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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

RASHI TAGUE JONES,

 Petitioner,

 v.

COPENHAVER, Warden,

 Respondent.

Case No. 1:13-cv-00472-BAM-HC

ORDER DENYING RESPONDENT'S REQUEST
TO TRANSFER THE PETITION (DOC. 17)

ORDER GRANTING RESPONDENT'S MOTION
TO DISMISS THE PETITION (DOC. 17)
AND DISMISSING THE PETITION (DOCS.
1, 7) OR, ALTERNATIVELY, DENYING
THE PETITION FOR WRIT OF HABEAS
CORPUS (DOCS. 1, 7)

ORDER DIRECTING THE ENTRY OF
JUDGMENT FOR RESPONDENT

Petitioner is a prisoner proceeding pro se and in forma pauperis with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. Pursuant to 28 U.S.C. 636(c)(1), the parties have consented to the jurisdiction of the United States Magistrate Judge to conduct all further proceedings in the case, including the entry of final judgment, by manifesting their consent in writings signed by the parties or their representatives and filed by Petitioner on April 19, 2013, and on behalf of Respondent on June 24, 2013.

Pending before the Court is the Respondent's motion to dismiss the petition, which was filed on October 4, 2013, and served by mail

1 on Petitioner. Although the time for filing opposition to the
2 motion has passed, no opposition has been filed.

3 I. Proceeding by a Motion to Dismiss

4 Because the petition was filed after April 24, 1996, the
5 effective date of the Antiterrorism and Effective Death Penalty Act
6 of 1996 (AEDPA), the AEDPA applies to the petition. Lindh v.
7 Murphy, 521 U.S. 320, 327 (1997); Jeffries v. Wood, 114 F.3d 1484,
8 1499 (9th Cir. 1997).

9 Title 28 U.S.C. § 2241 provides that writs of habeas corpus may
10 be granted by a district court within its jurisdiction only to a
11 prisoner whose custody is within enumerated categories, including
12 but not limited to custody under the authority of the United States
13 or custody in violation of the Constitution, laws, or treaties of
14 the United States. 28 U.S.C. § 2241(a), (c)(1) and (3).

15 A district court must award a writ of habeas corpus or issue an
16 order to show cause why it should not be granted unless it appears
17 from the application that the applicant is not entitled thereto. 28
18 U.S.C. § 2243. Rule 4 of the Rules Governing Section 2254 Cases in
19 the United States District Courts (Habeas Rules) is applicable to
20 proceedings brought pursuant to § 2241. Habeas Rule 1(b). Habeas
21 Rule 4 permits the filing of "an answer, motion, or other response,"
22 and thus it authorizes the filing of a motion in lieu of an answer
23 in response to a petition. Rule 4, Advisory Committee Notes, 1976
24 Adoption and 2004 Amendments. This gives the Court the flexibility
25 and discretion initially to forego an answer in the interest of
26 screening out frivolous applications and eliminating the burden that
27 would be placed on a respondent by ordering an unnecessary answer.
28 Advisory Committee Notes, 1976 Adoption. Rule 4 confers upon the

1 Court broad discretion to take "other action the judge may order,"
2 including authorizing a respondent to make a motion to dismiss based
3 upon information furnished by respondent, which may show that a
4 petitioner's claims suffer a procedural or jurisdictional infirmity,
5 such as res judicata, failure to exhaust state remedies, or absence
6 of custody. Id.

7 The Supreme Court has characterized as erroneous the view that
8 a Rule 12(b)(6) motion is appropriate in a habeas corpus proceeding.
9 See, Browder v. Director, Ill. Dept. of Corrections, 434 U.S. 257,
10 269 n. 14 (1978); but see Lonchar v. Thomas, 517 U.S. 314, 325-26
11 (1996). However, in light of the broad language of Rule 4, it has
12 been held in this circuit that motions to dismiss are appropriate in
13 cases that proceed pursuant to 28 U.S.C. § 2254 and present issues
14 of failure to state a colorable claim under federal law, O'Bremski v.
15 Maas, 915 F.2d 418, 420-21 (9th Cir. 1990); procedural default in
16 state court, White v. Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989);
17 and failure to exhaust state court remedies, Hillery v. Pulley, 533
18 F.Supp. 1189, 1194 n.12 (E.D.Cal. 1982). Analogously, a motion to
19 dismiss a petition for a lack of subject matter jurisdiction is
20 appropriate in the present proceeding because this Court has a duty
21 to determine its own jurisdiction in advance of determining the
22 merits of the petition. Wilson v. Belleque, 554 F.3d 816, 821 (9th
23 Cir. 2009), cert. den., 130 S.Ct. 75 (2009).

