

**IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF ILLINOIS**

Vivek Shah,	)	
	)	
Petitioner,	)	
	)	Case No. 18 C 7990
v.	)	
	)	Judge Sharon Johnson Coleman
	)	
Richard Hartman,	)	
Director of Salvation Army Freedom Center,	)	
Pathway Forward,	)	
	)	
Respondent.	)	

**ORDER**

Petitioner’s emergency motion for a temporary restraining order seeking his immediate release [6] is denied.

**STATEMENT**

Petitioner Vivek Shah, a federal prisoner presently incarcerated at a halfway house in Chicago, Illinois, brought this *pro se* habeas corpus petition under 28 U.S.C. § 2241 challenging his criminal conviction from the United States District Court for the Southern District of West Virginia. In 2013, Petitioner pled guilty to one count of transmitting in interstate commerce a threat with intent to extort in violation of 18 U.S.C. § 875(b), and seven counts of mailing threatening communications in violation of 18 U.S.C. § 876(b). *Shah v. United States*, No. 5:15-cv-7542, 2017 WL 3168425, at \*1 (S.D.W. Va. July 26, 2017). He was sentenced to a term of 87 months of imprisonment followed by a three-year supervised release term. *Id.* His habeas corpus petition challenges the underlying merits of his criminal convictions. (Dkt. 1.)

This case is assigned to the Honorable Gary Feinerman. On December 22, 2018, Petitioner filed an emergency temporary restraining order (TRO) seeking his release from his halfway house based upon Congress’ recent passage of the First Step Act of 2018, Pub. L. No. 115-015, 132 Stat. 015 (2018), on December 20, 2018. (Dkt. 6.) The Court is presiding over this motion in its capacity as the Emergency Judge. The Court heard oral argument from Petitioner and an Assistant United States Attorney on the motion on January 3, 2019. Although Petitioner appeared *pro se*, he was well-prepared and offered a number of nuanced and well-crafted arguments in support of his position.

When considering a request for a TRO, the Court applies the same standard used for evaluating a motion for a preliminary injunction. *Carlson Group Inc. v. Davenport*, No. 16 CV 10520, at \*2 (N.D. Ill. Dec. 13, 2016) (St. Eve, J.). A TRO is an ““extraordinary remedy [that is]

never awarded as of right.”” *Benisek v. Lamone*, 138 S. Ct. 1942, 1943 (2018) (quoting *Winter v. Natural Res. Def. Counsel, Inc.*, 555 U.S. 7, 24 (2008)). To obtain relief, Petitioner must demonstrate: (1) likelihood of success on the merits; (2) demonstrate that he will suffer irreparable harm without the requested relief; and, (3) demonstrate that the equities balance in his favor, and that the award of relief is in the public interest. *Benisek*, 138 S. Ct. 1942, 1943-44 (citing *Winter*, 555 U.S. at 20, 32).

A federal prisoner claiming that he is being denied the proper application of good conduct credits can bring a section 2241 habeas corpus petition. *Waletzki v. Keohane*, 13 F.3d 1079, 1080 (7th Cir. 1994). However, Petitioner cannot demonstrate a likelihood of success on the merits, and so cannot obtain a TRO.

Petitioner’s TRO involves the First Step Act’s clarification of 18 U.S.C. § 3624(b). Prior to the enactment of the First Step Act, a federal prisoner could earn up to 54 days of credit for each year incarcerated for good behavior. 18 U.S.C. § 3624(b). The Bureau of Prisons calculated the good conduct earned based on actual time served in prison, not the length of the imposed prison sentence. *Barber v. Thomas*, 560 U.S. 474, 476-79 (2010). The result is that prisoners effectively earned 47 days per year of good conduct credit instead of a full 54 days. *Id.* The reason for the effective reduction to 47 days is that the prisoner was unable to earn a full year’s worth of good conduct credit in his final year of incarceration assuming it is a partial year of confinement. *Id.* Legal challenges to the Bureau of Prisons’ implementation of § 3624(b) have been previously rejected. *Barber*, 560 U.S. at 492 (upholding Bureau of Prisons’ awarding of good conduct credit based on actual time served in prison instead of length of imposed sentence); *White v. Scibana*, 390 F.3d 997, 1003 (7th Cir. 2004) (same).

