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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 JESSE BRAZELL,

12 Plaintiff,

13 v.

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

17 Defendant.

Case No.: 19-CV-01084 JLS (MSB)

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

(ECF No. 1)

18
19 Presently before the Court is Petitioner Jesse Brazell's ("Petitioner") Petition for a
20 Writ of Habeas Corpus ("Pet.," ECF No. 1). Also before the Court is the Government's
21 ("Respondent") Answer and Return to the Petition, or in the alternative, Motion for
22 Summary Judgment ("Answer," ECF No. 12), and Petitioner's Traverse ("Resp.," ECF No.
23 13). The Court decides the matter on the papers submitted and without oral argument
24 pursuant to Civil Local Rule 7.1(d)(1). Having carefully considered the Parties' arguments
25 and the relevant law, the Court **DENIES** the Petition for Writ of Habeas Corpus.

26 **BACKGROUND**

27 Petitioner is a former active duty member of the United States Air Force. Answer
28 at 1. In May 2017, a U.S. general court-martial tried Petitioner for offenses allegedly

1 committed in Okinawa, Japan. *Id.* The court-martial convicted Petitioner of two
2 specifications of sexual assault of a child and one specification of sexual abuse of a child
3 in violation of Article 120b, Uniform Code of Military Justice (“UCMJ”), 10 U.S.C.
4 § 920b. *Id.* M.L., the 12-year-old alleged victim, was a temporary guest of her father, J.L.,
5 at his off-base residence in Okinawa, Japan at the time of the alleged assaults. J.L. was in
6 Japan working as a civilian government contractor for Lockheed Martin. *Id.* M.L. is not
7 a Japanese citizen. *Pet.* at 3.

8 The court-martial sentenced Petitioner to confinement for seven years, total
9 forfeiture of pay and allowances, and reduction to pay grade E-1. *See id.* at 2. Following
10 the submission of the matter in the military post-trial process, the convening authority
11 approved the sentence as adjudged. *See Answer* at 2. On June 29, 2018, Petitioner filed
12 his assignments of error before the Air Force Court of Criminal Appeals (“AFCCA”) for
13 mandatory review under Article 66, UCMJ, 10 U.S.C. § 866(b). *See id.* at 2–3. Petitioner
14 did not include the present jurisdictional claims on appeal, and the AFCCA denied
15 Petitioner’s motion to supplement his assignments of error to include the jurisdictional
16 issues which Petitioner complains of in this Petition. *See id.* Petitioner applied to the
17 AFCCA for relief through a writ of habeas corpus, and the AFCCA denied the petition on
18 January 28, 2019. *See id.* On February 15, 2019, Petitioner filed a petition for writ-appeal
19 of the AFCCA’s decision, and the Court of Appeals for the Armed Forces (“CAAF”)
20 denied further review on March 11, 2019. *See id.*; *see generally* *Brazell v. Uddenberg*, No.
21 MC 2018-08, 2019 WL 366306, at *1 (A.F. Ct. Crim. App. Jan. 28, 2019), *rev. den.*, No.
22 19-0231/AF, 2019 CAAF LEXIS 468 (C.A.A.F. 2019). Petitioner remains incarcerated at
23 the Naval Consolidated Brig Miramar in San Diego, California. *See Pet.* at 1.

24 On June 10, 2019, Petitioner filed this instant Petition for Writ of Habeas Corpus
25 asserting that the court-martial lacked subject matter jurisdiction because the U.S. Japan
26 Status of Forces Agreement (“SOFA”) assigned the primary right to exercise jurisdiction
27 over Petitioner’s offenses to Japan, and Japan did not waive its primary jurisdiction. *See*
28 *generally Pet.* On September 11, 2019, Respondent filed an Answer and Return asserting

1 that the Petition should be dismissed or denied through summary judgment because the
2 U.S. military courts had proper concurrent jurisdiction in this case. See generally Answer
3 at 7. Further, Respondent contends that “Petitioner has no standing to object to ‘violations’
4 of the SOFA.” Id. at 9. On September 23, 2019, Petitioner filed a Traverse to Respondent’s
5 Answer and Return asking the Court to grant summary judgment in favor of Petitioner.
6 See generally Resp. Petitioner argues that Japan did not waive its right of first refusal and,
7 therefore, the United States did not have subject-matter jurisdiction over Petitioner. Id.