24 II. Jurisdiction and Request for Transfer

25 A. Jurisdiction

26 Petitioner signed and declared under penalty of perjury that he
27 mailed his petition from the United States Prison at Atwater (USPA)
28 on March 25, 2013. (Doc. 1, 5.) The petition was deemed filed on

1 that date pursuant to the "mailbox rule," which was initially
2 developed in case law and is reflected in Habeas Rule 3(d) and Rule
3 3(d) of the Rules Governing § 2255 Proceedings for the United States
4 District Courts. Pursuant to the mailbox rule, a prisoner's pro se
5 habeas petition is "deemed filed when he hands it over to prison
6 authorities for mailing to the relevant court." Houston v. Lack,
7 487 U.S. 266, 276 (1988); Huizar v. Carey, 273 F.3d 1220, 1222 (9th
8 Cir. 2001). Rule 3(d) requires an inmate to use the custodial
9 institution's system designed for legal mail and provides for a
10 showing of timely filing by a declaration in compliance with 28
11 U.S.C. § 1746 or by a notarized statement setting forth the date of
12 deposit and verifying prepayment of first-class postage. The
13 mailbox rule applies to federal and state petitions alike. Campbell
14 v. Henry, 614 F.3d 1056, 1058-59 (9th Cir. 2010) (citing Stillman v.
15 LaMarque, 319 F.3d 1199, 1201 (9th Cir. 2003), and Smith v.
16 Ratelle, 323 F.3d 813, 816 n.2 (9th Cir. 2003)). The mailbox rule,
17 liberally applied, in effect assumes that absent evidence to the
18 contrary, a legal document is filed on the date it was delivered to
19 prison authorities, and a petition was delivered on the day it was
20 signed. Houston v. Lack, 487 U.S. at 275-76; Roberts v. Marshall,
21 627 F.3d 768, 770 n.1 (9th Cir. 2010); Campbell v. Henry, 614 F.3d
22 1056, 1058-59 (9th Cir. 2010); Lewis v. Mitchell, 173 F.Supp.2d
23 1057, 1058 n.1 (C.D.Cal. 2001). The date a petition is signed may
24 be inferred to be the earliest possible date an inmate could submit
25 his petition to prison authorities for filing under the mailbox
26 rule. Jenkins v. Johnson, 330 F.3d 1146, 1149 n.2 (9th Cir. 2003),
27 overruled on other grounds, Pace v. DiGuglielmo, 544 U.S. 408
28 (2005).

1 Respondent represents that after the petition was mailed but
2 before the petition was "filed," Petitioner was transferred to
3 United States Prison at Allenwood on March 27, 2013. (Doc. 17, 2.)
4 The Court notes that Petitioner filed in this Court a notification
5 of change of address that was signed on April 15, 2013. (Doc. 6.)
6 Respondent declines to challenge the Court's jurisdiction over
7 Respondent Copenhaver, Warden of USPA, in view of the foregoing
8 facts. (Doc. 17, at 3:10-11, and at 2-3.)

9 This Court has jurisdiction over Petitioner's custodian. Title
10 28 U.S.C. § 2241(a) provides that writs of habeas corpus may be
11 granted by the district courts "within their respective
12 jurisdictions." A writ of habeas corpus operates not upon the
13 prisoner, but upon the prisoner's custodian. Braden v. 30th Judicial
14 Circuit Court of Kentucky, 410 U.S. 484, 494-495 (1973). A
15 petitioner filing a petition for writ of habeas corpus under § 2241
16 must file the petition in the judicial district of the petitioner's
17 custodian. Brown v. United States, 610 F.2d 672, 677 (9th Cir.
18 1990). The warden of the penitentiary where a prisoner is confined
19 constitutes the custodian who must be named in the petition, and the
20 petition must be filed in the district of confinement. Rumsfeld v.
21 Padilla, 542 U.S. 426, 446-47 (2004). It is sufficient if the
22 custodian is in the territorial jurisdiction of the court at the
23 time the petition is filed; transfer of the petitioner thereafter
24 does not defeat personal jurisdiction that has once been properly
25 established. Ahrens v. Clark, 335 U.S. 188, 193 (1948), overruled
26 on other grounds in Braden v. 30th Judicial Circuit Court of
27 Kentucky, 410 U.S. at 499-500; Francis v. Rison, 894 F.2d 353, 354
28 (9th Cir. 1990).

