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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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John H. Estep,

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No. CV-15-443-TUC-RM (LAB)

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Petitioner,

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**REPORT AND
RECOMMENDATION**

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vs.

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J.T. Shartle,

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Respondent.

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On September 18, 2015, the petitioner, an inmate confined in the Federal Correctional Institution in Tucson, AZ, filed a Petition for Writ of Habeas Corpus pursuant to Title 28, United States Code, Section 2241. (Doc. 1) The petitioner claims the trial court’s order of restitution fails to comply with federal statutes.

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Pursuant to the Rules of Practice of this Court, this matter was referred to the Magistrate Judge for Report and Recommendation.

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The petition should be dismissed. This claim is not cognizable.

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Background

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Estep pleaded guilty to two counts of producing child pornography, one count of conspiracy to receive/distribute child pornography, six counts of receiving/distributing child pornography, and one count of possession of child pornography. (Doc. 10-2, pp. 6-7) On July

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1 14, 2005, the trial court sentenced him to an aggregate sentence of 780 months. (Doc. 10-2, p.
2 8)

3 The trial court also imposed restitution of \$221,480.10. (Doc. 10-2, p. 11) The trial
4 court ordered that the total sum is due “immediately” and that “[a]ny outstanding balance owed
5 by the defendant . . . shall be paid in minimum quarterly installments of \$25.00 unless the
6 defendant is employed by the Federal Prison authorities, in which case the defendant’s quarterly
7 installments shall be no less than \$60.00.” (Doc. 10-2, p. 12) On October 3, 2005, the trial
8 court granted the government’s unopposed Motion for Offset of Defendant’s Retirement Benefit
9 and directed the U.S. Office of Personnel Management (OPM) to remit 100% of Estep’s
10 monthly annuity payment to the U.S. Clerk’s Office in Lexington, Kentucky. (Doc. 10-2, p. 40)
11 It is this order to OPM that Estep challenges.

12 On direct appeal, Estep argued he should have been permitted to withdraw his guilty plea
13 because “(1) he mistakenly thought there was a written plea agreement, (2) he was not
14 competent to plead guilty because he was sleep deprived, and (3) he pleaded guilty under duress
15 because his attorney told him that if he did not plead guilty, he would be physically harmed in
16 state prison.” (Doc. 10-2, pp. 42-43) The Sixth Circuit denied his appeal on September 21,
17 2006. (Doc. 10-2, pp. 42-44)

18 Estep then filed a motion to correct, set aside, or vacate his sentence, which the trial court
19 construed as a petition brought pursuant to 28 U.S.C. § 2255. The court denied the motion as
20 untimely on September 13, 2011. (Doc. 10-2, pp. 55-56)

21 Estep filed a second motion pursuant to 28 U.S.C. § 2255 on June 27, 2013. (Doc. 10-2,
22 pp. 57-73) In that motion, Estep argued, among other things, that “[t]he restitution order was
23 and is outside the law.” (Doc. 10-2, p. 71) “It does not set a payment amount, there is no
24 schedule of payments, nor is [sic] there start and end payment dates.” *Id.* The trial court
25 transferred the motion to the Sixth Circuit for authorization because it was a “second or
26 successive” motion. (Doc. 10-2, p. 75) On April 29, 2014, the Sixth Circuit denied Estep
27 authorization to file a “second or successive § 2255 motion” because his petition did not rely
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1 on “newly discovered evidence” or “a new law of constitutional law” pursuant to 28 U.S.C. §
2 2255(h). (Doc. 10-2, pp. 75-76)

3 On September 9, 2015, Estep filed the pending petition for writ of habeas corpus
4 pursuant to 28 U.S.C. 2241. (Doc. 1) He claims the trial court’s restitution order “does not
5 include a payment amount, a payment schedule or starting and ending payment dates” (Doc.
6 1, p. 4) Instead, it simply says “the restitution ordered herein shall be paid from Defendant’s
7 monthly retirement benefits.” *Id.* Estep argues the trial court “has delegated its own scheduling
8 duties to the office of personnel management.” *Id.* He asks that this court “send the restitution
9 order back to be amended . . . and squash [sic] original writ of garnishment and amend to
10 include specific payment amount.” (Doc. 1, p. 6)

11 The respondent filed an answer on December 10, 2015. (Doc. 10) He argues the petition
12 should be dismissed for failure to exhaust or because the issue is waived. *Id.* He argues in the
13 alternative, that the petition should be denied on the merits. *Id.* Estep filed a reply on January
14 11, 2016. (Doc. 13) The court concludes Estep’s claim is not cognizable.

15 16 Discussion

17 A federal prisoner may file a petition pursuant to 28 U.S.C. §2241 when challenging the
18 “manner, location, or conditions of a sentence’s execution.” *Hernandez v. Campbell*, 204 F.3d
19 861, 864 (9th Cir. 2000) When filing such a petition, “the prisoner must name the warden of the
20 penitentiary where he is confined as a respondent.” *Johnson v. Reilly*, 349 F.3d 1149, 1153 (9th
21 Cir. 2003). This requirement follows naturally because the warden has custody over the
22 petitioner and is primarily responsible for the execution of his sentence.

