



1 See, e.g., O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990) (using Rule 4 to evaluate  
2 motion to dismiss petition for failure to exhaust state remedies); White v. Lewis, 874 F.2d 599,  
3 602-03 (9th Cir. 1989) (using Rule 4 as procedural grounds to review motion to dismiss for state  
4 procedural default); Hillery v. Pulley, 533 F.Supp. 1189, 1194 & n.12 (E.D. Cal. 1982) (same).  
5 The Court will review the motion under Rule 4 standards. See Hillery, 533 F. Supp. at 1194 & n.  
6 12.

## 7 **II. Background**

8 Petitioner is serving a 95-month term of imprisonment for his conviction of conspiracy to  
9 launder money and proceeds of unlawful activity in violation of 18 U.S.C. § 1956(h). (Doc. 13-1  
10 at 3-6.<sup>1</sup>)

11 Petitioner is incarcerated at Federal Correctional Institution in Mendota, California. In his  
12 petition, Petitioner claims that the Bureau of Prisons (“BOP”) deemed him ineligible for First  
13 Step Act (“FSA”) credits because he has an immigration detainer lodged against him. (Doc. 1 at  
14 6.) Since then, BOP records indicate that Petitioner has been awarded 365 days of FSA credits  
15 toward early transfer to supervised release, and he has an advanced FSA projected release date of  
16 October 25, 2023. (Doc. 13-1 at 8, 13.)

17 According to the BOP’s records of its Administrative Remedy Program, Petitioner has  
18 never submitted an Administrative Remedy Request. (Doc. 13-1 at 15.)

## 19 **III. The First Step Act**

20 The First Step Act was enacted on December 21, 2018. The Act implemented a number of  
21 prison and sentencing reforms, including computation of good time credits, reducing and  
22 restricting mandatory minimum sentences, safety valve eligibility, retroactive application of the  
23 Fair Sentencing Act, and the availability of early release. First Step Act of 2018, Pub. L. No. 115-  
24 391, 132 Stat. 5194 (2018).

25 With respect to earned time credit, the Ninth Circuit has described the First Step Act's  
26 amendments as follows:

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28 <sup>1</sup> Citations are to ECF pagination unless noted.

1 [P]aragraph 102(b)(1) amends [18 U.S.C.] § 3624 by adding subsection (g), which  
2 is relevant to the Act's creation of an earned time credit system. [132 Stat.] at  
3 5210-13. The Act requires that, within 210 days of its enactment, the Attorney  
4 General establish a “risk and needs assessment system” to, broadly speaking,  
5 review each prisoner's recidivism risk level, award earned time credit as an  
6 incentive for participation in recidivism reduction programming, and “determine  
7 when a prisoner is ready to transfer into prerelease custody or supervised release in  
8 accordance with section 3624.” § 101(a), 132 Stat. at 5196– 97. Section 3624(g)  
9 details the criteria for when a prisoner becomes eligible, considering earned time  
10 credit, for transfer to prerelease custody or supervised release. § 102(b), 132 Stat.  
11 at 5210–13.

12 Bottinelli v. Salazar, 929 F.3d 1196, 1197–98 (9th Cir. 2019).

13 In accordance with 18 U.S.C. § 3632, the United States Department of Justice (“DOJ”)  
14 published the risk and needs assessment system on July 19, 2019. Press Release, U.S. Dep't of  
15 Just., Department of Justice Announces the Release of 3,100 Inmates Under First Step Act,  
16 Publishes Risk And Needs Assessment System (July 19, 2019),  
17 [https://www.justice.gov/opa/pr/department-justice-announces-release-3100-inmates-under-first-](https://www.justice.gov/opa/pr/department-justice-announces-release-3100-inmates-under-first-step-act-publishes-risk-and)  
18 [step-act-publishes-risk-and](https://www.justice.gov/opa/pr/department-justice-announces-release-3100-inmates-under-first-step-act-publishes-risk-and) (*last visited* May 2, 2023).