1 Here, the petition was deemed filed as of the time it was
2 mailed; thus, the record reflects that Petitioner's custodian was in
3 the territorial jurisdiction of this Court at the time the petition
4 was filed.

5 B. Transfer

6 Respondent acknowledges that venue is proper in this district.
7 (Doc. 17, 3:14-15.) However, Respondent seeks a transfer, asserting
8 that exercising jurisdiction in this case would be anomalous.
9 However, as the foregoing authorities demonstrate, no anomaly is
10 present; rather, Petitioner was transferred after jurisdiction
11 attached. Respondent also argues that transfer would be more
12 practical and allow for a more efficient adjudication of the
13 petition. However, Respondent cites no facts in support of this
14 argument. The district of Petitioner's present custodial
15 institution is not the district in which Petitioner was sentenced,
16 and it appears that full documentation of Petitioner's restitution
17 history is before the Court.

18 Respondent contends that this Court's decision in this case
19 will be subject to review in Petitioner's present district, and
20 further, that any determinations this Court would make on the merits
21 of the petition concern Petitioner's sentence and are thus beyond
22 the authority of this Court to undertake in a petition pursuant to
23 28 U.S.C. § 2241. As the following analysis will show, to the
24 extent that this Court might be considered to have jurisdiction to
25 reach the merits of the petition, this Court addresses only the
26 authority of the BOP to collect restitution and does not purport to
27 affect the sentence imposed on Petitioner.

28 Accordingly, the request for transfer will be denied.

1 III. Background

2 After filing his petition on March 25, 2013, Petitioner filed a
3 supplement to the petition on April 26, 2013. In the petition,
4 Petitioner challenges the authority of the Federal Bureau of Prisons
5 (BOP) to set a payment schedule for, and to collect, the payment of
6 restitution. Specifically, Petitioner challenges his participation
7 in the BOP's Inmate Financial Responsibility Program (IFRP) as a
8 violation of the Mandatory Victims Restitution Act of 1996 (MVRA),
9 18 U.S.C. § 3663A. (Doc. 1, 1-5.)

10 Documentation submitted to the Court by Respondent in
11 connection with the motion to dismiss establishes that pursuant to
12 convictions of being a felon in possession of a firearm, conspiracy,
13 bank robbery, and causing death of another through use of a semi-
14 automatic assault weapon in relation to a crime of violence,
15 Petitioner was sentenced to one hundred and twenty (120) months plus
16 life in prison in United States v. Jones, case number 3:97CR00169-
17 002, in the United States District Court for the Eastern District of
18 Virginia, on June 18, 1998. (Mot. to dismiss, decl. of Vickers & abs.
19 of judgment, doc. 17-1 at 3, 7-9.) The judgment in the criminal case
20 provided that the defendant should pay a total of \$500 in financial
21 penalties and further provided:

22 The defendant shall make restitution to the following
23 persons in the following amounts:

24 Name of Payee

25 The defendant will be ordered to pay full restitution
26 in this case. The defendant is held jointly and severally
27 liable for restitution. The defendant shall participate in
28 the Inmate Financial Responsibility Program while
incarcerated, if deemed appropriate. If the defendant is
released from prison, the balance of the unpaid restitution
shall be paid in monthly installment payments of no less than

1 \$250. Restitution will be due and payable immediately.
2 FURTHER ORDER OF RESTITUTION TO ENTER.

3 Each restitution payment shall be divided proportionately
4 among the payees named unless specified in the priority
5 payment column above.

6 Payments shall be applied in the following order:
7 (a) assessment; (2) restitution; (3) fine principal;
8 (4) cost of prosecution; (5) interest; (6) penalties.

9 The total fine and other monetary penalties shall be due
10 as follows:
11 [x] in full immediately....

12 All financial penalty payments are to be made to the Clerk
13 of Court, except those payments made through the Bureau
14 of Prisons' Inmate Financial Responsibility Program.
15 (Doc. 17-1, 12-13.)

