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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

JEREMY E. LEWIS,

Petitioner,

v.

ANDRE D. MATEVOUSIAN,

Respondent.

Case No. 1:16-cv-00144-LJO-SAB-HC

FINDINGS AND RECOMMENDATION TO  
GRANT RESPONDENT'S MOTION TO  
DISMISS AND DISMISS PETITION FOR  
WRIT OF HABEAS CORPUS

ORDER DENYING MOTION FOR  
DISCOVERY

(ECF Nos. 11, 14)

Petitioner is a federal prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241.

**I.**

**BACKGROUND**

On December 8, 2008, Petitioner was indicted in the United States District Court for the Southern District of Ohio for: armed bank robbery; two counts of use, carrying, and discharging a firearm in relation to a crime of violence; conspiracy; and being a felon in possession of a firearm. On December 7, 2009, Petitioner pleaded guilty to count 1 (bank robbery) and count 2 (discharge of a firearm in relation to a crime of violence) pursuant to a written plea agreement. (ECF No. 14 at 2).<sup>1</sup> On March 17, 2010, Petitioner was sentenced to 168 months on count 1 and

<sup>1</sup> Page numbers refer to the ECF page numbers stamped at the top of the page.

1 120 months on count 2, to be served consecutively. (ECF No. 14-1 at 12). As part of the  
2 judgment, Petitioner was ordered to pay \$1,711 in restitution. (Id. at 15). Thereafter, Petitioner  
3 filed an untimely appeal. (ECF No. 14 at 3).

4 Petitioner currently is in the custody of the Federal Bureau of Prisons (“BOP”) at the  
5 United States Penitentiary in Atwater, California. (ECF No. 14 at 2). On February 1, 2016,  
6 Petitioner filed the instant petition for writ of habeas corpus. (ECF No. 1). Petitioner challenges  
7 the BOP’s authority to collect restitution payments from him, asserting that the district court  
8 impermissibly delegated to the BOP the court’s obligation to set a restitution payment schedule.  
9 On May 6, 2016, Respondent filed a motion to dismiss. (ECF No. 14).

## 10 II.

### 11 DISCUSSION

#### 12 A. Jurisdiction

13 Respondent asserts that the Court lacks jurisdiction to consider Petitioner’s claim because  
14 the proper mechanism for a restitution challenge is a direct appeal. (ECF No. 14 at 5).  
15 Respondent argues that because Petitioner does not challenge either the fact or duration of his  
16 confinement, his claim is not cognizable under 28 U.S.C. § 2241. (Id. at 6). Respondent also  
17 argues that Petitioner waived his claim by not raising it on direct appeal. (Id. at 6–7). The Ninth  
18 Circuit has held that a federal prisoner’s claim challenging “the execution of the restitution order,  
19 specifically improper delegation, [is] properly brought . . . under § 2241,” and the claim is not  
20 waived “by failing to challenge the restitution order before the sentencing court either on direct  
21 appeal or under 28 U.S.C. § 2255.” Moore v. Rios, 555 F. App’x 720, 720 (9th Cir. 2014) (citing  
22 Ward v. Chavez, 678 F.3d 1042, 1044–45 (9th Cir. 2012); United States v. Lemoine, 546 F.3d  
23 1042, 1047–50 (9th Cir. 2008)). Accordingly, the Court finds that it has jurisdiction to consider  
24 Petitioner’s claim, and dismissal is not warranted on this ground.

#### 25 B. Exhaustion

26 Respondent also asserts that Petitioner failed to exhaust the administrative remedy  
27 process prior to filing the instant petition, and thus, the petition should be dismissed. (ECF No.  
28 14 at 8). “As a prudential matter, courts require that habeas petitioners exhaust all available

1 judicial and administrative remedies before seeking relief under § 2241.” Ward, 678 F.3d at 1045  
2 (citing Castro-Cortez v. INS, 239 F.3d 1037, 1047 (9th Cir. 2001), abrogated on other grounds  
3 by Fernandez-Vargas v. Gonzales, 548 U.S. 30 (2006)). However, because it is not a  
4 jurisdictional prerequisite, exhaustion can be waived if pursuing administrative remedies would  
5 be futile. Ward, 678 F.3d at 1045 (citing Castro-Cortez, 239 F.3d at 1047; Fraley v. U.S. Bureau  
6 of Prisons, 1 F.3d 924, 925 (9th Cir. 1993)).