19 With respect to implementation of the risk and needs assessment system, 18 U.S.C. §  
20 3621(h) provides:

21 (1) In general.--Not later than 180 days after the Attorney General completes and  
22 releases the risk and needs assessment system (referred to in this subsection as the  
23 “System”) developed under subchapter D, the Director of the Bureau of Prisons  
24 shall, in accordance with that subchapter--

25 (A) implement and complete the initial intake risk and needs assessment  
26 for each prisoner (including for each prisoner who was a prisoner prior to  
27 the effective date of this subsection), regardless of the prisoner's length of  
28 imposed term of imprisonment, and begin to assign prisoners to appropriate  
evidence-based recidivism reduction programs based on that determination;

(B) begin to expand the effective evidence-based recidivism reduction  
programs and productive activities it offers and add any new evidence-  
based recidivism reduction programs and productive activities necessary to  
effectively implement the System; and

(C) begin to implement the other risk and needs assessment tools necessary  
to effectively implement the System over time, while prisoners are  
participating in and completing the effective evidence-based recidivism  
reduction programs and productive activities.

(2) Phase-in.--In order to carry out paragraph (1), so that every prisoner has the  
opportunity to participate in and complete the type and amount of evidence-based  
recidivism reduction programs or productive activities they need, and be  
reassessed for recidivism risk as necessary to effectively implement the System,

1 the Bureau of Prisons shall--

2 (A) provide such evidence-based recidivism reduction programs and  
3 productive activities for all prisoners before the date that is 2 years after the  
4 date on which the Bureau of Prisons completes a risk and needs assessment  
5 for each prisoner under paragraph (1)(A); and

6 (B) develop and validate the risk and needs assessment tool to be used in  
7 the reassessments of risk of recidivism, while prisoners are participating in  
8 and completing evidence-based recidivism reduction programs and  
9 productive activities.

10 18 U.S.C. § 3621(h)(1)–(2).

11 Pursuant to 18 U.S.C. § 3621(h)(1), all inmates in the BOP system were to receive an  
12 initial assessment using the risk and needs assessment system known as the Prisoner Assessment  
13 Tool Targeting Estimated Risk and Need (“PATTERN”) by January 15, 2020. Press Release,  
14 U.S. Dep’t of Just., Department of Justice Announces Enhancements to the Risk Assessment  
15 System and Updates on First Step Act Implementation (Jan. 15, 2020),  
16 [https://www.justice.gov/opa/pr/departments-justice-announces-enhancements-risk-assessment-](https://www.justice.gov/opa/pr/departments-justice-announces-enhancements-risk-assessment-system-and-updates-first-step-act)  
17 [system-and-updates-first-step-act](https://www.justice.gov/opa/pr/departments-justice-announces-enhancements-risk-assessment-system-and-updates-first-step-act) (*last visited* May 2, 2023). On January 13, 2022, the  
18 Department of Justice announced that the BOP had finalized the FSA time credit rule, and on  
19 January 19, 2022, the final rule was published. FSA Time Credits, 87 Fed. Reg. 2705-01, 2022  
20 WL 159155 (Jan. 19, 2022) (codified at 28 C.F.R. §§ 523, 541.)

21 Prisoners “who successfully complete[ ] evidence-based recidivism reduction  
22 programming or productive activities” “shall earn 10 days of time credits for every 30 days of  
23 successful participation.” 18 U.S.C. § 3632(d)(4)(A). A prisoner determined “to be at a minimum  
24 or low risk for recidivating, who, over 2 consecutive assessments, has not increased their risk of  
25 recidivism, shall earn an additional 5 days of time credits for every 30 days of successful  
26 participation in evidence-based recidivism reduction programming or productive activities.” 18  
27 U.S.C. § 3632(d)(4)(A)(ii).

28 Inmates may begin earning First Step Act time credits (“FTCs”) after the inmate’s term of  
imprisonment commences, but an inmate cannot earn FTCs for programming or activities in  
which he or she participated prior to December 21, 2018. 28 C.F.R. § 523.42. Further, an inmate  
can earn retroactive application of time credits for programming or activities in which he or she

1 participated from December 21, 2018, to January 13, 2022. Id.

2 “Section 3624(g) details the criteria for when a prisoner becomes eligible, considering  
3 earned time credit, for transfer to prerelease custody or supervised release,” Bottinelli, 929 F.3d at  
4 1198, and provides that the “Attorney General, in consultation with the Assistant Director for the  
5 Office of Probation and Pretrial Services, shall issue guidelines for use by the Bureau of Prisons  
6 in determining the appropriate type of prerelease custody or supervised release and level of  
7 supervision for a prisoner placed on prerelease custody pursuant to this subsection,” 18 U.S.C. §  
8 3624(g)(6)(A).

