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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 JEREMY SCHLENKER,

9 Plaintiff,

v.

10 UNITED STATES OF AMERICA,

11 Defendant.

CASE NO. C20-5122 BHS

ORDER GRANTING
GOVERNMENT'S MOTION TO
DISMISS

12
13 This matter comes before the Court on Defendant United States of America's
14 ("Government") motion to dismiss, Dkt. 12, and Plaintiff Jeremy Schlenker's
15 ("Schlenker") motion for summary judgment, Dkt. 10.¹ The Court has considered the
16 pleadings filed in support of and in opposition to the motions and the remainder of the
17 file and hereby grants the Government's motion and denies Schlenker's motion for the
18 reasons stated herein.

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20 _____
21 ¹ Schlenker also brought a motion to expedite, seeking a decision on the motions in
22 advance of his asserted June 24, 2020 deadline to bring a motion under 28 U.S.C. § 2255. Dkt.
14. That motion is denied as moot. Schlenker also filed a motion to file a surreply, Dkt. 23;
however, he has withdrawn the motion. Dkt. 26. The Court has not considered the proffered
surreply.

1 **I. BACKGROUND**

2 **A. Background and Procedural History**

3 This matter is closely related to Schlenker’s criminal case, CR15-5197 BHS
4 (“Criminal Matter”). Schlenker wishes to bring a motion collaterally attacking his
5 sentence under 28 U.S.C. § 2255, based upon a United States Supreme Court case
6 decided after he was sentenced that invalidated the “residual clause” of 18 U.S.C.
7 § 924(c). *United States v. Davis*, 139 S. Ct. 2319 (2019) (“*Davis*”). However, Schlenker
8 is concerned that the waiver clause in his plea agreement could empower the Government
9 to assert additional charges against him if he brings a collateral attack on his sentence;
10 Schlenker therefore seeks a declaratory judgment that his contemplated filing of a § 2255
11 motion would not violate his plea agreement. Dkt. 1.

12 The Court entered an order accepting Schlenker’s guilty plea in the Criminal
13 Matter on April 22, 2016. Criminal Matter, Dkt. 41. Schlenker pled guilty to two counts:
14 (1) second degree murder, and (2) possession of a firearm in furtherance of a crime of
15 violence pursuant to 18 U.S.C. § 924(c)(1)(A)(i)-(iii). *Id.*, Dkt. 38. The Court sentenced
16 Schlenker to 16 years for Count 1 and applied § 924(c)’s mandatory consecutive sentence
17 of 10 years for Count 2, for a total custodial sentence of 26 years. *Id.*, Dkt. 56.
18 Schlenker now wishes to collaterally attack the 10-year sentence he received for the
19 § 924(c) violation on the ground that *Davis* renders his sentence and conviction on Count
20 2 invalid. Dkt. 11-8.

21 Schlenker’s plea agreement “waives to the full extent of the law . . . [a]ny right to
22 bring a collateral attack against the conviction and sentence . . . except as it may relate to

1 the effectiveness of legal representation.” Criminal Matter, Dkt. 38 at 10.² The waiver
2 provision further provides that “[i]f Defendant breaches this Plea Agreement at any time
3 by appealing or collaterally attacking (except as to effectiveness of legal representation)
4 the conviction or sentence in any way, the United States may prosecute Defendant for
5 any counts, including those with mandatory minimum sentences, that were dismissed or
6 not charged pursuant to this Plea Agreement.” *Id.*

7 Schlenker’s counsel contacted the Government on December 19, 2019, informing
8 it of Schlenker’s intent to file a § 2255 motion and asking whether it would consider the
9 filing to be a breach of the plea agreement. Criminal Matter, Dkt. 63-1. The Government
10 responded on January 14, 2020, stating that it “will consider [a § 2255] action to be a
11 breach of the parties’ plea agreement.” Dkt. 11-1.

12 Schlenker has both brought a motion in the Criminal Matter to “clarify” the plea
13 agreement (Criminal Matter, Dkt. 61) and filed a civil complaint in this matter seeking a
14 declaratory judgment that his contemplated collateral attack would not constitute a breach
15 of his plea agreement. Dkt. 1. The Government moved to dismiss. Dkt. 12. Schlenker
16 opposed the motion, Dkt. 20, and the Government replied, Dkt. 22. Schlenker filed a
17 motion for summary judgment seeking the declaration requested in his complaint. Dkt.
18 10. The Government responded, Dkt. 19, and Schlenker replied, Dkt. 21. Both motions
19 are ripe for consideration.

21 ² Schlenker’s contemplated § 2255 petition would not be based upon a claim of
22 ineffective assistance of counsel; it would be premised upon the ruling in *Davis*. Dkt. 11-8
(proposed petition).

