

1 **WO**

2  
3  
4  
5  
6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 Steven Patrick Smiley,

No. CV 11-1153-PHX-GMS (SPL)

10 Petitioner,

**ORDER**

11 v.

12 Dennis Smith,

13 Respondent.  
14

15 Pending before the Court is Petitioner Steven Smiley's Motion to Amend/Alter  
16 Judgment under Rule 59 or Rule 60. (Doc. 20.) For the reasons articulated below, the  
17 Court grants the motion and orders the government to exempt Smiley from restitutionary  
18 obligations under the IFRP until the sentencing courts issue proper restitution schedules.

19 **BACKGROUND**

20 On November 12, 2009, Smiley was convicted and sentenced in the U.S. District  
21 Court for the District of Utah for conspiracy to commit bank fraud. A little less than a  
22 year later, in September 2010, Smiley was convicted and sentenced in the U.S. District  
23 Court for the Southern District of Illinois for mail fraud. Both sentences required Smiley  
24 to begin payment of restitution.<sup>1</sup>

25  
26 <sup>1</sup> The Utah restitution order stated that "[r]estitution payments are to begin  
27 immediately. Payment of criminal monetary penalties shall be made in accordance with a  
28 schedule established by the Bureau of Prisons Inmate Financial Responsibility Program  
while incarcerated." (Doc. 9, Ex. 2 at 10.) After determining that penalty payments would  
commence 30 days after release from imprisonment, the Illinois restitution order includes  
a statement that "[u]nless the court has expressly ordered otherwise, if this judgment

1           Smiley did not appeal either sentence and is currently incarcerated at the Federal  
2 Correctional Institution in Phoenix, Arizona. While incarcerated, he has enrolled in the  
3 voluntary Inmate Financial Responsibility Program (“IFRP”), which “encourages each  
4 sentenced inmate to meet his or her legitimate financial obligations.” 28 C.F.R. § 545.10.  
5 Participation in the IFRP results in access to certain benefits,<sup>2</sup> such as employment in  
6 UNICOR, the federal prison corporation that sells goods to the government. *See* 28  
7 C.F.R. § 545.11. A condition of enrollment in the IFRP is payment of a certain  
8 percentage of wages toward restitution ordered by the sentencing court. *See id.* Smiley  
9 enrolled in the IFRP on March 21, 2011, and the Bureau of Prisons (“BOP”) began  
10 deducting 50% of Smiley’s wages to go toward the restitution ordered by the sentencing  
11 courts. (Doc. 20, Ex. B.)

12           On June 8, 2011, Smiley filed a Petition for Writ of Habeas Corpus in this Court  
13 under 28 U.S.C. § 2441. He alleged that the BOP lacked authority to collect restitution  
14 payments through the IFRP in the absence of a payment schedule set by the sentencing  
15 district courts. On October 15, 2012, this Court held that the withdrawal of restitution  
16 moneys from Smiley’s prison account violated the Mandatory Victims’ Restitution Act  
17 (“MVRA”), 18 U.S.C. § 3663 et seq. It ordered the BOP “to cease collecting restitution  
18 payments from Smiley until a proper restitution schedule has been set by the sentencing  
19 courts.” (Doc. 18 at 8.)

20           Subsequent to that decision, prison officials met with Smiley about his continued  
21 participation in the IFRP. They informed him that he had to enroll in the IFRP to  
22 continue his work at UNICOR, which meant that, like before, Smiley would have to  
23 devote 50% of his pay to restitution. (Doc. 20 ¶¶ 2-4.) Other jobs were available, and  
24

---

25 imposes imprisonment, payment of criminal monetary penalties is due during  
26 imprisonment. All criminal monetary penalties, except those payments made through the  
27 Federal Bureau of Prisons’ Inmate Financial Responsibility Program, are made to the  
28 clerk of court.” (Doc. 9, Ex. 3 at 9.)

<sup>2</sup> Or failure to enroll in the IFRP results in certain penalties. For purposes of this order, the perspective does not matter.