16 A "RESTITUTION JUDGMENT" was filed in the criminal action. In
17 the restitution judgment, it states that in case of a conflict
18 between the restitution judgment and the judgment in the criminal
19 case, the restitution judgment governs. (Id. at 15.) The total
20 amount of restitution that the two defendants were ordered to pay
21 was \$1,227,970.70, with each defendant's liability joint and
22 several. Amounts were stated for direct victims and indirect
23 victims. (Id. at 16.) With respect to payment and collection, the
24 restitution judgment provides:

25 4. Payment. Payment is due immediately. The United
26 States may enforce the restitution judgment in accordance
27 with 18 U.S.C. §§ 3613 and 3664(m) (1) (B).

28 5. BOP Collection. The Bureau of Prisons may require
the defendant to participate in its Inmate Financial
Responsibility Program.

...

8. Place of Payment. All restitution shall be paid to the

1 Clerk of Court, United States District Court.
2 (Doc. 17-1, 17.) The document also makes provisions for payments to
3 direct victims in full before indirect victims are paid, and for
4 payments to insurers of amounts of recoverable losses. (Id. at 18.)
5 It also specifies the order and amounts of payments to victims to be
6 made by the clerk.
7

8 Although Petitioner's penalty assessment has expired,
9 restitution in the amount of \$1,227,970.70 remains owing. (Id. at
10 22.) Paperwork signed in April 2013 shows that Petitioner agreed to
11 participate in the IFRP and to submit payments towards satisfaction
12 of his financial obligation in the amount of \$25.00 per quarter
13 beginning on September 2013 until the obligation is satisfied. (Id.
14 at 24.) Since December 11, 1999, Petitioner made twenty-four IFRP
15 payments ranging in amount from \$10.00 to \$50.00. (Id. at 4, 27-
16 28.)
17

18 IV. Subject Matter Jurisdiction

19 Respondent argues that this Court lacks subject matter
20 jurisdiction because Petitioner is actually challenging his sentence
21 and not the execution of his sentence.
22

23 A federal prisoner who wishes to challenge his conviction or
24 sentence on the grounds it was imposed in violation of the
25 Constitution or laws of the United States or was otherwise subject
26 to collateral attack must do so by way of a motion to vacate, set
27 aside, or correct the sentence under 28 U.S.C. § 2255. 28 U.S.C.
28 § 2255; Stephens v. Herrera, 464 F.3d 895, 897 (9th Cir. 2006);

1 Tripati v. Henman, 843 F.2d 1160, 1162 (9th Cir. 1988). In such
2 cases, the motion must be filed in the district where the defendant
3 was sentenced because only the sentencing court has jurisdiction.
4 Hernandez v. Campbell, 204 F.3d at 864; Tripati, 843 F.2d at 1163.
5 Generally, a prisoner may not collaterally attack a federal
6 conviction or sentence by way of a petition for a writ of habeas
7 corpus pursuant to 28 U.S.C. § 2241. Stephens v. Herrera, 464 F.3d
8 at 897; Tripati, 843 F.2d at 1162.

9 In contrast, a federal prisoner challenging the manner,
10 location, or conditions of that sentence's execution must bring a
11 petition for writ of habeas corpus under 28 U.S.C. § 2241. Brown v.
12 United States, 610 F.2d 672, 677 (9th Cir. 1990).

13
14 Petitioner is arguing that the BOP lacks authority to set a
15 payment schedule where the sentencing court has not done so.
16 Although Respondent characterizes this as an attack on Petitioner's
17 sentence, it may likewise be viewed legitimately as a challenge
18 regarding the execution of Petitioner's sentence concerning the
19 ongoing collection of restitution and the authority of the BOP to
20 set forth a payment schedule and collect restitution pursuant to it.
21 In Ward v. Chavez, 678 F.3d 1042 (9th Cir. 2012), the court held in
22 a proceeding pursuant to § 2241 that because the sentencing court
23 did not set forth a proper payment schedule in the restitution
24 order, the court's order was unlawful, and the BOP therefore lacked
25 the authority to collect restitution payments from Ward through the
26 IFRP. Ward, 678 F.3d at 1051. Although subject matter jurisdiction
27 was not discussed, the Court considered the issue of collection of
28 restitution in terms that apply to Petitioner's case also, namely,

1 the authority of the BOP to execute Petitioner's sentence in the
2 manner of which Petitioner complains.

3 The Court concludes that it has subject matter jurisdiction to
4 consider whether the BOP has the authority to collect Petitioner's
5 restitution.

