FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLIFFORD B. HUBBARD, *Petitioner-Appellant*, v. UNITED STATES OF AMERICA, *Respondent-Appellee.*	No. 20-16094 D.C. No. 1:19-mc-00333- LEK-KJM OPINION

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

Filed August 10, 2021

Before: Jacqueline H. Nguyen, John B. Owens, and Michelle T. Friedland, Circuit Judges.

Per Curiam Opinion;
Concurrence by Judge Friedland

SUMMARY*

Innocence Protection Act

The panel affirmed the district court's dismissal for lack of subject-matter jurisdiction of a petition brought by U.S. Army Private Clifford Hubbard seeking DNA testing under the Innocence Protection Act ("IPA").

In 1982, a court-martial convicted Hubbard of murder and sentenced him to life in prison. He sought DNA testing under the IPA to prove his innocence.

The panel held that the district court lacked jurisdiction because the district court was not the court that entered the judgment of conviction. Rather, Hubbard's conviction was entered by a general court-martial, which has since dissolved, not in federal court. The panel rejected Hubbard's contention that the district court had the power to grant his petition for DNA testing under the IPA.

The panel also rejected Hubbard's contention that the IPA should nonetheless be construed to allow him to petition for DNA testing in the district court because he would otherwise have no forum in which to seek his relief. The panel held that the IPA, unlike the federal habeas statutes, does not provide a procedural mechanism for prisoners convicted by courts-martial to seek collateral relief in federal court.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Concurring, Judge Friedland joined by Judges Nguyen and Owens, wrote to urge Congress to amend the IPA to explicitly provide servicemembers convicted by courts-martial the same avenues for post-conviction DNA testing afforded to other prisoners.

COUNSEL

Jennifer Brown (argued) and William A. Harrison (argued), Hawai‘i Innocence Project, Honolulu, Hawaii, for Petitioner-Appellant.

Marion Percell (argued), Chief of Appeals; Kenji M. Price, United States Attorney; United States Attorney's Office, Honolulu, Hawaii; for Respondent-Appellee.

OPINION

PER CURIAM:

In 1982, a court-martial convicted U.S. Army Private Clifford Hubbard of murder and sentenced him to life in prison. Hubbard has unsuccessfully challenged his conviction on both direct review in military court and habeas review in federal court. He now seeks another form of relief, which he asserts will prove his innocence: DNA testing under the Innocence Protection Act of 2004 ("IPA"), 18 U.S.C. § 3600. The district court dismissed Hubbard's petition for lack of jurisdiction. We affirm.

I.

A.

Hubbard was charged with premeditated murder; felony murder; sodomy; and the commission of indecent, lewd, and lascivious acts with a child under the age of sixteen, all under the Uniform Code of Military Justice, 10 U.S.C. §§ 918, 925, 934 (1982). A general court-martial was convened, and a trial was held at Fort Shafter, Hawaii, from June 28 to July 1, 1982. At trial, the prosecution presented no direct physical evidence of Hubbard's involvement in the victim's death. Rather, the prosecution primarily relied on statements from a witness who had also been a suspect and who absconded before trial. The court-martial convicted Hubbard on all charges and sentenced him to life in prison.[1]

Hubbard has unsuccessfully challenged his conviction in military court and federal court. On direct appeal, he argued that the witness's testimony was both inadmissible and insufficient to establish his guilt. The military courts rejected these arguments. *United States v. Hubbard*, 18 M.J. 678 (A.C.M.R. 1984), *aff'd*, 28 M.J. 27 (C.M.A. 1989).[2] The Supreme Court denied certiorari. *Hubbard v. United States*, 493 U.S. 847 (1989) (Mem.).

In 1990, while Hubbard was incarcerated at a military facility in Kansas, he filed a habeas petition challenging his

[1] As to the premeditated murder and sodomy charges, the court convicted Hubbard of the lesser crimes of unpremeditated murder and attempted sodomy.

[2] The Court of Military Appeals set aside the unpremeditated murder conviction as multiplicitous with the felony murder conviction. *Hubbard*, 28 M.J. at 34. This had no effect on Hubbard's sentence. *Id.*

conviction on multiple grounds. *See Hubbard v. Berrong*, No. 90-3120, 1993 WL 62402 (D. Kan. Feb. 18, 1993). The district court dismissed the petition and denied relief, *id.*, and the Tenth Circuit affirmed, *see Hubbard v. Berrong*, 7 F.3d 1045 (10th Cir. 1993) (unpublished table decision).

