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

GERRY JOHNS,  
  
Petitioner,  
  
vs.  
  
LARRY SMALL, Warden, et al.,  
  
Respondent.

CASE NO. 10cv749-MMA (BLM)

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

[Doc. No. 16]

**GRANTING RESPONDENT'S  
MOTION TO DISMISS;**

[Doc. No. 13]

**DISMISSING PETITION FOR WRIT  
OF HABEAS CORPUS WITH  
PREJUDICE**

[Doc. No. 1]

**DENYING CERTIFICATE OF  
APPEALABILITY**

Petitioner Gerry Johns, proceeding *pro se* and *in forma pauperis*, filed a petition for writ of habeas corpus [Doc. No. 1] pursuant to 28 U.S.C. § 2254, challenging the constitutionality of a prison disciplinary proceeding which resulted in the forfeiture by Petitioner of ninety days of good time credit. Respondent filed a motion to dismiss the petition [Doc. No. 13], which Petitioner opposes [Doc. No. 15]. The matter is currently before the Court for review of the Report and

1 Recommendation issued by United States Magistrate Judge Barbara Lynn Major recommending that  
2 the motion be granted and the petition be dismissed with prejudice [Doc. No. 16].

3 **DISCUSSION**

4 Under 28 U.S.C. § 636(b)(1), in reviewing a magistrate judge’s report and recommendation,  
5 the district court “shall make a *de novo* determination of those portions of the report . . . to which  
6 objection is made,” and “may accept, reject, or modify, in whole or in part, the findings or  
7 recommendations made by the magistrate judge.” Petitioner has filed objections to the Report and  
8 Recommendation [Doc. No. 17].

9 Having read and considered the underlying petition, the Report, and Petitioner’s objections  
10 thereto, the Court **OVERRULES** Petitioner’s objections and concludes that the Report presents a  
11 well-reasoned analysis of the issues and properly recommends that the petition be dismissed with  
12 prejudice. As explained in the Report and Recommendation, Petitioner cannot state a claim for a  
13 violation of his Due Process rights because the challenged prison disciplinary proceedings did not  
14 implicate a federally protected liberty interest. The decision led to the forfeiture of time credits, but  
15 that forfeiture will not inevitably affect Petitioner’s duration of confinement because he is serving an  
16 indeterminate sentence of 16 years to life, of which he has served almost 30 years. He is long past  
17 his minimum parole date and his parole suitability will depend on a myriad of circumstances. The  
18 Report also correctly notes that in this case the question is not whether the claim ought to be pursued  
19 in civil rights rather than in habeas, but rather whether there is a due process claim at all. The  
20 undersigned agrees with the magistrate judge and concludes there is not.

21 **CERTIFICATE OF APPEALABILITY**

22 Should petitioner wish to appeal this decision, he must receive a certificate of appealability.  
23 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946,  
24 950-951 (9th Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550, 551-52 (9th Cir. 2001).  
25 Generally, a petitioner must make “a substantial showing of the denial of a constitutional right” to  
26 warrant a certificate of appealability. *Id.*; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473,  
27 483-84 (2000). “The petitioner must demonstrate that reasonable jurists would find the district  
28 court’s assessment of the constitutional claims debatable or wrong.” *Id.* (quoting *Slack*, 529 U.S. at

1 484). In order to meet this threshold inquiry, the petitioner has the burden of demonstrating that the  
2 issues are debatable among jurists of reason; that a court could resolve the issues differently; or that  
3 the questions are adequate to deserve encouragement to proceed further. *Id.*

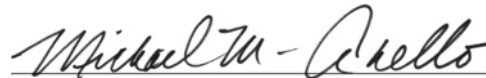
4 Pursuant to the December 1, 2009 amendment to Rule 11 of the Rules Governing Section  
5 2254 and 2255 Cases, district courts are required to rule on the certificate of appealability in the  
6 order disposing of a proceeding adversely to the petitioner rather than waiting for a notice of appeal  
7 and request for certificate of appealability to be filed. Rule 11(a). For the reasons set forth in the  
8 Report and Recommendation, Petitioner has not made a substantial showing of the denial of a  
9 constitutional right. Accordingly, a certificate of appealability should not issue in this action.

10 **CONCLUSION**

11 Based on the foregoing, the Court **ADOPTS** the Report and Recommendation in its entirety.  
12 The Court **GRANTS** Respondent's motion to dismiss and **DISMISSES** the petition with prejudice.  
13 No certificate of appealability shall issue. The Clerk of Court shall enter judgment accordingly and  
14 terminate this action.

15 **IT IS SO ORDERED.**

16 DATED: May 27, 2011

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18 Hon. Michael M. Anello  
19 United States District Judge  
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