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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

JOHN SMALLWOOD,
Petitioner,
v.
PAUL THOMPSON,
Respondent.

No. 2:21-CV-0641-JAM-DMC-P

FINDINGS AND RECOMMENDATIONS

Petitioner, a federal prisoner proceeding pro se, brings this petition for a writ of habeas corpus under 28 U.S.C. § 2241. Pending before the Court is Respondent’s motion to dismiss. See ECF No. 9.

I. BACKGROUND

Petitioner is a federal prisoner incarcerated at the Federal Correctional Institution – Herlong. See ECF No. 1, pg. 1. Petitioner claims that he is entitled to relief under the First Step Act (FSA) of 2018 in the form of additional credits and, as a result, immediate release or transfer to pre-release custody. See id. at 8-9. With his petition, Petitioner has filed a motion for preliminary injunction seeking the same relief. See ECF No. 2.

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1 **II. DISCUSSION**

2 Respondent contends the Court should dismiss the petition. By way of
3 background, Respondent offers the following summary of the relevant provisions of the FSA:

4 On 12/21/2018, Congress enacted the FSA to prescribe criminal
5 justice reform. *See* Pub. L. No. 115-391, 132 Stat. 5194. The U.S.
6 Department of Justice, under BOP, was permitted 210 days to develop and
7 then publicly release a risk and needs assessment system to assess
8 inmates’ risk of recidivism. *See* 18 U.S.C. § 3632(a). BOP timely
9 published its risk and needs assessment system on 7/19/2019; BOP timely
10 implemented and completed initial intake risk and needs assessment for
11 each inmate before 1/15/2020. Pursuant to 18 U.S.C. § 3621(h)(1)(A),
12 BOP assigns inmates to appropriate evidence-based recidivism reduction
13 programs based on that determination.

14 Against this background, as a matter of law, Bureau of Prisons has
15 two years to “phase-in” programming and provide “evidenced-based
16 recidivism reduction programs and productive activities for all prisoners
17” *Id.* § 3621(h)(2)(A-B); *see also Betts-Gaston v. Entzel*, No. 19-
18 03295 (C.D. Ill. Feb. 27, 2020) (BOP has until January 2022 to phase in
19 programming in order to determine when a prisoner is ready to transfer
20 into prerelease custody) (internal quotations omitted). Under FSA,
21 prisoners, such as Petitioner Matecki, who qualify and who “successfully
22 complete evidence-based recidivism reduction programming or productive
23 activities, shall earn time credits.” *Id.* § 3632(d)(4)(A). These credits can
24 accrue at the rate of “10 days of time credits for every 30 days of
25 successful participation in evidence-based recidivism programming or
26 productive activities.” *Id.* § 3632(d)(4)(A)(i). Some prisoners who are
27 scored at a low or minimum risk of recidivating, and who have not
28 increased this risk over a period of two consecutive assessments, will earn
an additional 5 days of time credits for every 30 days of successfully
participation. *Id.* § 3632(d)(4)(A)(ii). The award of any credits is *not*
retroactive to any programs the prisoner successfully completed “prior to
the date of enactment of this subchapter.” *Id.* § 3632(d)(4)(B).

ECF No. 9, pg. 4.

Respondent argues the Court lacks Article III standing because the phase-in period
has not expired. Respondent also argues Petitioner fails to state a claim upon which relief can be
granted because the Bureau of Prisons has sole discretion to place an inmate in end-of-sentence
transition programs. Finally, Respondent contends Petitioner has failed to exhaust administrative
remedies.

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1 **A. Standing**

2 According to Respondent:

3 Article III limits the federal courts to deciding “cases” and
4 “controversies.” To ensure that any matter presented to a federal court
5 meets such requirement, this Court must consider the doctrines of
6 standing, ripeness, and mootness. *See Ellis v. Tribune Television*, 443 F.3d
7 71, 80 (2d Cir.2006). The most important of these doctrines is standing.
8 *See Allen v. Wright*, 468 U.S. 737, 750 (1984). To establish standing, “[a]
9 plaintiff must allege personal injury fairly traceable to the defendant’s
10 allegedly unlawful conduct and likely to be redressed by the requested
11 relief.” *Id.* at 751. The injury must be “an invasion of a legally protected
12 interest which is (a) concrete and particularized and (b) ‘actual or
13 imminent,’ “not conjectural or hypothetical”. *Lujan v. Defenders of*
14 *Wildlife*, 504 U.S. 555, 560 (1992) (citations omitted). A determination of
15 standing is based on the facts at the time the action is filed. *See Hargrave*
16 *v. Vermont*, 340 F.3d 27, 34 n. 7 (2d Cir.2003) (citations omitted).

