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

ESTER BURNETT,

Petitioner,

vs.

JAMES YATES, Warden,

Respondent.

CASE NO. 09 CV 2682 MMA (BLM)

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

[Doc. No. 10]

**OVERRULING PETITIONER'S
OBJECTIONS;**

[Doc. No. 11]

**DENYING PETITION FOR WRIT
OF HABEAS CORPUS**

[Doc. No. 1]

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. 5], challenging a decision by the prison's senior disciplinary hearing officer that Petitioner was guilty of "delaying a peace officer in the performance of his duties" when Petitioner refused to cooperate when being transferred to another facility. The hearing officer assessed Petitioner thirty days forfeiture of good time. [*Id.* at p.7-8.] Respondent filed an answer to the petition on March 12, 2010 [Doc. No. 8], and Petitioner filed a traverse on April 5, 2010 [Doc. No. 9]. The matter was

1 referred to United States Magistrate Judge Barbara L. Major for preparation of a Report and
2 Recommendation under 28 U.S.C. § 636(b) and Civil Local Rule 72.1(d).

3 Judge Major issued a well-reasoned and thorough Report recommending the first amended
4 petition be denied in its entirety. Petitioner timely filed objections, challenging the findings and
5 conclusions of law set forth in the Report and Recommendation. [Doc. No. 11.] Respondent did
6 not file an objection to the Report, or a response to Petitioner's objections.

7 Under 28 U.S.C. § 636(b)(1), in reviewing a magistrate judge's report and
8 recommendation, the district court "shall make a *de novo* determination of those portions of the
9 report . . . to which objection is made," and "may accept, reject, or modify, in whole or in part, the
10 findings or recommendations made by the magistrate judge." Here, Petitioner objects to the
11 entirety of the Report. [Doc. No. 11, ¶1.] Primarily, Petitioner asserts Sergeant Trujillo's written
12 report and statement given during the hearing do not have any indicia of reliability because
13 Sergeant Trujillo's underlying conduct violated several provisions of the California Code of
14 Regulations. [*Id.* at ¶¶26-28.] The Court has considered the merits of each of Petitioner's
15 objections, as well as Petitioner's request that the Report and Recommendation be rejected as a
16 whole. With respect to Petitioner's objections to the findings of fact detailed in the Report, the
17 Court overrules the objections, as they are amply supported by the record. Petitioner's objections
18 to the conclusions of law are similarly without merit, and are therefore, overruled. Judge Major
19 identified the correct legal standards, applied each standard correctly, considered relevant case
20 law, and reached sound conclusions that this Court has no reason to reject.

21 Having reviewed the Report and Recommendation and the files and records herein, the
22 Court **ADOPTS** the Report and Recommendation in its entirety. Accordingly, the Court **DENIES**
23 Petitioner's first amended petition for writ of habeas corpus.

24 **CERTIFICATE OF APPEALABILITY**

25 "The district court must issue or deny a certificate of appealability when it enters a final
26 order adverse to the applicant." Rule 11 foll. 28 U.S.C. § 2254. A petitioner may not seek an
27 appeal of a claim arising out of a state court detention unless the petitioner first obtains a
28 certificate of appealability from a district judge or circuit judge under 28 U.S.C. § 2253. Fed. R.

1 App. Proc. 22(b). Under 28 U.S.C. § 2253(c), a certificate of appealability will issue only if the
2 petitioner makes a substantial showing of the denial of a constitutional right.

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

6 **IT IS SO ORDERED.**

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8 DATED: September 7, 2010

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10 Hon. Michael M. Anello
11 United States District Judge

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