6 V. Failure to Exhaust Judicial Remedies

7 Although Respondent concedes that Petitioner exhausted
8 administrative remedies (mot., doc. 17, 3:27-28), Respondent
9 contends that Petitioner waived his contention concerning the
10 unlawfulness or legal insufficiency of the restitution order by not
11 raising it on appeal from the judgment. Respondent informs the
12 Court that in the course of Petitioner's appeal from the judgment in
13 the Fourth Circuit Court of Appeals, which was decided in 2000,
14 Petitioner did not raise any issue concerning the restitution order
15 that was part and parcel of the sentence. Further, Respondent is
16 unaware of any § 2255 motion filed by Petitioner challenging the
17 restitution terms of his sentence. Petitioner has not brought to
18 the Court's attention any documentation of efforts to challenge the
19 restitution order in the process of direct appeal or by proceeding
20 pursuant to § 2255.

21 Title 28 U.S.C. § 2241 does not specifically require
22 petitioners to exhaust direct appeals before filing petitions for
23 habeas corpus. However, as a prudential matter, it is required that
24 habeas petitioners exhaust available judicial and administrative
25 remedies before seeking relief under § 2241. Ward v. Chavez, 678
26 F.3d 1042, 1045 (9th Cir. 2012); Castro-Cortez v. I.N.S., 239 F.3d
27 1037, 1047 (9th Cir. 2001), abrogated on other grounds, Fernandez-
28 Vargas v. Gonzales, 548 U.S. 30 (2006); Brown v. Rison, 895 F.2d

1 533, 535 (9th Cir. 1990), overruled on other grounds in Reno v.
2 Koray, 515 U.S. 50, 54-55 (1995) . The exhaustion requirement in
3 § 2241 cases is subject to waiver because it is not required by
4 statute and is thus not a "jurisdictional" prerequisite. Brown, 895
5 F.2d at 535. It has been acknowledged that the exhaustion
6 requirement may be waived or excused in various circumstances, such
7 as where the remedy provides no genuine opportunity for adequate or
8 efficacious relief, or pursuit of it would be futile; irreparable
9 injury might occur without immediate judicial relief; the remedial
10 proceedings would be void; or some instances of a complaining
11 party's raising a substantial constitutional question. Laing v.
12 Ashcroft, 370 F.3d 994, 1000-1001 (9th Cir. 1994).

13 Specifically, non-constitutional and non-jurisdictional claims
14 that could have been raised on appeal, but were not, may not be
15 asserted in collateral proceedings. Stone v. Powell, 428 U.S. 465,
16 477 n.10 (1976). It is recognized that a non-constitutional claim
17 is not cognizable pursuant to § 2255 if it could have been raised on
18 appeal but was not so raised. United States v. Davis, 417 U.S. 333,
19 342-465 (1974)

20 Here, the MVRA was enacted in 1996. Ward v. Chavez, 678 F.3d
21 at 1043-44. Petitioner does not show any legal or factual basis for
22 his failure to challenge the legal sufficiency of the restitution
23 order in his appeal from his sentence, which was imposed in 1998.
24 Although the validity of the sentencing court's restitution order
25 and the authority of the BOP to enforce the order may be viewed as
26 separate questions, resolution of the issue in the context of a
27 challenge to the terms of Petitioner's sentence would have
28 eliminated the issue concerning the BOP's authority. The Court

1 concludes that Petitioner's failure to exhaust his judicial remedies
2 may be held to bar relief pursuant to § 2241 and to require
3 dismissal of the petition.

4 However, it may be contended that Petitioner does not seek to
5 invalidate any portion of his sentence, but rather seeks only to
6 raise a claim concerning the execution of his sentence, namely, the
7 authority of the BOP to engage in the ongoing activity of collecting
8 the restitution ordered by the sentencing court.

9 Accordingly, in an abundance of caution, the Court will
10 consider the merits of the petition.

11 VI. Collection of Restitution by the BOP

12 A. Delegation of the Duty to Schedule Payment
13 of Restitution

14 The MVRA provides in pertinent part as follows:

15 (f) (1) (A) In each order of restitution, the court shall
16 order restitution to each victim in the full amount of
17 each victim's losses as determined by the court and
without consideration of the economic circumstances of the
defendant.

18 (B) In no case shall the fact that a victim has received
19 or is entitled to receive compensation with respect to a
20 loss from insurance or any other source be considered in
determining the amount of restitution.