17 Here, neither Petitioner’s custodial status nor custody term has
18 been impacted by any BOP action or theoretical inaction. (footnote 1
19 omitted). *See Matecki*, 2021 WL 2457691 at *2-3. In other words, BOP
20 has not rendered any decision regarding FSA/ETC sentence end-phase
21 programing options. *See Liwag Declaration* at 8-10. Accordingly,
22 Petitioner Smallwood lacked Article III standing at the time he filed the
23 petition, and he continues to lack standing. *See Matecki*, 2021 WL
24 2457691 at *2; *see also Sanders v. Sanders*, 2006 WL 751281, at *4 (E.D.
25 Ark. Mar. 21, 2006) (dismissing § 2241 petition as premature and for lack
26 of standing); *Allen v. Federal Bureau of Prisons*, 2006 WL 20527 (D. N.J.
27 Jan. 3, 2006). Without authority, Petitioner demands — contrary to the
28 FSA — that this Court usurp BOP discretion and order BOP discretionary
 release.

 ECF No. 9, pgs. 5-6.

 Respondent also contends:

 Further, this Court should dismiss for lack of ripeness. “Ripeness is
 a justiciability doctrine designed to prevent the courts, through avoidance
 of premature adjudication, from entangling themselves in abstract
 disagreements over administrative policies, and also to protect the
 agencies from judicial interference until an administrative decision has
 been formalized and its effects felt in a concrete way by the challenging
 parties.” *National Park Hospitality Ass'n v. Department of Interior*, 538
 U.S. 803, 807–08 (2003) (internal quotes and citation omitted). Petitioner's
 2241 petition is not ripe for review, and this Court should dismiss for lack
 of subject-matter jurisdiction. *Accord Hand*, 2021 WL 1734517 (E.D.
 Cal., May 03, 2021), *adopting Magistrate findings and recommendations*,
 2021 WL 694904 (Feb. 23, 2021).

 In this matter, the temporally distant and speculative nature
 underlying Petitioner's demands do not establish that he will sustain
 immediate injury and that such injury would be redressed by the relief
 requested. *Matecki*, 2021 WL 2457691 at *2; *see Cinel v Connick*, 15
 F.3d 1338, 1341 (5th Cir. 1994) (citation omitted). *Accord Sample v.*
 Morrison, 406 F.3d 310, 312–13 (5th Cir.2005). *See also Rudd v. Smith*,
 No. 1:07-cv-01073 DLB (HC), 2007 WL 4557105 (E.D. Cal. Dec. 21,

1 2007) (dismissing premature claim and 2241 petition for lack of ripeness).
2 For lack of ripeness, Petitioner's reliance, ECF 1 p 12-13, on *Goodman v.*
3 *Ortiz*, No. CV 20-7582 (RMB), 2020 WL 5015613 (D.N.J. Aug. 25,
4 2020), is without merit. *Matecki*, 2021 WL 2457691 at *2. See *Hand v.*
5 *Warden of FCI Herlong*, No. 2:20-cv-0348-AWI-SAB (E.D. Cal. May 10,
6 2021), Dct 24.

7 ECF No. 9, pg. 6.

8 These arguments are persuasive. The Court finds Petitioner's claim is
9 nonjusticiable for lack of standing and ripeness based on the same reason – Petitioner's claim is
10 premature. As explained above, the phase-in period does not expire until January 2022. Until
11 that time, Petitioner cannot establish a live case or controversy upon which this Court can be
12 called upon to pass judgment. Similarly, because the phase-in period has not expired, Petitioner
13 can only speculate as to what the BOP may or may not do in his case. Until the phase-in period
14 expires and the BOP has or has not taken some action with respect to the availability of credits for
15 petitioner under the FSA, there is no ripe claim for this Court to review. Respondent's motion to
16 dismiss should be granted.

17 **B. Failure to State a Claim**

18 At footnote 1 of his motion to dismiss, Respondent argues Petitioner fails to state a
19 claim upon which relief can be granted because Petitioner seeks to compel a discretionary act.