Hubbard then filed a second habeas petition, which the district court dismissed, and the Tenth Circuit again affirmed. *Hubbard v. Lowe*, 43 F.3d 1483 (10th Cir. 1994) (unpublished table decision). The Supreme Court again denied Hubbard's petition for certiorari. *Hubbard v. Lowe*, 514 U.S. 1100 (1995) (Mem.).

B.

In 2019, Hubbard filed the instant petition under the IPA in the U.S. District Court for the District of Hawaii, requesting DNA testing of the evidence collected during the investigation leading to his 1982 conviction. The IPA "opens the door to revisiting mistaken convictions, when the new science of identifying people by their DNA left at a crime scene may exonerate the wrongly convicted." *United States v. Watson*, 792 F.3d 1174, 1177 (9th Cir. 2015). Specifically, the IPA provides:

> Upon a written motion by an individual sentenced to imprisonment or death pursuant to a conviction for a Federal offense . . . , the court that entered the judgment of conviction shall order DNA testing of specific evidence if the court finds that all of the following [ten statutory conditions] apply.

18 U.S.C. § 3600(a). In support of his petition, Hubbard argued that none of the physical evidence collected from the crime scene and introduced at trial had been forensically

linked to him, and that if the evidence were reexamined today using DNA testing technology that was unavailable in 1982, it would demonstrate his innocence.

The district court dismissed Hubbard's petition for lack of subject-matter jurisdiction, holding that Hubbard did not qualify for relief under the IPA because his court-martial convictions were not for "Federal offense[s]." *Id.* Hubbard timely appealed.

II.

"We review questions of subject-matter jurisdiction and statutory interpretation de novo." *Mollison v. United States*, 568 F.3d 1073, 1075 (9th Cir. 2009).

In the district court and in their briefs on appeal, the parties disputed whether the term "Federal offense" in the IPA includes offenses committed in violation of the Uniform Code of Military Justice. 18 U.S.C. § 3600(a). We need not resolve that dispute here, however, because it is clear that the district court lacked jurisdiction for a different reason: the district court was not "the court that entered the judgment of conviction." *Id.* Hubbard's judgment of conviction was instead entered by a general court-martial, not in federal court. That court-martial has since dissolved. *See McClaughry v. Deming*, 186 U.S. 49, 64 (1902) (explaining that a court-martial is "a special body convened for a specific purpose, and when that purpose is accomplished its duties are concluded and the court is dissolved"). For this reason alone, we reject Hubbard's contention that the district court had the power to grant his petition for DNA testing under the IPA.

Conceding that the district court is not "the court that entered the judgment of conviction," Hubbard argues that

the IPA should nonetheless be construed to allow him to petition for DNA testing in the district court because he would otherwise have no forum in which to seek relief. For this proposition, Hubbard points to the availability of habeas proceedings for prisoners convicted by courts-martial. Although a court-martial is "not available for collateral review" of guilty verdicts, *Denedo v. United States*, 66 M.J. 114, 124 (C.A.A.F. 2008), *aff'd*, 556 U.S. 904 (2009), a prisoner convicted and sentenced by court-martial may seek habeas relief in federal court, *see Burns v. Wilson*, 346 U.S. 137, 142 (1953) (plurality opinion); *Clinton v. Goldsmith*, 526 U.S. 529, 537 n.11 (1999). According to Hubbard, fundamental fairness compels the same result here.

Hubbard's analogy to habeas overlooks the fact that the federal habeas statutes, unlike the IPA, provide a procedural mechanism for prisoners convicted by courts-martial to seek collateral relief in federal court. Ordinarily, a federal prisoner seeking to challenge the legality of his detention may do so only by "mov[ing] *the court which imposed the sentence* to vacate, set aside or correct the sentence." 28 U.S.C. § 2255(a) (emphasis added). This language in § 2255(a), without more, suggests that prisoners sentenced by courts-martial may not seek relief in federal court. But § 2255 includes a savings clause under which a federal prisoner may challenge his conviction by filing a habeas petition in the *custodial* court if the § 2255 remedy is "inadequate or ineffective to test the legality of his detention." *Hernandez v. Campbell*, 204 F.3d 861, 865 (9th Cir. 2000) (per curiam) (quoting 28 U.S.C. § 2255(e)). It is this savings clause that enables prisoners who were convicted and sentenced by courts-martial to file habeas petitions in the district in which they are in custody, just as

Hubbard did in the District of Kansas.[3] *Cf. Goldsmith*, 526 U.S. at 537 n.11.