21 (2) Upon determination of the amount of restitution owed
22 to each victim, the court shall, pursuant to section 3572,
23 specify in the restitution order the manner in which, and
24 the schedule according to which, the restitution is to be
paid, in consideration of--

25 (A) the financial resources and other assets of
26 the defendant, including whether any of these
assets are jointly controlled;

27 (B) projected earnings and other income of the
28 defendant; and

1 (C) any financial obligations of the defendant;
2 including obligations to dependents.

3 18 U.S.C. § 3664(f)(1)-(2). The statute has been construed to
4 require the court itself to specify the manner in which, and the
5 schedule according to which, the restitution is to be paid; the
6 court's duty to set a schedule for the payment of restitution is
7 non-delegable. United States v. Gunning (Gunning I), 339 F.3d 948,
8 949 (9th Cir. 2003) (holding that a district court's order making
9 restitution payable "immediately," with any amount unpaid after the
10 defendant's release "to be paid during the period of supervision as
11 directed by a U.S. probation officer," assigned full control of
12 subsequent payment to the probation office and thus constituted an
13 impermissible delegation of the court's authority to the probation
14 officer); United States v. Gunning (Gunning II), 401 F.3d 1145, 1149
15 (9th Cir. 2005) (holding that the district court's order directing
16 the payment of restitution "immediately," to be paid through the
17 BOP's IFRP program during the time that the defendant was
18 imprisoned, and to be paid in monthly installments of not less than
19 ten percent of the defendant's gross income commencing thirty days
20 after release from imprisonment, constituted an impermissible
21 delegation of authority because there was no adequate provision for
22 payment during the period of imprisonment between the petitioner's
23 sentencing and the petitioner's supervised release).

24 Pursuant to this line of cases, a district court's order that
25 restitution is due or be paid "immediately," made with an
26 expectation that the BOP or probation will work out the details of
27 payment over time, constitutes an impermissible delegation of
28 authority. Ward v. Chavez, 678 F.3d at 1047-48.

1 An order to pay restitution immediately may be permissible if
2 it involves no delegation of the scheduling of payment, such as
3 where the court determines that the defendant has the financial
4 ability to pay the restitution in full immediately. However, a
5 sentencing court has a duty to consider the defendant's financial
6 position in determining a restitution payment schedule. 18 U.S.C.
7 § 3664(f)(2); United States v. Martin, 278 F.3d 988, 1006 (9th Cir.
8 2002); Ward v. Chavez, 678 F.3d at 1048-49. The statute governing
9 the mode of payment of restitution provides, "A person sentenced to
10 pay a fine or other monetary penalty, including restitution, shall
11 make such payment immediately, unless, in the interest of justice,
12 the court provides for payment on a date certain or in
13 installments." 18 U.S.C. § 3572(d). Where a district court
14 determines that the defendant's financial resources are such that
15 periodic payments are unwarranted, then it is appropriate for a
16 district court to order payment immediately; in such circumstances,
17 no improper delegation occurs. Ward v. Chavez, 678 F.3d at 1049-50;
18 United States v. Martin, 278 F.3d 988, 1006 (9th Cir. 2005) (holding
19 that it was correct to order immediate payment where the district
20 court had before it information concerning the defendant's financial
21 resources that it presumably considered and found insufficient to
22 warrant periodic payments). In contrast, where the defendant has
23 insufficient financial resources to make immediate repayment, then
24 the district court, as distinct from the BOP or probation, must set
25 a repayment schedule in the judgment of conviction in order to
26 discharge its duties under the MVRA. Ward v. Chavez, 678 F.3d at
27 1049. Where a court orders immediate payment without considering
28 the defendant's ability to pay, the restitution order is likewise

1 insufficient because of a failure to set forth a schedule. Id. The
2 court in Ward v. Chavez summarized the authorities as follows:

3 For a restitution order to be lawful, therefore, § 3664
4 requires that the district court set a schedule in
5 consideration of the defendant's financial resources. If
6 the court considers the defendant's financial resources
7 and concludes that periodic payments are unwarranted "in
8 the interest of justice," the order is lawful, as we
9 concluded in Martin. If, however, the district court
10 simply orders immediate repayment and leaves it to another
11 agency, like the BOP, to actually set the payment schedule
12 that the statute obligates the court to determine, that
13 order is unlawful, as the district court has abdicated in
14 its duty to set the schedule "in consideration of" the
15 financial circumstances of the defendant.