1 **B. Summary of the Parties' Arguments**

2 Schlenker contends that the waiver is invalid or inapplicable for five reasons: (1)
3 it is not in effect because, as a result of *Davis*, Schlenker's sentence exceeded applicable
4 sentencing guidelines; (2) the colloquy during Schlenker's plea hearing did not
5 adequately inform Schlenker of the collateral attack waiver; (3) the sentence was
6 rendered unlawful by *Davis* and therefore the waiver is void; (4) Schlenker is actually
7 innocent of the § 924(c) count as a result of the holding in *Davis*; and (5) bringing a
8 collateral attack would not constitute breach because the waiver clause lacks a covenant
9 not to bring a § 2225 action. Dkt. 10 at 1; Dkt. 1 at ¶¶ 22(a)-(f).

10 Other than a footnote addressing grounds (2) and (5) in its response to Schlenker's
11 summary judgment motion, the Government did not respond to Schlenker's arguments on
12 the merits. Dkt. 19 at 2, n.1. Instead, it contends that (1) Schlenker has failed to identify
13 any waiver of its sovereign immunity and (2) the Court is without subject matter
14 jurisdiction to consider Schlenker's complaint. Dkts. 12, 19. With respect to jurisdiction,
15 the Government first contends that Schlenker seeks a mere advisory opinion and there is
16 therefore no case or controversy; second, it contends that Schlenker's complaint
17 impermissibly attempts to substitute a civil declaratory judgment action for a § 2255
18 motion. *Id.*

19 Schlenker responds that the Administrative Procedures Act, 5 U.S.C. § 702
20 ("APA") waives sovereign immunity. Dkt. 20 at 2. He argues that jurisdiction exists
21 because declaratory relief may be sought in a court where "the one against whom
22 [declaratory relief is sought] could have asserted his own rights" and therefore exists

1 pursuant to 28 U.S.C. § 1331. Dkt. 20 at 1 n.1 (quoting *Standard Ins. Co. v. Saklad*, 127
2 F.3d 1179 (9th Cir. 1997)). Schlenker further contends that this case presents precisely
3 the dilemma that the declaratory judgment remedy was meant to address and thus does
4 not seek a mere advisory opinion. Dkt 20 at 6-7, citing *MedImmune, Inc. v. Genentech,*
5 *Inc.*, 549 U.S. 118 (2007). Finally, Schlenker contends that this action is a mere
6 “precursor” to his contemplated habeas proceeding, not a substitute for it. *Id.*

7 The Court agrees with the Government that Schlenker’s complaint should be
8 dismissed. The Court lacks subject matter jurisdiction because there is no case or
9 controversy.

10 II. DISCUSSION

11 Federal Rule of Civil Procedure 12(b)(1) authorizes the dismissal of a case for
12 lack of subject matter jurisdiction. *See* Fed. R. Civ. P. 12. Federal courts are courts of
13 limited jurisdiction and are presumed to lack subject matter jurisdiction until the plaintiff
14 establishes otherwise. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377
15 (1994); *see also Miguel v. Country Funding Corp.*, 309 F.3d 1161, 1164 (9th Cir. 2002).
16 Once subject matter jurisdiction has been challenged, the plaintiff bears the burden of
17 establishing it. *Id.*

18 Under the Declaratory Judgment Act, courts of the United States “may declare the
19 rights and other legal relations of any interested party seeking such declaration.” 28
20 U.S.C. § 2201(a). A lawsuit seeking federal declaratory relief must first present an actual
21 case or controversy within the meaning of Article III, section 2 of the United States
22 Constitution. *Gov’t Emps. Ins. Co. v. Dizol*, 133 F.3d 1220, 1222–23 (9th Cir. 1998). It

1 must fulfill statutory jurisdictional prerequisites. *Id.* If the suit passes constitutional and
2 statutory muster, the district court must also be satisfied that entertaining the action is
3 appropriate. *Id.* A district court has the “unique and substantial discretion to decide
4 whether to issue a declaratory judgment,” *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286
5 (1995), but is “under no compulsion to exercise that jurisdiction,” *Brillhart v. Excess Ins.*
6 *Co. of America*, 316 U.S. 491, 494 (1942).

7 **A. Case or Controversy**

8 A case or controversy exists if “the facts alleged, under all the circumstances,
9 show that there is a substantial controversy, between parties having adverse legal
10 interests, of sufficient immediacy and reality to warrant the issuance of a declaratory
11 judgment.” *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273, (1941). What
12 makes a declaratory judgment “a proper judicial resolution of a ‘case or controversy’
13 rather than an advisory opinion—is in the settling of some dispute *which affects the*
14 *behavior of the defendant towards the plaintiff.*” *Hewitt v. Helms*, 482 U.S. 755, 761
15 (1987).