1 restitution would not be deducted from other funds. On October 23, 2012, Smiley again  
2 enrolled in the IFRP and agreed to devote 50% of his wages to restitution. (*Id.*, Ex. C.)  
3 The BOP promptly began deducting 50% of Smiley’s wages. (*Id.*, Ex. A.)Smiley filed  
4 this Motion on November 15, 2012, and requests this Court to alter its judgment to  
5 declare that the BOP must exempt Smiley from participation in the IFRP because the  
6 sentencing courts have not imposed lawful restitutionary orders. He alternatively asks the  
7 Court to hold the BOP in contempt for failure to comply with its previous Order.

## 8 **DISCUSSION**

### 9 **I. LEGAL STANDARD**

10 The Parties’ briefing has clarified that Smiley seeks relief under Rule 60(b) of the  
11 Federal Rules of Civil Procedure. That rule allows a court to “relieve a party or its legal  
12 representative from a final judgment, order, or proceeding” for reasons including mistake,  
13 newly discovered evidence, or “any other reason that justifies relief.” Fed. R. Civ. P.  
14 60(b). Typically, it is the losing party that invokes Rule 60. Smiley, on the other hand,  
15 succeeded on his petition. Smiley also describes his Motion as one for sanctions against  
16 the government for failure to comply with this Court’s October 15, 2012 Order.  
17 Regardless of whether either rule is the appropriate one to invoke, the Court retains  
18 jurisdiction over the case to determine whether the government is complying with its  
19 Order and to issue whatever clarification is necessary.

### 20 **II. ANALYSIS**

21 The government’s principal justification for continuing to collect restitution  
22 payments from Smiley is that he voluntarily agreed to participate in the IFRP—which  
23 requires a 50% restitution payment—to keep his UNICOR job. In its view, the delegation  
24 problems posed by the prior arrangement have vanished because the restitution deduction  
25 is based on Smiley’s agreement.

26 The government relies on the Ninth Circuit’s description of the interplay between  
27 the MVRA and the IFRP in *United States v. Lemoine*, 546 F.3d 1042 (9th Cir. 2008).

1 There, the BOP conditioned the petitioner's participation in the IFRP on paying  
2 restitution at a dollar figure and frequency that exceeded the schedule set by the district  
3 court. *Id.* at 1044 (\$132 a month instead of \$25 a quarter). The Ninth Circuit held that,  
4 "where the district court has properly set a restitution repayment schedule as required  
5 under the MVRA, the BOP has the authority to encourage voluntary payments in excess  
6 of those required under the court's judgment by conditioning the receipt of certain  
7 privileges during the term of imprisonment on the inmate's participation in the IFRP." *Id.*  
8 at 1050 (emphasis added). A prisoner has no specific entitlement to the benefits provided  
9 by the IFRP, and so his election to participate in a program that required greater  
10 contributions poses no delegation problems. Still, the *Lemoine* court expressly  
11 conditioned its holding on the existence of a lawful restitution order.

12 Nevertheless, Judge Bolton relied on the *Lemoine* rationale in a case identical to  
13 the case before the Court. In *Sours v. Chavez*, 2:08-cv-01903 (March 24, 2011), *aff'd* 466  
14 Fed. App'x 637 (Jan. 19, 2012), Judge Bolton had found an improper delegation of  
15 authority by the district court to the BOP to set restitution payments through the IFRP,  
16 and she ordered the BOP to stop collecting payments. The petitioner then filed a motion  
17 for contempt, asserting that the BOP was violating the court's order by continuing to  
18 collect restitution payments through the IFRP in the absence of a restitution schedule  
19 from the sentencing court. There, as in Smiley's situation, the petitioner voluntarily  
20 agreed to participate in the IFRP and abide by its restitution requirements after the court  
21 entered its order finding improper delegation. The voluntariness of that subsequent  
22 agreement was decisive on whether the government was violating the court's order.  
23 Judge Bolton explained that

24 [w]hen Petitioner was given the choice between retaining his UNICOR job  
25 and voluntarily agreeing to pay on his financial obligations or losing his  
26 UNICOR job, Petitioner choose to continue in his UNICOR job and agreed  
27 to the Inmate Financial Plan. Respondent is not in contempt of the Court's  
28 Order. The current deduction of 50% of his wages paid towards Petitioner's  
restitution obligation is a voluntary payment made by Petitioner pursuant to  
the written financial plan executed by him.