#### 9 **IV. Mootness**

10 Article III of the United States Constitution limits the federal courts to deciding “cases”  
11 and “controversies.” To ensure that any matter presented to a federal court meets that  
12 requirement, the Court considers the doctrines of standing, ripeness, and mootness. See Poe v.  
13 Ullman, 367 U.S. 497, 502-505 (1961). The case or controversy requirement of Article III of the  
14 Federal Constitution deprives the Court of jurisdiction to hear moot cases. Iron Arrow Honor  
15 Soc’y v. Heckler, 464 U.S. 67, 70 (1983); NAACP, Western Region v. City of Richmond, 743  
16 F.2d 1346, 1352 (9th Cir. 1984). A case becomes moot if “the issues presented are no longer  
17 ‘live’ or the parties lack a legally cognizable interest in the outcome.” Murphy v. Hunt, 455 U.S.  
18 478, 481 (1984). The Federal Court is “without power to decide questions that cannot affect the  
19 rights of the litigants before them.” North Carolina v. Rice, 404 U.S. 244, 246 (1971) (*per*  
20 *curiam*) (quoting Aetna Life Ins. Co. v. Hayworth, 300 U.S. 227, 240-241 (1937)).

21 Petitioner alleges the BOP found him ineligible to earn FTCs solely because he is an alien.  
22 Prior to November 18, 2022, the BOP did take the position that inmates with detainees were  
23 ineligible for FSA credits. However, on November 18, 2022, the BOP issued Program Statement  
24 5410.01 wherein the BOP modified its procedures to allow inmates with detainees to earn FTCs;  
25 the inmates still could not have those FTCs applied until the detainees were resolved. U.S. Dep't  
26 of Justice, Federal Bureau of Prisons, Program Statement No. 5410.01, First Step Act of 2018 -  
27 Time Credits: Procedures for Implementation of 18 U.S.C. 3632(d)(4), at 17 (Nov. 18, 2022),  
28 [https://www.bop.gov/policy/progstat/5410\\_01.pdf](https://www.bop.gov/policy/progstat/5410_01.pdf) (*last visited* May 2, 2023). Recently, on

1 February 6, 2023, the BOP issued a change notice to the program statement in which the BOP  
2 deleted the requirement that inmates have no detainers in order to have FTCs applied to their  
3 sentence. U.S. Dep't of Justice, Federal Bureau of Prisons, Change Notice to Program Statement  
4 No. 5410.01, First Step Act of 2018 - Time Credits: Procedures for Implementation of 18 U.S.C.  
5 3632(d)(4) (Feb. 6, 2023), [https://www.bop.gov/policy/progstat/5410.01\\_cn.pdf](https://www.bop.gov/policy/progstat/5410.01_cn.pdf) (*last visited* May  
6 2, 2023). Thus, Petitioner is no longer barred from earning FTCs and having them applied to his  
7 sentence due to the detainer. In fact, BOP records indicate that Petitioner is eligible to earn and  
8 apply FSA credits, and the BOP has applied 365 days toward his sentence resulting in an  
9 advanced release date. (Doc. 13-1 at 8, 12.) Thus, Respondent correctly asserts that the  
10 underlying matter has become moot.

#### 11 **V. Exhaustion**

12 Before filing a petition for writ of habeas corpus, a federal prisoner challenging any  
13 circumstance of imprisonment must first exhaust all administrative remedies. Martinez v.  
14 Roberts, 804 F.2d 570, 571 (9th Cir. 1986); Chua Han Mow v. United States, 730 F.2d 1308,  
15 1313 (9th Cir. 1984); Ruviwat v. Smith, 701 F.2d 844, 845 (9th Cir. 1983). The requirement that  
16 federal prisoners exhaust administrative remedies before filing a habeas corpus petition was  
17 judicially created; it is not a statutory requirement. Brown v. Rison, 895 F.2d 533, 535 (9th Cir.  
18 1990). Thus, “because exhaustion is not required by statute, it is not jurisdictional.” Id. If  
19 Petitioner has not properly exhausted his claims, the district court, in its discretion, may either  
20 “excuse the faulty exhaustion and reach the merits or require the petitioner to exhaust his  
21 administrative remedies before proceeding in court.”

