

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

SEP 1 2023

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JESSE L. BRAZELL,

Petitioner-Appellant,

v.

CLIFF J. UDDENBERG, Commander,
United States Navy Commandant, Naval
Brig Miramar,

Respondent-Appellee.

No. 22-55954

D.C. No.

3:19-cv-01084-JLS-MSB

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Janis L. Sammartino, District Judge, Presiding

Argued and Submitted August 16, 2023
Pasadena, California

Before: WARDLAW, CHRISTEN, and SUNG, Circuit Judges.

Jesse L. Brazell, who is currently confined at the Naval Brig in Miramar, California, appeals the district court's order denying his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2241. Because the parties are familiar with the facts, we do not recount them here. We have jurisdiction pursuant to 28

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

U.S.C. §§ 1291 and 2253(a), and we affirm.

In 2017, Brazell was convicted by a general court-martial of two specifications of sexual assault of a child and one specification of abuse of a child in violation of Article 120b of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b. The offense was committed in Japan against a child who was not a Japanese citizen. Brazell argues that the court-martial lacked subject-matter jurisdiction because the U.S.–Japan Status-of-Forces Agreement (SOFA), a bilateral executive agreement, vested the primary right to exercise concurrent jurisdiction over his prosecution with Japan. *See* Agreement Under Article VI of the Treaty of Mutual Cooperation and Security: Facilities and Areas and the Status of United States Armed Forces in Japan [hereinafter U.S.–Japan SOFA], 11 U.S.T. 1652 (1960). Brazell argues that because Japan did not waive its right to prosecute him before the United States prosecuted him, the court-martial lacked subject-matter jurisdiction. We review this claim de novo. *Tablada v. Thomas*, 533 F.3d 800, 805 (9th Cir. 2008).

Brazell’s argument fails for two reasons. First, nothing in the SOFA’s text suggests that the agreement stripped the court-martial of subject-matter jurisdiction over Brazell’s offense. The military court possessed subject-matter jurisdiction over the offense by virtue of Brazell’s military status. *See Solorio v. United States*, 483 U.S. 435, 439 (1987) (noting that court-martial jurisdiction turns on the status

of the accused). Article XVII of the SOFA governs the allocation of criminal jurisdiction between the United States and Japan. *See* U.S.–Japan SOFA, art. XVII. Subject to Article XVII’s provisions, Paragraph 1 reserves to the United States’ military authorities “the right to exercise within Japan all criminal and disciplinary jurisdiction conferred on them by the law of the United States over all persons subject to the military law of the United States,” and also provides that Japan “shall have jurisdiction over the members of the United States armed forces . . . with respect to offenses committed within the territory of Japan and punishable by the law of Japan.” *Id.* art. XVII ¶ 1. Paragraph 2 specifies that each country has “exclusive jurisdiction” over offenses that the other does not criminalize. *See id.* art. XVII ¶ 2. Exclusive jurisdiction is not implicated in this case because both the U.S. Code of Military Justice and the Japanese Penal Code criminalize sexual abuse of minors. *See* 10 U.S.C. § 920b; KEIHŌ (PEN. C.) art. 176.

Paragraph 3 of Article XVII sets forth rules for handling cases for which there is concurrent jurisdiction:

- (a) The military authorities of the United States shall have the primary right to exercise jurisdiction over members of the United States armed forces or the civilian component in relation to
 - (i) offenses solely against the property or security of the United States, or offenses solely against the person or property of another member of the United States armed forces or the civilian component or of a dependent;
 - (ii) offenses arising out of any act or omission done in the performance of official duty.

(b) In the case of any other offense the authorities of Japan shall have the primary right to exercise jurisdiction.

(c) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.

U.S.–Japan SOFA, art. XVII ¶ 3.

The record reflects that Japan had the primary right to exercise concurrent jurisdiction pursuant to Paragraph 3(b), and we discern no indication that Japan ever waived that right. Although Paragraph 3(c) sets forth a waiver procedure to facilitate the disposition of cases in which the signatories have concurrent jurisdiction, the text of the agreement does not indicate that the United States’ or Japan’s failure to follow that procedure would nullify a signatory’s authority to prosecute an offense. As the district court correctly explained, Brazell’s contrary interpretation conflates concurrent jurisdiction with exclusive jurisdiction.

Brazell’s argument fails for a second reason: Paragraph 3’s jurisdiction-allocating provisions are not judicially enforceable because the SOFA specifies a diplomatic mechanism for resolving disputes over its meaning. Article XXV of the SOFA provides that “[a] Joint Committee shall be established as the means for consultation between the [United States and Japan] on all matters requiring mutual consultation regarding the implementation of this Agreement.” *Id.* art. XXV ¶ 1. Appended to the SOFA is the signatories’ joint understanding that “[m]utual

procedures relating to waivers of the primary right to exercise jurisdiction shall be determined by” this Joint Committee. *Id.* art. XVII (Agreed Minutes).

In *Patterson v. Wagner*, we held that materially identical language in the U.S.–South Korea SOFA indicated that “the SOFA establishes an enforcement mechanism that is ‘diplomatic, not judicial.’” 785 F.3d 1277, 1285 (9th Cir. 2015) (quoting *In re Burt*, 737 F.2d 1477, 1488 (7th Cir. 1984)). On this basis, *Patterson* allowed an extradition to proceed despite the petitioner’s claims that South Korea would subject him to double jeopardy in violation of the U.S.–South Korea SOFA. *Id.*; see also *id.* at 1284 (“Though the SOFA appears to establish individual rights, we conclude that they are not judicially enforceable.”). Brazell seeks to distinguish *Patterson* by arguing that its holding was limited to SOFA violations by a foreign sovereign. But *Patterson* did not articulate any such limits on its holding, and we are bound by it.

AFFIRMED.