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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

ESTER BURNETT,	
	Plaintiff,
vs.	
MICHAEL A. SMELOSKY, Warden, et al.,	
	Defendant.

CASE NO. 09cv2681-MMA (AJB)

**ORDER ADOPTING REPORT AND  
RECOMMENDATION OF UNITED  
STATES MAGISTRATE JUDGE;**

[Doc. No. 19]

**DENYING FIRST AMENDED  
PETITION FOR WRIT OF HABEAS  
CORPUS**

[Doc. No. 3]

Petitioner Ester Burnett, a state prisoner proceeding *pro se* and *in forma pauperis*, filed a first amended petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 [Doc. No. 3], challenging the outcome of a prison disciplinary proceeding which resulted in the forfeiture by Petitioner of ninety days of good time credit. Respondent filed an answer to the petition [Doc. No. 15], and Petitioner filed a traverse [Doc. No. 18]. The matter is currently before the Court for review of the Report and Recommendation issued by United States Magistrate Judge Anthony J. Battaglia recommending that the petition be denied [Doc. No. 19].

Pursuant to Rule 72 of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1), the Court must “make a *de novo* determination of those portions of the report . . . to which objection is made,” and “may accept, reject, or modify, in whole or in part, the findings or recommendations

1 made by the magistrate [judge].” 28 U.S.C. § 636(b) (1); *see also United States v. Remsing*, 874  
2 F.2d 614, 617 (9th Cir. 1989). When no objections are filed, as is the case here, a district court may  
3 assume the correctness of the magistrate judge’s factual findings and decide the motion on the  
4 applicable law. *Johnson v. Nelson*, 142 F.Supp.2d 1215, 1217 (S.D.Cal. 2001) (citing *Campbell v.*  
5 *United States District Court*, 501 F.2d 196, 206 (9th Cir. 1989))

6 The Court concludes that the magistrate judge issued an accurate report and well-reasoned  
7 recommendation that the instant petition be denied. Accordingly, the Court **ADOPTS** the Report  
8 and Recommendation in its entirety and **DENIES** Petitioner’s first amended petition for writ of  
9 habeas corpus.


10 **CERTIFICATE OF APPEALABILITY**

11 “The district court must issue or deny a certificate of appealability when it enters a final  
12 order adverse to the applicant.” Rule 11 foll. 28 U.S.C. § 2254. A petitioner may not seek an appeal  
13 of a claim arising out of a state court detention unless the petitioner first obtains a certificate of  
14 appealability from a district judge or circuit judge under 28 U.S.C. § 2253. Fed. R. App. Proc.  
15 22(b). Under 28 U.S.C. § 2253(c), a certificate of appealability will issue only if the petitioner  
16 makes a substantial showing of the denial of a constitutional right.

17 For the reasons set forth in detail in the Report and Recommendation, Petitioner has not  
18 made a substantial showing of the denial of a constitutional right. Accordingly, a certificate of  
19 appealability should not issue in this action.

20 **IT IS SO ORDERED.**

21 DATED: November 29, 2010



Hon. Michael M. Anello  
United States District Judge

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