22 The first step in seeking administrative remedies is a request for informal resolution. 28  
23 C.F.R. § 542.13. When informal resolution procedures fail to achieve sufficient results, the BOP  
24 makes available to inmates a formal three-level administrative remedy process: (1) a Request for  
25 Administrative Remedy (“BP-9”) filed at the institution where the inmate is incarcerated; (2) a  
26 Regional Administrative Remedy Appeal (“BP-10”) filed at the Regional Office for the  
27 geographic region in which the inmate’s institution is located; and (3) a Central Office  
28 Administrative Remedy Appeal (“BP-11”) filed with the Office of General Counsel. 28 C.F.R. §

1 542.10 et seq.

2 According to Respondent, Petitioner has never requested relief through the BOP's  
3 administrative remedy process. Thus, the claims are unexhausted. The exhaustion requirement  
4 "is not lightly to be disregarded." Murillo v. Mathews, 588 F.2d 759, 762, n.8 (9th Cir. 1978)  
5 (citation omitted). A "key consideration" in exercising such discretion is whether "relaxation of  
6 the requirement would encourage the deliberate bypass of the administrative scheme[.]" Laing v.  
7 Ashcroft, 370 F.3d 994, 1000 (9th Cir. 2004) (internal quotation marks omitted). Petitioner does  
8 not claim that he has exhausted his administrative remedies; he instead contends exhaustion is  
9 futile since the BOP's position that he is statutorily barred from earning FTCs is established  
10 policy. As set forth above, the BOP has since altered its position such that Petitioner is not  
11 statutorily barred from earning FTCs. Therefore, exhaustion in this case would not be futile, and  
12 the exhaustion requirement should not be excused in this case.

### 13 **VI. Failure to State a Claim for Relief**

14 Respondent correctly notes that this Court lacks jurisdiction to review BOP discretionary,  
15 individualized, decisions concerning release to home confinement and application of time credits.  
16 As a matter of law, 34 U.S.C. § 60541(g) grants to the Attorney General the discretion to release  
17 certain prisoners to serve the latter part of their sentence on home confinement. As the statute  
18 makes clear, the "Attorney General" is granted the discretion and "may release" some eligible  
19 offenders. Id. Whether or not the BOP grants Petitioner credits under the FSA is entirely within  
20 its discretion. The "failure to receive relief that is purely discretionary in nature does not amount  
21 to a deprivation of a liberty interest." See Mejia Rodriguez v. Reno, 178 F.3d 1139, 1146 (11th  
22 Cir. 1999) (citing Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458, 465 (1981)).

23 Petitioner contends that the BOP has deemed him ineligible for early release under the  
24 FSA. He asserts that the BOP has misinterpreted the statute to bar him from earning FSA credits.  
25 As previously noted, Program Statement 5410.01, issued on November 18, 2022, modified the  
26 BOP's previous position that inmates with detainers were ineligible for FSA credits, and held that  
27 inmates with detainers *could earn* FSA credits but not *spend* them unless the detainers were  
28 resolved. On February 6, 2023, the BOP further modified the program statement by deleting the

1 requirement that inmates have no detainers prior to having FTCs applied to their sentence. Since  
2 Petitioner is not barred from earning FTCs and having them applied to his sentence, the petition  
3 does not present a claim for relief.

4 **ORDER**

5 IT IS HEREBY ORDERED that the Clerk of Court is DIRECTED to assign a district judge  
6 to this case.

7 **RECOMMENDATION**

8 For the foregoing reasons, the Court RECOMMENDS that Respondent's motion to  
9 dismiss the petition be GRANTED and the petition be DISMISSED.

10 This Findings and Recommendation is submitted to the United States District Court Judge  
11 assigned to this case, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 304  
12 of the Local Rules of Practice for the United States District Court, Eastern District of California.  
13 Within twenty-one (21) days after being served with a copy, any party may file written objections  
14 with the Court. Such a document should be captioned "Objections to Magistrate Judge's Findings  
15 and Recommendation." Replies to objections shall be filed within ten (10) court days of the date  
16 of filing of objections. The Court will then review the Magistrate Judge's ruling pursuant to 28  
17 U.S.C. § 636 (b)(1)(C). The parties are advised that failure to file objections within the specified  
18 time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153  
19 (9th Cir. 1991).

20  
21 IT IS SO ORDERED.

22 Dated: May 4, 2023

*Is/ Sheila K. Oberto*  
23 UNITED STATES MAGISTRATE JUDGE  
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