16 The Government contends that Schlenker is seeking an advisory opinion, arguing
17 that Schlenker’s rights would be implicated if and only if he actually files a § 2255
18 petition and the Government seeks to find him in breach of the plea agreement. Dkt. 12
19 at 2. Schlenker argues that his desire to bring a § 2255 petition, the Government’s
20 position that bringing such a petition would be a breach, combined with the “significant
21 consequences” if the Government is right, demonstrates an actual conflict. Dkt. 20 at 7.
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1 The Court agrees with the Government. Here, the Government has simply
2 responded to a request for its position by stating that it “would consider” a future filing of
3 a § 2255 petition to be a breach of the plea agreement. Dkt. 11-1. Notably, the
4 Government did not threaten any action, and in particular did not state that it would
5 proceed to file additional charges. In contrast, *MedImmune*, upon which Schlenker relies,
6 involved a “clear threat” of adverse action. 549 U.S. at 122.

7 Furthermore, it remains wholly speculative whether Schlenker would incur any
8 harm. Schlenker has not identified what, if any, additional charges could be brought, or
9 how they would affect his sentence if he were to be convicted. In addition, the outcome
10 of Schlenker’s as-yet unfiled § 2255 petition is unknown, as is any response by the
11 Government if Schlenker were to prevail. Indeed, the legal landscape governing the
12 proposed petition is also uncertain. While *Davis* has invalidated the residual clause of 18
13 U.S.C. § 924(c)(3), the scope of the elements clause is currently the subject of a pending,
14 but abeyed, rehearing *en banc*. *United States v. Begay*, No. 14-10080, 2019 WL 7900329
15 (December 5, 2019) (“*Begay*”). As Schlenker’s proposed petition indicates, the future
16 disposition of the panel decision in *Begay* is relevant to whether—if a § 2255 petition is
17 filed and is successful—any error would be harmless. Dkt. 11-8.

18 These multiple contingencies render Shlenker’s claim non-justiciable. The Ninth
19 Circuit reached the same conclusion in an unreported disposition³ where, like Schlenker,
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22 ³ Although unpublished decisions of the Ninth Circuit are not binding on this Court, they
have persuasive value and indicate how the Ninth Circuit applies binding authority.

1 the plaintiff sought a declaration that filing a § 2255 petition would not breach his plea
2 agreement:

3 The issue of whether Mulholland breaches his plea agreement by filing a
4 section 2255 motion is more appropriately considered in that
5 proceeding. . . . Moreover, Mulholland’s request for a declaration
6 prohibiting future prosecution is unripe for adjudication because “it rests
7 upon contingent future events that may not occur as anticipated, or indeed
8 may not occur at all.” *See Texas v. United States*, 523 U.S. 296, 300 (1998)
9 (internal quotations omitted). Accordingly, we reverse the district court’s
10 judgment and remand with instructions to dismiss the action for lack of
11 jurisdiction.

12 *Mulholland v. Snohomish Cty.*, 68 Fed. App’x 75 (9th Cir. 2003) (“*Mulholland*”).⁴

13 Schlenker’s claim, like Mulholland’s, is not ripe for adjudication.

14 **B. Schlenker’s Motion for Summary Judgment**

15 In light of the Court’s grant of the Government’s motion to dismiss, Schlenker’s
16 motion for summary judgment, Dkt. 14, is **denied as moot**.

17 **III. ORDER**

18 Therefore, it is hereby **ORDERED** as follows:

- 19 1. The Government’s motion to dismiss, Dkt. 12, is **GRANTED** and this
20 matter is **DISMISSED**;

21 ⁴ Schlenker’s motion in the Criminal Matter cited a district court opinion from the
22 Northern District of New York, *Cady v. United States*, 970 F. Supp. 97 (N.D.N.Y. 1997), in
which, as in this case and *Mulholland*, a criminal defendant sought declaratory judgment that
filing a § 2255 petition would not violate his plea agreement. The court determined it had
jurisdiction and found that the future filing of a petition would not constitute a breach. *Id.* at
100. In light of *Mulholland*, the Court does not find *Cady* persuasive. However, the subsequent
history in *Cady* is instructive: after *Cady* filed his § 2255 petition, the court found that the filing
did breach the plea agreement. *Cady v. United States*, No. 98–CV–33 1998 WL 743719 at *5
(N.D.N.Y. October 15, 1998). Thus, the original ruling was ultimately proved not only to have
been an advisory opinion, but to have been incorrect.

- 1 2. Schlenker's motion for summary judgment, Dkt. 14, is **DENIED**; and
- 2 3. The Clerk shall enter a **JUDGMENT** and close the case.

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4 Dated this 18th day of June, 2020.

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8 BENJAMIN H. SETTLE
9 United States District Judge

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