The First Step Act reverses the Bureau of Prisons’ implementation by amending section 3624(b). Section 3624(b) previously stated that a “prisoner who is serving a term of imprisonment of more than one year [] may receive credit toward the service of the prisoner’s sentence, ***beyond the time served, of up to 54 days at the end of each year of the prisoner’s term of imprisonment***, beginning at the end of the first year of the term, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations.” 18 U.S.C. § 3624(b) (emphasis added).

The First Step Act amends section 3624(b) to read a “prisoner who is serving a term of imprisonment of more than one year [] may receive credit toward the service of the prisoner’s sentence ***of up to 54 days of each year of the prisoner’s sentence imposed by the court*** beginning at the end of the first year of the term, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations.” First Step Act of 2018, Pub. L. No. 115-015, 132 Stat. 015 § 102(b)(1)(A) (2018).

Petitioner asserts that he contacted the Bureau of Prisons Designation and Sentence Computation Center in Grand Prairie, Texas, by telephone on December 21, 2018, to inquire about the implementation of the Act. He was told that the recalculation of his release date was not yet complete, and that the Bureau of Prisons was “waiting on a directive” regarding how to proceed under the new Act. (Dkt. 6, pg. 3.)

The plain language of the First Step Act's amendment to section 3642(b) makes clear Congress' intent to reject the Bureau of Prisons' prior implementation of good conduct credit based on actual time served, and to instead adopt the contrary position that good time credit is earned based on the imposed sentence length. In sum, Congress is instructing that federal prisoners are eligible to earn a full 54 days of good conduct credit per year, not the 47 days that resulted under the Bureau of Prisons' policy.

Petitioner argues that under the old Bureau of Prisons policy, he is set for release from his halfway house on February 4, 2019. However, under the amendment passed by the First Step Act, Petitioner asserts he is entitled to additional good conduct credit, which would result in his immediate release from his halfway house and placement onto supervised release.

Petitioner, however, cannot obtain relief under the Act at this time. Section 102(b) of the First Step Act states that the amendment to section 3624(b) does not take effect until after the Attorney General completes and releases the needs assessment system established under section 101(a) of the Act. First Step Act of 2018, Pub. L. No. 115-015, 132 Stat. 015 § 102(b)(2) (2018). The Attorney General is given up to 210 days to implement the risk and needs assessment system. First Step Act of 2018, Pub. L. No. 115-015, 132 Stat. 015 § 101(a) (2018).

The government, at oral argument, asserted that the amendment to section 3624(b) is not yet in effect because the Attorney General has not yet completed and released the needs assessment system. The Court agrees with the government. The plain language of section 102(b)(2) of the Act is clear that the entirety of section 102(b), including the amendment to section 3624(b), is not effective until the Attorney General completes and releases the risk and needs assessment system under section 101(a) of the Act. The Act gives the Attorney General up to 210 days to complete the task. Less than two weeks have elapsed since the Act's passage. Consequently, pursuant to section 102(b)(2), the amendment to section 3624(b) set forth in section 102(b)(1)(A) is not yet in effect and so Petitioner is not yet entitled to relief.

Petitioner argued at oral argument that the delay in implementation under section 102(b)(2) does not apply to the amendment to section 3624(b) under section 102(b)(1)(A) because the Attorney General's risk and needs assessment system addresses matters unrelated to the awarding of sentencing credit. There are two problems with this argument. First, section 102(b)(2) is clear that it covers section 102(b)(1)(A)'s implementation as it applies to the implementation of all of section 102(b). Second, contrary to Petitioner's position, the risk and needs assessment system does involve sentence calculation to the extent that the system must "determine when a prisoner is ready to transfer into prelease custody or supervised release in accordance with § 3624." First Step Act of 2018, Pub. L. No. 115-015, 132 Stat. 015 § 101(a) (2018).

Petitioner also argues that the Court should apply the rule of lenity. The rule of lenity "only applies if, after considering text, structure, history, and purpose, there remains a 'grievous ambiguity or uncertainty in the statute.'" *Barber*, 560 U.S. at 488 (quoting *Muscarello v. United States*, 524 U.S. 125, 139 (1998)). There is no ambiguity in the First Step Act. Congress chose

to delay the implement of its amendment to section 3624(b) until the Attorney General completed the risk and needs assessment system.