7 In Ward, the petitioner had exhausted only the first step of the three-step BOP  
8 administrative remedy system by filing a formal administrative grievance with the warden,  
9 which the warden denied. 678 F.3d at 1045. The Ninth Circuit found that exhaustion would be  
10 futile because denial of the petitioner’s restitution challenge was based on the Inmate Financial  
11 Responsibility Program, an official BOP policy. Id. at 1045–46. In contrast, here, Petitioner has  
12 failed to file *any* administrative remedy requests regarding the BOP’s collection of restitution  
13 payments from Petitioner. (ECF No. 14-1 at 3). Given that Petitioner did not provide the BOP an  
14 opportunity to consider his claim through the administrative remedy system, the BOP has not  
15 denied Petitioner relief based on official BOP policy, distinguishing the instant case from Ward.  
16 Moreover, after Ward was decided, the BOP issued a notice to all inmates housed in facilities  
17 within the Ninth Circuit advising that they could request review of restitution orders that are  
18 “due immediately” and have no court-ordered payment schedule. See Hinojosa v. Shartle, No.  
19 CV-12-00921-TUC-BGM, 2015 WL 3823791, at \*4 (D. Ariz. June 19, 2015); Villa v. McGrew,  
20 No. CV 13-3619-JSL (RNB), 2013 WL 5755489, at \*5 (C.D. Cal. Oct. 23, 2013). Therefore,  
21 exhaustion of administrative remedies would not be futile in the instant case, and Petitioner’s  
22 failure to file any administrative remedy requests regarding his claim requires dismissal for  
23 nonexhaustion.

### 24 **C. Merits of Petitioner’s Claim**

25 Regardless, even if nonexhaustion did not warrant dismissal, Petitioner’s claim would fail  
26 on the merits. The Mandatory Victims Restitution Act of 1996 (“MVRA”) “directs that the  
27 sentencing court ‘shall . . . specify in the restitution order the manner in which, and the schedule  
28 according to which, the restitution is to be paid.’” Ward, 678 F.3d at 1046 (quoting 18 U.S.C.

1 § 3664(f)(2)). “For a restitution order to be lawful, therefore, § 3664 requires that the district  
2 court set a schedule in consideration of the defendant’s financial resources.” Ward, 678 F.3d at  
3 1050.

4 Petitioner was ordered to pay \$1,711 in restitution as part of the judgment, which  
5 included the following special instruction regarding payment:

6 If the defendant, while incarcerated, is working in a non-UNICOR  
7 or grade 5 UNICOR job, the defendant shall pay \$25.00 per  
8 quarter toward defendant’s monetary obligation. If working in a  
9 grade 1–4 UNICOR job, defendant shall pay 50% of defendant’s  
monthly pay toward defendant’s monetary obligation. Any change  
in this schedule shall be made only by order of this Court.

10 (ECF No. 14-1 at 16). Although Petitioner relies on Ward in his petition, the Court finds the  
11 instant case is distinguishable. In Ward, the Ninth Circuit found to be unlawful a restitution  
12 order, which simply stated that a \$1,000 Crime Victim Fund Assessment and \$27,885 in  
13 restitution “were due and payable ‘immediately’” without specifying any payment schedule.  
14 Ward, 678 F.3d at 1044, 1052. In contrast, the sentencing court here took into consideration the  
15 different possible jobs Petitioner might have while incarcerated and set a payment schedule  
16 accordingly. The payment schedule imposed in Petitioner’s case is more comparable to the one  
17 upheld by the Ninth Circuit in Lemoine, which required the prisoner to pay restitution during his  
18 incarceration “at the rate of not less than \$25 per quarter, and pursuant to the Bureau of Prisons’  
19 Inmate Financial Responsibility Program.” Lemoine, 546 F.3d at 1044, 1050. The restitution  
20 order in the instant case complies with 18 U.S.C. § 3664 and the requirements of Ward.

