated, “Your petition was not filed within  
10 two years after approval by the convening authority of your court-martial sentence and is  
11 therefore untimely. We are returning it to you without action.” (*Id.*)

## 12 II.

### 13 DISCUSSION

14 Petitioner raises four claims in the present Petition. First, he claims the finding of  
15 sexual assault is not supported by sufficient evidence based on newly discovered evidence.  
16 Second, Petitioner contends there was insufficient evidence to support the finding of  
17 communicating a threat. Third, he argues the judge committed error in allowing KB to  
18 testify about multiple “assaults” rather than the one assault for which he was convicted.  
19 Fourth, Petitioner asserts the judge committed error in his instructions to the members of  
20 the court-martial.

#### 21 A. Legal Standard

22 “Federal district courts have jurisdiction to review habeas corpus petitions  
23 challenging military convictions pursuant to 28 U.S.C. § 2241.” *Montalvo v. Spencer*, No.  
24 18-CV-1336 GPC BLM, 2020 WL 5106654, at \*3 (S.D. Cal. Aug. 31, 2020). However,  
25 the scope of review in these cases is narrower than in other habeas proceedings “because  
26 of the peculiar relationship between the civil and military law.” *Burns v. Wilson*, 346 U.S.  
27 137, 139-140 (1953). As stated in *Burns*,

1 Military law, like state law, is a jurisprudence which exists separate and apart  
2 from the law which governs in our federal judicial establishment. This Court  
3 has played no role in its development; we have exerted no supervisory power  
4 over the courts which enforce it; the rights of men in the armed forces must  
5 perform be conditioned to meet certain overriding demands of discipline and  
6 duty, and the civil courts are not the agencies which must determine the  
7 precise balance to be struck in this adjustment. The Framers expressly  
8 entrusted that task to Congress.

7 *Id.* at 140 (footnotes omitted).

8 In carrying out that task, Congress revised the Articles of War and established the  
9 UCMJ. *Id.* Rigorous provisions in that system of jurisprudence “guarantee a trial as free  
10 as possible from command influence, the right to prompt arraignment, the right to counsel  
11 of the accused's own choosing, and the right to secure witnesses and prepare an adequate  
12 defense.” *Id.* at 141. They “also establish a hierarchy within the military establishment to  
13 review the convictions of courts-martial, to ferret out irregularities in the trial, and to  
14 enforce the procedural safeguards which Congress determined to guarantee to those in the  
15 Nation's armed services.” *Id.* Congress also “provided a special post-conviction remedy  
16 within the military establishment, apart from ordinary appellate review, whereby one  
17 convicted by a court-martial, may attack collaterally the judgment under which he stands  
18 convicted.” *Id.*

19 Against that framework, the *Burns* Court stated, “In military habeas corpus cases,  
20 even more than in state habeas corpus cases, it would be in disregard of the statutory  
21 scheme if the federal civil courts failed to take account of the prior proceedings—of the  
22 fair determinations of the military tribunals after all military remedies have been  
23 exhausted.” *Id.* at 142. Given Congress’s provision that “these determinations are ‘final’  
24 and ‘binding’ upon all courts,” the Supreme Court held in *Burns* that the civil court’s role  
25 is simply “to determine whether the military have given fair consideration” to the  
26 petitioner’s claims. *Id.* at 144 (citing *Whelchel v. McDonald*, 340 U.S. 122 (1950)). *See*  
27 *also Sunday v. Madigan*, 301 F.2d 871, 873 (9th Cir. 1962) (citing *Burns*, 346 U.S. 147)  
28 (stating “once it has been concluded by the civil courts that the military had jurisdiction

1 and dealt fully and fairly with all such claims, it is not open to such courts to grant the writ  
2 simply to re-evaluate the evidence.”)

3 **B. Petitioner’s Claims**

4 Applying this legal standard to Petitioner’s claims, it is clear he is not entitled to  
5 habeas relief. Petitioner’s second and third claims were presented to the AFCCA, which  
6 rejected the claims on the merits after full and fair consideration. (ECF No. 1 at 32-36,  
7 40.) The AFCCA also rejected Petitioner’s fourth claim alleging instructional error on the  
8 ground Petitioner’s trial counsel did not object to the instruction. Although that was not a  
9 ruling on the merits of the claim, this Court cannot say the military courts did not give the  
10 claim full and fair consideration. *See Lips v. Commandant, U.S. Disciplinary Barracks*,  
11 997 F.2d 808, 811 (10th Cir. 1993) (finding military court gave issue full and fair  
12 consideration where it found claim was waived due to counsel’s failure to object during  
13 trial).

14 This leaves only Petitioner’s first claim, which the OJAG denied because it was  
15 untimely. (ECF No. 1 at 46.) That ruling created a procedural bar against further review  
16 of the claim in this Court. *See United States v. White*, No. ACM 31474(F REV), 1997 WL  
17 643590, at \*2 (A.F. Ct. Crim. App. Oct. 1, 1997) (declining to review untimely issues  
18 absent showing of good cause). To overcome that procedural bar, Petitioner had to show  
19 cause and prejudice, *Lips*, 997 F.2d at 812, “or demonstrate that the failure to consider the  
20 claim[ ] will result in a fundamental miscarriage of justice.” *Bennett v. Mueller*, 322 F.3d  
21 573, 580 (9th Cir. 2003) (quoting *Noltie v. Peterson*, 9 F.3d 802, 804–05 (9th Cir.1993)).  
22 Petitioner has not made either of those showings here. Thus, this Court will not review  
23 Petitioner’s first claim here. *Lips*, 997 F.2d at 812 (citing *Watson v. McCotter*, 782 F.2d  
24 143, 145 (10th Cir. 1986)).

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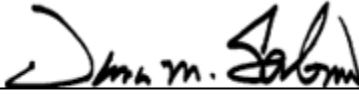
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**III.**  
**CONCLUSION AND ORDER**

For the reasons set out above, Petitioner’s request for habeas relief is denied.  
**IT IS SO ORDERED.**

Dated: May 21, 2021

  
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Hon. Dana M. Sabraw, Chief Judge  
United States District Court