16 Ward v. Chavez, 678 F.3d at 1050.

17 Here, the criminal judgment specified the persons to whom
18 payment was to be made, scheduled monthly installment payments in an
19 amount no less than \$250.00 for any balance of unpaid restitution
20 remaining owing upon the defendant's release from prison, but failed
21 to schedule payments during the Petitioner's imprisonment. The
22 restitution judgment set forth the names of the victim payees and
23 the total amount of restitution, but it failed to set forth any
24 schedule pursuant to which Petitioner was to make the payments,
25 except if Petitioner were released from prison, a circumstance
26 warranting specification of a precise installment payment schedule
27 of monies to be paid to the court clerk. It thus appears that the
28 sentencing court did not set forth a complete payment schedule.

29 However, the restitution judgment expressly provided that it
30 was imposed pursuant to the MVRA (doc. 17-1, 15), and it states with
31 respect to interest, "Interest is waived as the Court determines
32 that the defendant does not have the ability to pay interest." (Id.
33 at 16.) It thus affirmatively appears from the record that the

1 sentencing court considered the financial ability of the defendant
2 in connection with setting the defendant's restitution obligation.
3 In contrast to the consideration given by the sentencing court here,
4 the court in Ward v. Chavez acknowledged that it did not consider
5 the defendant's financial ability and left to BOP to work out the
6 details. Id. At 1050.

7 As in United States v. Martin, 278 F.3d 988, it must be
8 presumed that the sentencing court considered information that was
9 sufficient for it to conclude that the petitioner was financially
10 able to pay restitution immediately; Petitioner has made no showing
11 that the sentencing court failed to consider his financial condition
12 when imposing restitution.

13 Accordingly, the Court concludes that Petitioner has not shown
14 that the trial court's order of immediate payment of restitution
15 involved an impermissible delegation of its authority to set a
16 payment schedule.

17 B. Use of the IFRP to Collect Restitution

18 Petitioner argues that his participation in the IFRP violates
19 the MVPA.

20 With respect to the use of the IFRP to collect restitution, as
21 long as the sentencing court's restitution order adequately
22 specifies the amount and rate of payment, then it is permissible for
23 a district court to require the payment be "pursuant to the Bureau
24 of Prisons' Inmate Financial Responsibility Program." United States
25 v. Lemoine, 546 F.3d 1042, 1046-50 (9th Cir. 2008). In Lemoine, the
26 court held that a district court's order to pay restitution of a
27 specified total amount during imprisonment "at the rate of not less
28 than \$25 per quarter, and pursuant to the Bureau of Prisons' Inmate

1 Financial Responsibility Program," was not an impermissible
2 delegation because the sentencing court had set forth a restitution
3 repayment schedule. Id. Further, in such circumstances, it was
4 appropriate and not an unlawful delegation for the BOP to operate a
5 voluntary program such as the IFRP to collect restitution, and it
6 was even permissible for the IFRP to require higher payments than
7 the sentencing court had specified because the inmate had agreed to
8 participate in the IFRP. The court determined that the inmate's
9 participation in the IFRP was voluntary despite the prison's
10 penalizing inmates for failure to participate in the program with
11 limitations on living and work assignments, benefits, and privileges
12 because the consequences are not punitive and do not amount to
13 atypical and significant hardships in the context of normal prison
14 life. Further, the consequences are reasonably related to the
15 government's legitimate penological interest in rehabilitation, and
16 the program promotes acceptance of responsibility and fulfillment of
17 the obligation to make restitution to victims. Id. at 1049-50.

18 Here, Petitioner has repeatedly consented to participate in the
19 IFP program and has made substantial payments through the program.
20 No circumstance appears that would render Petitioner's participation
21 in the IFRP involuntary. In light of the apparent legal sufficiency
22 of the sentencing court's restitution order, the Court concludes
23 that Petitioner has not shown that his voluntary participation in
24 the IFRP violated the MVRP or was otherwise in violation of federal
25 law.

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VII. Disposition

Accordingly, it is ORDERED that:

1) Respondent's request to transfer the petition is DENIED; and

2) Respondent's motion to dismiss the petition for writ of habeas corpus is GRANTED, and the petition is DISMISSED; or

3) In the alternative, the petition for writ of habeas corpus is DENIED; and

4) The Clerk is DIRECTED to enter judgment for Respondent.

IT IS SO ORDERED.

Dated: December 20, 2013

/s/ Barbara A. McAuliffe
UNITED STATES MAGISTRATE JUDGE