Petitioner's final argument is that he is in a fundamentally unfair situation. He claims that there is no dispute that he will receive the benefit of the First Step Act's amendment to award additional good conduct credits, but that by the time the Act is implemented he will be unable to receive that benefit because he will have already been released from his halfway house. At oral argument, Petitioner compared his situation to a person receiving a government financial subsidy. Petitioner argued that his hypothetical individual can be made whole at a later date by a retroactive financial payment. Petitioner counters that he cannot be made whole by the failure to award good conduct credits because his term of incarceration cannot be reduced once he has already been released.

This Court is not unsympathetic to the apparent inequity of Petitioner's situation. This Court, however, is obligated to apply the law as it is written. Congress chose to delay the implementation of the First Step Act's amendments until the Attorney General could complete the risk and needs assessment. The Court has no power to rewrite or disregard the statute in order to accommodate Petitioner's situation.

Finally, the government contends that the Petitioner has not exhausted his claim. An individual in custody must properly exhaust his claims before raising them in a 28 U.S.C. § 2241 habeas corpus petition. *Richmond v. Scibana*, 387 F.3d 602, 604 (7th Cir. 2004). The Bureau of Prisons has an established grievance process, the Administrative Remedy Program, for review of any aspect of a prisoner's confinement. *Tylman v. Roal*, No. 12-CV-0863-DRH, 2013 WL 171073, at \*3 (S.D. Ill. Jan. 16, 2013). This is a multi-step grievance process requiring the prisoner to first attempt informal resolution of the issue. *Id.* If unsuccessful, an individual in custody then files a BP-9 grievance form. *Id.* If unsatisfied with the answer to his grievance, the individual then appeals to the Regional Director using a BP-10 form, and unsatisfied with that step, the individual can bring the final step of appealing to the General Counsel with a BP-11 form. *Id.* The grievance process applies to both inmates and former inmates for issues that arose during their confinement. 28 C.F.R. § 542.10(b).

Petitioner has not taken any of the required grievance steps, and in addition, he has not provided the Bureau of Prisons time to adjudicate his claim. The First Step Act was passed on December 20th, and he filed his present emergency motion two days later on December 22nd. Petitioner's only effort was to place a phone call the Bureau of Prisons. He has therefore not completed the required exhaustion process.

When the question of exhaustion was raised at oral argument, Petitioner countered that exhaustion of claims in a habeas corpus petition is not statutory required by the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a). This is a true statement, but it is unhelpful to Petitioner, as the federal courts apply the exhaustion requirement to § 2241 as a common law rule. *Richmond*, 387 F.3d at 604.

This, moreover, is a situation where the exhaustion requirement is eminently reasonable.

The Department of Justice and Bureau of Prisons are in the process of implementing a new statute. Congress has given the Executive Branch time for this implementation. It is reasonable to permit that implementation to occur, and to be challenging from within the Bureau of Prisons, before subjecting it to challenges in the federal courts. As mentioned above, the Court is not unsympathetic to Petitioner's argument that he would be entitled to his immediate release from his halfway house if the First Step Act had been immediately implemented, but Congress declined to require immediate implementation and this Court is powerless to alter that fact.

All, however, is not lost for Petitioner. Under his current sentence, Petitioner must serve three years of supervised release following his release from the halfway house. In the event that Petitioner elects to file a motion to modify his supervised release, the Court notes that "overincarceration carries great weight in a motion to modify supervised release under 18 U.S.C. § 3583(e)." *Pope v. Perdue*, 889 F.3d 410, 418 (7th Cir. 2018). Petitioner is advised that a motion to modify supervised release under 18 U.S.C. § 3583(e) must be made before his sentencing judge.

Petitioner's emergency temporary restraining order seeking his immediate release (Dkt. 6.) is accordingly denied. The underlying habeas corpus petition (Dkt. 1.) and associated motion for leave to proceed *in forma pauperis* (Dkt. 3.) shall remain pending for adjudication by Judge Feinerman in the first instance as those are not emergency matters. The Court's participation in this case as Emergency Judge is concluded.

Date: 1/3/2019

/s/Sharon Johnson Coleman  
Sharon Johnson Coleman  
U.S. District Court Judge