20 According to Respondent:

21 This Court lacks jurisdiction to review BOP discretionary,
22 individualized, decisions concerning release to home confinement and
23 application of time credits. As a matter of law, 34 U.S.C. § 60541(g)
24 grants to *the Attorney General* the discretion to release certain prisoners to
25 serve the latter part of their sentence on home confinement. For
26 implementation, the Attorney General's BOP must make unique, agency
27 specific, determinations. Indeed, for any decision regarding First Step Act
28 sentence end-phase programming (home detention), the Attorney General,
via BOP, must make *inter alia* determinations regarding costs, savings,
and further find that the offender, if eligible, does not pose a risk of
engaging in future criminal conduct or is otherwise a danger. As the
statute makes clear, the "Attorney General" is granted the discretion and
"may release" some eligible offenders. The "failure to receive relief that is
purely discretionary in nature does not amount to a deprivation of a liberty
interest." See *Mejia Rodriguez v. Reno*, 178 F.3d 1139, 1146 (11th Cir.
1999) (citing *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 465
(1981)).

ECF No. 9, pg. 5, n.1.

1 The Court also finds this argument persuasive. Here, the FSA provides a
2 mechanism for the BOP to exercise its discretion concerning credits and early release.
3 Specifically, once the phase-in period expires, Petitioner may be entitled to additional early
4 release credits. As Respondent’s notes, whether or not to grant Petitioner early release pursuant
5 to the as-yet implemented provisions of the FSA is a matter within the BOP’s discretion. And as
6 Respondent also notes, the denial of early release in the exercise of the BOP’s discretion would
7 not give rise to the deprivation of a liberty interest such as would support Petitioner’s claim.
8 Petitioner does not state a claim upon which relief can be granted under 28 U.S.C. § 2241.

9 **C. Exhaustion of Administrative Remedies**

10 Finally, Respondent contends the Court should dismiss the case because Petitioner
11 failed to exhaust administrative remedies. Respondent argues:

12 Moreover, this Court should dismiss for lack of statutory
13 jurisdiction and failure to challenge via administrative process.

14 On the one hand, Petitioner is a federal prisoner who is not
15 presently eligible for FSA/ETC sentence end-phase programming. Liwag
16 Declaration at 8-10. Even if he were to become eligible, any theoretical
17 decision is entrusted by law to BOP discretion.

18 On the other hand, “[a]s a prudential matter, courts require that
19 habeas petitioners exhaust all available judicial and administrative
20 remedies before seeking relief under § 2241.” *Ward v. Chavez*, 678 F.3d
21 1042, 1045 (9th Cir. 2012). Here, Petitioner failed to exhaust BOP’s
22 administrative remedy procedure. As a prudential matter, federal prisoners
23 must exhaust administrative remedies prior to bringing habeas corpus
24 actions. *See Martinez v. Roberts*, 804 F.2d 570, 571 (9th Cir. 1986)
25 (“Federal prisoners are required to exhaust their federal administrative
26 remedies prior to bringing a petition for writ of habeas corpus in federal
27 court.”). Petitioner’s claim of excuse from the requirement to exhaust for
28 futility (challenge to BOP policy) and for irreparable injury are without
merit. These excuse claims in the context of so-called advanced
application of ETC credits under the FSA are erroneous. *Matecki*, 2021
WL 2457691 at *4. *See also Hand v. Barr*, 2021 WL 392445 at *4,
Hand v. Merlak, 2020 WL 3172697 at *2-3.

 Congress was clear in giving the BOP an additional two years, or
until January 2022, to phase in the programming to reduce recidivism for
the specific reasons as outlined in 18 U.S.C. 3621(h)(2).

 In order to carry out paragraph (1) [implementation
of the risk and needs assessment system], 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, the Bureau of Prisons

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

18 U.S.C. 3621(h)(2). . . .

ECF No. 9, pgs. 6-7.

Here, it is clear that Petitioner has not yet sought administrative relief from the BOP for the simple reason that it would be premature for him to do so prior to expiration of the phase-in period. For this additional reason, the Court finds that relief under 28 U.S.C. § 2241 is not appropriate at this time.

III. CONCLUSION

Based on the foregoing, the undersigned recommends that:

- 1. Respondent’s motion to dismiss, ECF No. 9, be granted;
- 2. Petitioner’s motion for injunctive relief, ECF No. 2, be denied;
- 3. Petitioner’s motion for an expedited hearing, ECF No. 8, be denied; and
- 4. This action be dismissed.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days after being served with these findings and recommendations, any party may file written objections with the Court. Responses to objections shall be filed within 14 days after service of objections. Failure to file objections within the specified time may waive the right to appeal. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: November 3, 2021



 DENNIS M. COTA
 UNITED STATES MAGISTRATE JUDGE