#### 21 **D. Motion for Discovery**

22 Petitioner requests that he be provided the judgment and the transcripts of his sentencing  
23 hearing in his underlying criminal case from the Southern District of Ohio in order “to prove that  
24 the district court ‘did not’ state a payment schedule for [Petitioner] to pay his restitution  
25 payments.” (ECF No. 11). Although discovery is available pursuant to Rule 6 of the Rules  
26 Governing Section 2254 Cases,<sup>2</sup> it is only granted at the Court’s discretion, and upon a showing

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28 <sup>2</sup> The Rules Governing Section 2254 Cases apply to § 2241 habeas petitions. See Rule 1(b) of the Rules Governing  
Section 2254 Cases (“The district court may apply any or all of these rules to a habeas corpus petition not covered  
by” 28 U.S.C. § 2254.).

1 of good cause. Bracy v. Gramley, 520 U.S. 899, 904 (1997); McDaniel v. U.S. District Court  
2 (Jones), 127 F.3d 886, 888 (9th Cir. 1997); Jones v. Wood, 114 F.3d 1002, 1009 (9th Cir. 1997);  
3 Rule 6(a), Rules Governing Section 2254 Cases. Good cause is shown “where specific  
4 allegations before the court show reason to believe that the petitioner may, if the facts are fully  
5 developed, be able to demonstrate that he is . . . entitled to relief.” Bracy, 520 U.S. at 908–09  
6 (citing Harris v. Nelson, 394 U.S. 287 (1969)). If good cause is shown, the extent and scope of  
7 discovery is within the court’s discretion. See Rule 6(a), Rules Governing Section 2254 Cases.  
8 “[A] district court abuse[s] its discretion in not ordering Rule 6(a) discovery when discovery [i]s  
9 ‘essential’ for the habeas petitioner to ‘develop fully’ his underlying claim.” Smith v. Mahoney,  
10 611 F.3d 978, 997 (9th Cir. 2010) (alterations in original) (internal quotation marks omitted)  
11 (quoting Pham v. Terhune, 400 F.3d 740, 743 (9th Cir. 2005)).

12 A copy of the judgment in Petitioner’s underlying criminal case was attached as an  
13 exhibit to Respondent’s motion to dismiss, which was served on Petitioner. (ECF No. 14 at 9;  
14 ECF No. 14-1 at 11–16). The transcripts of the sentencing hearing are not “essential” for  
15 Petitioner to “develop fully” his claim because the judgment, a copy of which he now possesses,  
16 includes the restitution order at issue. Accordingly, Petitioner is not entitled to discovery of the  
17 sentencing transcripts.

### 18 III.

#### 19 RECOMMENDATION AND ORDER

20 Based on the foregoing, the Court HEREBY RECOMMENDS that Respondent’s motion  
21 to dismiss (ECF No. 14) be GRANTED and the petition for writ of habeas corpus be  
22 DISMISSED. Further, the Court DENIES the motion for discovery (ECF No. 11).

23 This Findings and Recommendation is submitted to the assigned United States District  
24 Court Judge, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local  
25 Rules of Practice for the United States District Court, Eastern District of California. Within  
26 **THIRTY (30) days** after service of the Findings and Recommendation, any party may file  
27 written objections with the court and serve a copy on all parties. Such a document should be  
28 captioned “Objections to Magistrate Judge’s Findings and Recommendation.” Replies to the

1 objections shall be served and filed within fourteen (14) days after service of the objections. The  
2 assigned United States District Court Judge will then review the Magistrate Judge's ruling  
3 pursuant to 28 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file objections within  
4 the specified time may waive the right to appeal the District Court's order. Wilkerson v.  
5 Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th  
6 Cir. 1991)).

7  
8 IT IS SO ORDERED.

9 Dated: August 25, 2016

  
UNITED STATES MAGISTRATE JUDGE

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