

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

AUG 10 2021

FOR THE NINTH CIRCUIT

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

CLIFFORD B. HUBBARD,

No. 20-16094

Petitioner-Appellant,

D.C. No.

v.

1:19-mc-00333-LEK-KJM

UNITED STATES OF AMERICA,

MEMORANDUM*

Respondent-Appellee.

Appeal from the United States District Court
for the District of Hawaii
Leslie E. Kobayashi, District Judge, Presiding

Argued and Submitted July 7, 2021
Honolulu, Hawaii

Before: NGUYEN, OWENS, and FRIEDLAND, Circuit Judges.

In 1982, a general court-martial convicted U.S. Army Private Clifford Hubbard of murder, attempted sodomy, and indecent acts with a child. Hubbard was sentenced to life in prison and is currently serving his sentence at a state prison in Florida. In 2019, Hubbard filed a petition for DNA testing under the Innocence Protection Act of 2004 (“IPA”), 18 U.S.C. § 3600, in federal district court. In a

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

concurrently filed opinion, we affirm the dismissal of that petition for lack of subject-matter jurisdiction.

Hubbard raises an additional argument on appeal—which he did not raise before the district court—that the IPA violates the Equal Protection Clause by discriminating against “military prisoners.” Hubbard does not contend that the statute discriminates against a suspect class; rather, he argues only that the IPA cannot withstand rational basis review. Applying that standard, we hold that Hubbard has not met his burden to “negative every conceivable basis which might support” the IPA—including, for example, giving special deference to military courts. *Dent v. Sessions*, 900 F.3d 1075, 1082 (9th Cir. 2018) (quoting *Hernandez-Mancilla v. Holder*, 633 F.3d 1182, 1185 (9th Cir. 2011)).

AFFIRMED.