By contrast, the IPA does not identify a forum that should have jurisdiction to hear a petition for DNA testing when the tribunal that entered the conviction has dissolved. Indeed, an earlier version of the bill that later became the IPA would have provided a route for prisoners convicted by courts-martial to apply for DNA testing. It would have required such prisoners to apply for relief in "the appropriate Federal court," defined as:

> (A) the United States District Court which imposed the sentence from which the applicant seeks relief; or
>
> (B) *in relation to a crime under the Uniform Code of Military Justice, the United States District Court having jurisdiction over the place where the court martial was convened* that imposed the sentence from which the applicant seeks relief, or the United States District Court for the District of Columbia, if no United States District Court has jurisdiction over the place where the court martial was convened.

Innocence Protection Act of 2002, S. 486, 107th Cong. § 101 (as reported by S. Comm. on the Judiciary, Oct. 16, 2002)

[3] Hubbard is currently in custody at the Holmes Correctional Institution in Florida. He filed the instant petition in the District Court for the District of Hawaii because the crime occurred within that district and because he believes that the evidence was "collected, preserved and maintained" there.

(emphasis added). But the phrase "the appropriate Federal court" and its accompanying definition were replaced with "the court that entered the judgment of conviction" in the enacted text. *See* 18 U.S.C. § 3600(a). The removal of the language in (B) suggests that Congress considered, but ultimately rejected, the notion that district courts should provide a forum for prisoners convicted by courts-martial to seek DNA testing under the IPA.

Hubbard also argues that the title of the comprehensive bill in which the IPA was enacted—the Justice for All Act of 2004—evinces Congress's intent that the statute should apply broadly and thus cover prisoners with court-martial convictions. *See* Pub. L. No. 108-405, § 1, 118 Stat. 2260, 2260. But although a statute's title "can be used to resolve ambiguity, it cannot control the plain meaning of a statute." *Logan v. U.S. Bank Nat'l Ass'n*, 722 F.3d 1163, 1172 (9th Cir. 2013) (cleaned up). The plain meaning of the phrase "the court that entered the judgment" in § 3600(a) indicates that federal courts cannot provide relief to prisoners whose judgments were entered by a court-martial that has since dissolved.

Finally, we recognize the broader argument that a "literal interpretation" of § 3600(a) will have the practical effect of preventing servicemembers who were convicted by courts-martial, such as Hubbard, from seeking the statute's benefits. But we are not "free to rewrite clear statutes under the banner of our own policy concerns." *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1815 (2019). We note, however, that although Hubbard may not seek an order *compelling* the military to conduct DNA testing in the district court, the IPA is silent as to whether the military may voluntarily test any existing evidence in cases like Hubbard's. The absence of physical evidence at trial connecting Hubbard to the crimes

makes this a particularly compelling case for DNA testing, as it presents at least the possibility that the wrong person has spent nearly forty years in prison.

III.

For the foregoing reasons, we affirm the district court's dismissal for lack of subject-matter jurisdiction.

AFFIRMED.

FRIEDLAND, Circuit Judge, with whom NGUYEN and OWENS, Circuit Judges, join, concurring:

The IPA's text creates the bizarre and unjust result that servicemembers convicted by courts-martial are less able to obtain DNA testing than other categories of prisoners, federal or state. *See* Kerry Abrams & Brandon L. Garrett, *DNA and Distrust*, 91 Notre Dame L. Rev. 757, 776 (2015) ("Today, all fifty states have enacted statutes providing access to DNA and post-conviction relief."); Samuel R. Wiseman, *Waiving Innocence*, 96 Minn. L. Rev. 952, 954 (2012) ("DNA has provoked a small revolution in criminal procedure, causing almost every state legislature, as well as Congress, to rethink well-established notions . . . to allow for post-conviction testing and relief." (footnotes omitted)). This disparity is entirely inconsistent with the respect usually given to veterans. I urge Congress to remedy this unfairness by amending the IPA to explicitly provide servicemembers convicted by courts-martial the same avenues for post-conviction DNA testing afforded to other prisoners.