8 **STANDARD OF REVIEW**

9 Federal district courts have jurisdiction to review habeas corpus petitions
10 challenging military convictions pursuant to 28 U.S.C. § 2241. See *Burns v. Wilson*, 346
11 U.S. 137, 139 (1953). While determinations made in military proceedings are final and
12 binding on all courts, 10 U.S.C. § 876, the federal civil courts’ jurisdiction over a petition
13 for habeas corpus from a military prisoner is not displaced. *Schlesinger v. Councilman*,
14 420 U.S. 738, 744–45 (1975). A petitioner must exhaust all possible military remedies
15 before seeking a writ of habeas corpus in federal courts. See *Noyd v. Bond*, 395 U.S. 683,
16 693–96 (1969); see also *Middendorf v. Henry*, 425 U.S. 25, 29 n.6 (1976) (“[T]he
17 exhaustion requirement is designed to protect the military from undue interference by the
18 federal courts.”).

19 “The federal courts possess authority to consider and determine habeas corpus
20 challenges to the jurisdiction of the military courts.” See *Willenbring v. United States*, 559
21 F.3d 225, 231 (4th Cir. 2009). A federal court’s review is normally limited to whether the
22 court-martial gave the petitioner’s claims full and fair consideration. See *Burns*, 346 U.S.
23 at 142. However, in matters involving constitutional challenges, the Ninth Circuit has held
24 that the court must conduct an independent review of the matter. See *Hatheway v.*
25 *Secretary of Army*, 641 F.2d 1376, 1380 (9th Cir. 1981), cert. denied, 454 U.S. 864 (1981)
26 (“The *Burns* plurality does not preclude civil court consideration of the constitutional
27 [equal protection, due process, and First Amendment] defects.”). Collateral relief from a
28 judgment of a court-martial may be sought where the judgment is void or without res

1 judicata effect because of a “lack of jurisdiction or other equally fundamental defect.”
2 Schlesinger, 420 U.S. at 746–47, 753; see Davis v. Marsh, 876 F.2d 1446, 1448 (9th Cir.
3 1989) (stating that court-martial determinations are “collaterally reviewable for
4 constitutional or jurisdictional error”); Fricke v. Sec’y of Navy, 509 F.3d 1287, 1290 (10th
5 Cir. 2007) (stating that the federal court’s “review of jurisdictional issues is independent
6 of the military courts’ consideration of such issues”); Calley v. Callaway, 519 F.2d 184,
7 203 (5th Cir. 1975) (“Military court-martial convictions are subject to collateral review by
8 federal civil courts on petitions for writs of habeas corpus where it is asserted that the court-
9 martial acted without jurisdiction, or that substantial constitutional rights have been
10 violated.”). Here, because Petitioner asserts that the court-martial lacked subject-matter
11 jurisdiction, the Court will review Petitioner’s claim de novo.

12 DISCUSSION

13 Petitioner asserts that the court-martial lacked subject-matter jurisdiction as to the
14 offenses of which it convicted Petitioner because Japan did not waive its primary
15 jurisdiction pursuant to the U.S.–Japan SOFA. Petitioner argues that the offenses in
16 question were not subject to court-martial jurisdiction because Japan did not waive its
17 primary jurisdiction over the offenses, and Japan’s jurisdiction is exclusive until the
18 primary right is waived. See Pet. at 9.

19 The U.S.–Japan SOFA contains agreements between the United States and Japan
20 regarding criminal jurisdiction over U.S. service members in Japan. See Agreement Under
21 Article VI of the Treaty of Mutual Cooperation and Security: Facilities and Areas and the
22 Status of United States Armed Forces in Japan, U.S.–Japan, Jan. 19, 1960, T.I.A.S. No.
23 4510, 11 U.S.T. 1652. The U.S.–Japan SOFA allocates exclusive and concurrent
24 jurisdiction between Japan and the United States for offenses committed in Japan by U.S.
25 service members. *Id.* Here, it is uncontested that neither the United States nor Japan had
26 exclusive jurisdiction as referenced in SOFA at Article XVII ¶ 2 because both the United
27 States and Japan criminalize the sexual abuse of minors, the crimes charged in this case.
28 See Pet. at 6.

1 In matters of concurrent jurisdiction, one state is allocated “primary concurrent
2 jurisdiction” while the other is afforded “secondary concurrent jurisdiction.” Article XVII
3 ¶ 3 of the SOFA provides that Japanese authorities have the primary right to exercise
4 concurrent jurisdiction where the purported victim of the offense is the dependent of a
5 contractor, as is the case here. See 1960, T.I.A.S. No. 4510, 11 U.S.T. 1652 at Article XVII
6 ¶ 3.