1 *Id.* at 2. The Ninth Circuit affirmed that reasoning in an unpublished opinion. *See Sours*,  
2 466 Fed. App'x at 637 (“The record shows that the BOP began collecting restitution  
3 payments again after Sours voluntarily entered into a contract and agreed to participate in  
4 the IFRP. Accordingly, the district court did not abuse its discretion by denying the  
5 motion for contempt.”). The government relies heavily on the distinction made by Judge  
6 Bolton in *Sours*.

7 The government’s position is foreclosed by the Ninth Circuit’s subsequent  
8 published decision in *Ward v. Chavez*. The court noted that the outcome in *Lemoine* was  
9 conditioned on the existence of a proper restitution order from the sentencing court. *Ward*  
10 *v. Chavez*, 678 F.3d 1042, 1048 (9th Cir. 2012) (“In upholding this order, we relied on  
11 the ‘proper’ setting of a restitution payment schedule by the district court.”). Thus the  
12 court cabined *Lemoine*’s allowance of separate IFRP schedules to situations where there  
13 was a proper schedule in place. There was not a proper restitution order in *Ward*, and the  
14 government has not provided any evidence that the sentencing courts here have produced  
15 such a schedule for Smiley. And, like Smiley, the petitioner in *Ward* was “voluntarily  
16 employed by Unicor.” *Id.* at 1044. But despite the voluntary nature of the petitioner’s  
17 participation in the IFRP, and despite Judge Wallace’s dissent that the voluntary  
18 arrangement removed delegation problems, see *id.* at 1056-57 (Wallace, J., dissenting),  
19 the majority held that “because the sentencing court in [petitioner’s] case did not set forth  
20 a proper payment schedule in the restitution order, that order is unlawful, and the BOP  
21 therefore lacks the authority to collect restitution payments from [petitioner] through the  
22 IFRP.” *Id.* at 1051-52.<sup>3</sup>

23 The natural application of *Ward* to Smiley’s situation requires the BOP to exempt  
24 Smiley from the provisions of the IFRP until a proper restitution order is in place. The  
25 factual similarity between *Ward* and this case provides little room for distinction.

---

27  
28 <sup>3</sup> Neither this decision, nor *Ward*, determines whether Smiley is entitled to participate in the IFRP absent the existence of a proper restitution order.

1 Furthermore, *Ward* likely alters the outcome in *Sours*, the government’s chief point of  
2 reliance. The IFRP, after all, assumes the existence of a “legitimate financial obligation.”  
3 *See* 28 C.F.R. § 545.10. When a district court improperly delegates its responsibility to  
4 set a restitution schedule to the BOP or any other entity, the restitution order is rendered  
5 “unlawful.” *Ward*, 678 F.3d at 1051. Therefore, the government cannot require Smiley to  
6 pay anything under the IFRP—even in a voluntary agreement—absent a proper  
7 restitution order from the sentencing courts. Smiley is therefore exempt from the  
8 requirements of the IFRP. While the government’s strongly protests the admittedly odd  
9 outcome produced by application of such a rule to this case, that outcome is dictated by  
10 *Ward*.

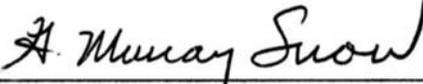
11 **CONCLUSION**

12 The government may not collect restitution payments from Smiley’s trust fund  
13 account unless and until the sentencing courts bring their sentences into conformity with  
14 the MVRA. The government’s error here, however, does not warrant sanctions. The  
15 Court will confine itself to clarification of its prior order.

16 **IT IS THEREFORE ORDERED:**

- 17 1. Petitioner’s Motion (Doc. 20) is **GRANTED**.  
18 2. The BOP is ordered to exempt Petitioner Smiley from the IFRP until a  
19 proper restitution schedule has been set by the sentencing courts.

20 Dated this 4th day of January, 2013.

21   
22 \_\_\_\_\_

23 G. Murray Snow  
24 United States District Judge  
25  
26  
27  
28