

1 to exhaust administrative remedies be denied. In making this recommendation, the Report
2 and Recommendation notes that while Petitioner filed his last administrative appeal after the
3 filing of the Petition for Writ of Habeas Corpus, the Bureau of Prisons National Inmate
4 Appeals Administrator responded on the merits of the final appeal denying it on the same
5 basis as the previous denials.

6 Relying upon *United States v. Gunning*, 401 F.3d 1145 (9th Cir. 2005), the Magistrate
7 Judge found that, because the district court failed to order a specific schedule for restitution
8 while incarcerated but only ordered that Petitioner pay restitution while incarcerated through
9 the Inmate Financial Responsibility Program, the Bureau of Prisons was without authority
10 to require restitution payments from Petitioner and recommended that the Petition be granted.

11 Respondent filed his objections to the Report and Recommendation on June 29, 2009,
12 arguing both that the Magistrate Judge erred in concluding that exhaustion would be futile
13 and in determining that there was an improper delegation of authority to the Bureau of
14 Prisons to set the restitution schedule.

15 In the Report and Recommendation, the Magistrate Judge was quite specific about the
16 factual basis for his determination of futility on the exhaustion issue. In his objections,
17 Respondent merely cites the Court to Bureau of Prisons statistics to support the claim that
18 the final appeal generally is not a futile one and that the Court should require the Petitioner
19 to exhaust his administrative remedies. The objections fail to address the specific facts which
20 support the finding of futility in this case. The Court having deducted its *de novo* review of
21 the record agrees with the Report and Recommendation of the Magistrate Judge that
22 exhaustion in this case would have been futile and that the Motion to Dismiss should be
23 denied.

24 In *United States v. Gunning*, the defendant was ordered to pay restitution while
25 incarcerated through the Bureau of Prisons Inmate Financial Responsibility Program and
26 while on supervised release in monthly installments not less than 10% of defendant's gross
27 income. *Id* at p. 1147. The Court of Appeals held that an order that restitution be paid
28 during imprisonment through the Bureau of Prisons Inmate Financial Responsibility Program

1 was a delegation by the trial judge of a non-delegable duty imposed upon the Court by the
2 Mandatory Victims Restitution Act of 1996 which requires the Court to determine “the
3 manner in which, and the schedule according to which, the restitution is to be paid.” 18
4 U.S.C.. § 3664(f)(2). The Court of Appeals held because the judgment had no set schedule
5 “the district court simply does not have the authority to delegate its own scheduling duties,
6 not to the probation office, not to the BOP, not to anyone else.” *Gunning* at p. 1150. While
7 the Court does not generally disagree that a prisoner could voluntarily enter into a contract
8 with the Bureau of Prisons to make restitution payments, that is not what occurred here.
9 Rather the Bureau of Prisons imposed a schedule of restitution which it did not have the
10 authority to do. The Court agrees with the Magistrate Judge that without a specific payment
11 scheduling order from the Court the Bureau of Prisons does not have the authority to require
12 a schedule of restitution payments collected while a defendant is participating in the Inmate
13 Financial Responsibility Program.

14 IT IS ORDERED overruling the objection to the Report and Recommendation of the
15 Magistrate Judge.

16 IT IS FURTHER ORDERED adopting the Report and Recommendation of the
17 Magistrate Judge as the order of this Court. (Doc. 22).

18 IT IS FURTHER ORDERED denying Respondent’s Motion to Dismiss. (Doc. 15).

19 IT IS FURTHER ORDERED that the Petition for Writ of Habeas Corpus be granted.

20 IT IS FURTHER ORDERED that the Bureau of Prisons is ordered to stop collecting
21 restitution payments from Petitioner through the Inmate Financial Responsibility Program.

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23 DATED this 26th day of August, 2009.

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28 Susan R. Bolton
United States District Judge