23 Here, Estep challenges the trial court’s restitution order of October 3, 2005 directing the
24 U.S. Office of Personnel Management (OPM) to remit 100% of Estep’s annuity payment to the
25 U.S. Clerk’s Office in Lexington, Kentucky. (Doc. 10-2, p. 40) Estep argues the restitution
26 order violates 18 U.S.C. §§ 3572, 3612, 3663, and 3664. (Doc. 1, p. 4) These statutes instruct
27 the trial court to impose restitution when “an identifiable victim or victims has suffered a
28 physical injury or pecuniary loss” and “specify in the restitution order the manner in which, and

1 the schedule according to which, the restitution is to be paid.” 18 U.S.C. §§ 3663A, 3664(f)(2).

2 Estep argues the trial court’s order to OPM runs afoul of the restitution statutes. This
3 claim challenges Estep’s sentence. It does not challenge the “manner, location, or conditions
4 of [his] sentence’s execution.” *See Hernandez v. Campbell*, 204 F.3d 861, 864 (9th Cir. 2000).
5 Accordingly, this claim is not cognizable in a petition brought pursuant to § 2241. *See Lara v.*
6 *Smith*, 132 F. App’x 420, 421 (3rd Cir. 2005).

7 If the Bureau of Prisons (BOP) were taking money from Estep’s prison account to satisfy
8 his restitution obligation, then a § 2241 petition directed to his custodian would be appropriate.
9 *See, e.g., Smiley v. Smith*, 2012 WL 4887485, at *4 (D. Ariz. 2012) (order clarified at 2013 WL
10 57822 (D. Ariz. 2013)) (“[A]n order to the BOP to cease collecting restitution payments is not
11 the same as issuing an order to the district courts . . . to modify their sentences.”). That is not
12 happening here. OPM is sending Estep’s annuity payments directly to the sentencing court.
13 (Doc. 1-1, pp. 29, 30) The respondent, Warden Shartle, can do nothing about that.

14 Estep’s jurisdictional problem is reflected in that section of the petition where he is
15 instructed, “If you did not exhaust all available administrative remedies relating to Ground One,
16 explain why” (Doc. 1, p. 4) Estep answered, “No administrative remedies to exhaust, none
17 available.” *Id.* He is correct. There is nothing the BOP can do for him. That is why his claim
18 is not cognizable.

19 One remaining jurisdictional issue remains. In a latter section of the petition, Estep
20 concedes that he is “challenging [his] conviction or sentence.” (Doc. 1, p. 5) Claims that do
21 so ordinarily must be brought pursuant to § 2255. *Id.* He maintains, however, that he is
22 bringing a § 2241 petition rather than a § 2255 petition, because the latter is “inadequate or
23 ineffective.” *Id.* He argues a § 2255 petition would not be permitted because he is not bringing
24 “an issue of custody.” *Id.* Estep is half-right.

25 If a § 2255 petition would be “inadequate or ineffective to test the legality of his
26 detention,” a petitioner may instead file a § 2241 petition. *Muth v. Fondren*, 676 F.3d 815, 818
27 (9th Cir. 2012). And, a § 2255 petition cannot be used to challenge a restitution order because
28 § 2255 applies only to “a prisoner in custody . . . claiming the right to be released.” *U.S. v.*

1 *Thiele*, 314 F.3d 399, 402 (9th Cir. 2002). The latter rule, however, does not implicate the
2 former.

3 Estep cannot challenge the restitution order in a § 2255 petition because he does not
4 “claim[] the right to be released.” *Thiele*, 314 F.3d at 402. This fact, however, does not make
5 § 2255 “inadequate or ineffective” triggering the so called “escape hatch” that permits the filing
6 of a § 2241 petition. A § 2255 petition is “inadequate or ineffective” only “when a petitioner
7 (1) makes a claim of actual innocence and (2) has not had an unobstructed procedural shot at
8 presenting that claim.” *Muth v. Fondren*, 676 F.3d 815, 819 (9th Cir. 2012) (punctuation
9 modified). Neither of these prerequisites is present here. Accordingly, the “escape hatch” is
10 not triggered, and Estep cannot bring a § 2241 petition under that exception.

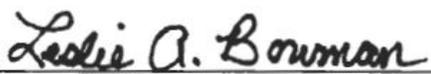
11 Estep’s claim may not be brought in a petition pursuant to §2241 or §2255. As the
12 respondent correctly notes, Estep should have brought this claim in his direct appeal. He failed
13 to do so, and now it is waived. *United States v. Gianelli*, 543 F.3d 1178, 1184 (9th Cir. 2008).

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15 RECOMMENDATION

16 The Magistrate Judge recommends that the District Court, after its independent review
17 of the record, enter an order dismissing the petition. (Doc. 1) Estep’s claim is not cognizable.

18 Pursuant to 28 U.S.C. §636(b), any party may serve and file written objections within
19 14 days of being served with a copy of this Report and Recommendation. If objections are not
20 timely filed, they may be deemed waived.

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22 DATED this 13th day of January, 2016.

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26 Leslie A. Bowman
27 United States Magistrate Judge
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