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## IN THE UNITED STATES DISTRICT COURT

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## FOR THE DISTRICT OF ARIZONA

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James Ray Willis,

No. CV-12-00618-TUC-JGZ

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Petitioner,

**ORDER**

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v.

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Craig Apker,

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Respondent.

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On August 12, 2013, Magistrate Judge Thomas D. Ferraro issued a Report and Recommendation (“R&R”) (Doc. 17) in which he recommended that Petitioner’s § 2241 Petition be granted in part. On August 26, 2013, Respondent filed an Objection to the Report and Recommendation; Petitioner timely responded. (Docs. 18, 19.) The Court adopts the Report and Recommendation of the Magistrate Judge.<sup>1</sup>

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**ANALYSIS**

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<sup>1</sup> The Court reviews *de novo* the objected to portions of the Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). The Court reviews for clear error the unobjected to portions of the Report and Recommendation. *Johnson v. Zema Systems Corp.*, 170 F.3d 734, 739 (7th Cir. 1999); *see also Conley v. Crabtree*, 14 F. Supp. 2d 1203, 1204 (D. Or. 1998).

1 Specifically, Respondent contends that the Magistrate’s finding that Petitioner’s  
2 restitution order is not proper or valid is inconsistent with the Magistrate’s finding that  
3 Petitioner is not challenging the legal validity of that order.

4 The Magistrate Judge did not find that Petitioner’s restitution order is not proper  
5 or valid. Petitioner did not challenge the validity of his restitution order, but rather the  
6 execution of that order: Petitioner alleged that the BOP had impermissibly collected  
7 money from his account through the IFRP and requested an order directing BOP to place  
8 Petitioner in “IFRP Exempt” status. (Doc. 1, pgs. 4, 9.) The Magistrate Judge found that  
9 “BOP is foreclosed by the court’s interpretation of the [Mandatory Victims Restitution  
10 Act] in *Ward* from imposing a payment schedule on Petitioner through the IFRP.” (Doc.  
11 17, pg. 5.) This finding is consistent with the relief sought by the Petitioner in his § 2241  
12 Petition. The Magistrate Judge explicitly stated that the court was considering only  
13 Petitioner’s argument regarding BOP enforcement of his restitution order. (Doc. 17, pg.  
14 5.)

15 The Magistrate Judge’s finding comports with the law of this Circuit. Petitioner’s  
16 restitution order was issued in the Fifth Circuit, which has not adopted *Ward’s* holding  
17 that a restitution order that fails to set forth a payment schedule impermissibly delegates  
18 judicial authority to the BOP in violation of the Mandatory Victims Restitution Act  
19 (“MVRA”). *See, e.g., Hickman v. Keffer*, 498 Fed. Appx. 375, 379 (5<sup>th</sup> Cir. 2012). In the  
20 Fifth Circuit, Petitioner’s restitution order is valid and if Petitioner were housed in a  
21 facility located in the Fifth Circuit, the BOP could impose a payment schedule on  
22 Petitioner through the IFRP. However, Petitioner is currently housed at the United States  
23 Penitentiary in Tucson, Arizona, which is located within the Ninth Circuit. When the  
24 BOP operates in the Ninth Circuit, it is subject to review under the law of the circuit.  
25 (Doc. 17, pg. 6.) In the Ninth Circuit, “the BOP lacks the authority to collect restitution  
26 payments from the petitioner” unless the petitioner’s restitution order sets forth a  
27 payment schedule. *Ward*, 678 F.3d at 1052. This is true regardless of whether the  
28 underlying restitution order is valid in the circuit in which it was issued. Contrary to

1 Respondent’s assertion, the invalidity of the restitution order is not a condition precedent  
2 to the relief Petitioner seeks. The Court recognizes that this Circuit split makes BOP’s  
3 efforts to collect on restitution orders inconsistent, but it is bound by the law of this  
4 Circuit.

5 The Court will modify the remedy recommended by the Magistrate Judge in  
6 granting the Petition. The Magistrate Judge concluded that the appropriate remedy for  
7 Petitioner is that he be placed on “IFRP Exempt” status “until a proper restitution  
8 schedule has been set by the sentencing court.” (Doc. 17, pg. 7.) Respondent argues  
9 that it is not possible for a “proper restitution schedule” to be set in Petitioner’s case  
10 because Petitioner has no legal basis to challenge the restitution component of his  
11 sentence in the Western District of Texas, and any opportunity to appeal that order has  
12 expired. The Court agrees with Respondent that there appears to be no likelihood that  
13 Petitioner’s restitution schedule will be amended to include a payment schedule. The  
14 Court also agrees with Respondent that this Court cannot direct the BOP to place  
15 Petitioner on IFRP status: the Court is without the legal authority to direct the BOP in the  
16 administration of inmate payments. However, the Magistrate’s conclusion that the BOP  
17 lacks authority to impose a payment schedule for Petitioner under the IFRP is nonetheless  
18 legally valid pursuant to *Ward*. Accordingly, the Court concludes that the appropriate  
19 remedy is an Order prohibiting Respondents from collecting restitution payments from  
20 Petitioner’s accounts so long as he is housed in this Circuit.

### 21 CONCLUSION

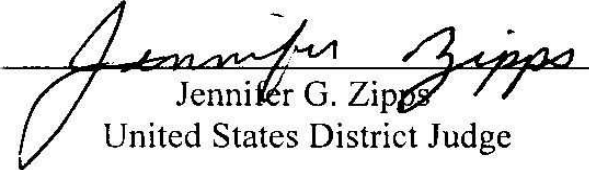
22 Accordingly, after an independent review, IT IS ORDERED that the Report and  
23 Recommendation (Doc. 17) is ADOPTED IN PART and REJECTED IN PART.

24 The R&R is ADOPTED insofar as it GRANTS IN PART the Petition for Writ of  
25 Habeas Corpus but DENIES in part the Petition’s request for reimbursement for past  
26 payments made through IFRP. (Doc. 1.)

27 The R&R is REJECTED insofar as it directs Respondents to place Petitioner on  
28 IFRP Exempt status until a proper restitution schedule has been set by the sentencing

1 court. IT IS ORDERED THAT Respondents are prohibited from collecting restitution  
2 payments from Petitioner's accounts so long as he is housed in this Circuit.

3 Dated this 30<sup>th</sup> day of September, 2014.

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7 Jennifer G. Zipp  
8 United States District Judge  
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