7 Respondent contends that Petitioner “has no standing to object to ‘violations’ of the
8 SOFA.” Answer at 9. After careful examination, this Court agrees. Petitioner argues that
9 even if Rules for Courts-Martial (“R.C.M.”) 201(d)(3)¹ did limit Petitioner’s standing in
10 military courts to challenge the court-martial’s jurisdiction, the rules for the court-martial
11 have no bearing on an Article III court to adjudicate matters within its jurisdiction. See
12 Resp. at 4. While Petitioner correctly argues that this Court is not governed by the rules
13 outlined R.C.M. 201(d)(3), Petitioner does not have standing for bringing forth a claim
14 alleging violation of an international agreement like the SOFA. Federal courts have held
15 that alleged violations of other SOFA treaties should be addressed diplomatically between
16 two nations. See *Patterson v. Wagner*, 785 F.3d 1277, 1285 (9th Cir. 2015) (“The [U.S.–
17 South Korea] SOFA’s provisions thus establish a diplomatic conflict resolution scheme
18 with no role for the judiciary.”); *Matter of Burt*, 737 F.2d 1477, 1488 (7th Cir. 1984) (“[I]t
19 is well settled that the recourse for such a treaty violation in these circumstances is
20 diplomatic, not judicial.”); *Holmes v. Laird*, 459 F.2d 1211, 1222 (D.C. Cir. 1972) (“[T]he
21 rights [appellants] claim to the provisions of an international agreement the enforcement
22 mechanism of which is diplomatic recourse only.”).

23 Petitioner cannot challenge jurisdiction resting on the violation of the U.S.–Japan
24 SOFA because a violation of the SOFA must be resolved diplomatically between the two
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27 ¹ R.C.M. 201(d)(3) states “[w]here an act or omission is subject to trial by court-martial and by one or
28 more civil tribunals, foreign or domestic, the determination which nation, state, or agency will exercise
jurisdiction is a matter for the nations, states, and agencies concerned, and is not a right of the suspect or
accused.”

1 nations. The U.S.–Japan SOFA explicitly states in Article XXV that “[a] Joint Committee
2 shall be established as the means for consultation between the Government of the United
3 States and the Government of Japan on all matters requiring mutual consultation regarding
4 the implementation of this Agreement” and “[i]f the Joint Committee is unable to resolve
5 any matter, it shall refer that matter to the respective Governments for further consideration
6 through appropriate channels.” 1960, T.I.A.S. No. 4510, 11 U.S.T. 1652 at Article XXV.
7 This Joint Committee, consisting of representatives from United States and Japan, details
8 that a conflict arising under the SOFA agreement should be resolved between the two
9 nations. The Court determines that Petitioner has no standing to allege his conviction in a
10 U.S. court-martial constituted a violation of the U.S.–Japan SOFA. Therefore, the Court
11 declines to decide whether the United States was in violation of its obligations under SOFA
12 by exercising its secondary jurisdiction prior to Japan’s waiver.

13 Even if the Petitioner were to have standing, which is not the case, the Court agrees
14 with Respondent that the court-martial would still have jurisdiction in this case because of
15 Petitioner’s active duty military status at the time of the offense. See *United States v.*
16 *Choisnard*, No. ACM 36654, 2008 WL 2853036, at *4 (A.F. Ct. Crim. App. July 15, 2008)
17 (“These authorities provide that [appellant] has no standing to object to ‘violations’ of the
18 SOFA and even if he did, the court-martial still would have jurisdiction because of the
19 appellant’s active duty status.”). Subject-matter jurisdiction is established by showing
20 military status at the time of the offense. See *Solorio v. United States*, 483 U.S. 435, 439
21 (1987) (“In an unbroken line of decisions from 1866 to 1960, this Court interpreted the
22 Constitution as conditioning the proper exercise of court-martial jurisdiction over an
23 offense on one factor: the military status of the accused.”). Because it is uncontested that
24 Petitioner was on active duty status at the time of the offense, subject-matter jurisdiction
25 in a U.S. military court was proper.

26 The Court therefore finds that Petitioner does not have standing to challenge the
27 court-martial conviction because an alleged violation of the U.S.–Japan SOFA must be
28 resolved diplomatically between the two nations. Additionally, Petitioner had active duty

1 military status at the time of the offenses, so the court-martial properly exercised
2 jurisdiction over Petitioner.

3 **CONCLUSION**

4 For the foregoing reasons, Petitioner's 28 U.S.C. § 2241 writ of habeas corpus
5 petition is hereby **DENIED WITHOUT PREJUDICE**. Petitioner is **ORDERED** to file
6 an amended petition within forty-five (45) days of the date of service of this Order. The
7 amended petition will supersede the original petition and should be complete in and of
8 itself. Failure to file an amended petition will result in the dismissal of this case.

9 **IT IS SO ORDERED.**

10 Dated: November 17, 2020

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