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 TOMMY LEE FRYMAN

11 **UNITED STATES DISTRICT COURT**  
 12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

13 TOMMY LEE FRYMAN,	)	No. C-05-0156-MHP (PR)
14	)	
15       Petitioner,	)	
16       vs.	)	REQUEST FOR CERTIFICATE OF
17 W.A. DUNCAN, Warden, et al.,	)	APPEALABILITY; <del>PROPOSED</del>
18       Respondent.	)	ORDER GRANTING CERTIFICATE OF
	)	APPEALABILITY

19  
 20       Petitioner TOMMY LEE FRYMAN, by undersigned counsel, moves the Court, the  
 21 Honorable Marilyn Hall Patel presiding, for a Certificate of Appealability (COA) under FRAP 22  
 22 and Circuit Rule 22-1. On January 8, 2010, the Court issued a judgment and order denying  
 23 Petitioner habeas corpus relief. (Documents 51 and 52.) The judgment encompassed two orders:  
 24 an interim order entered on July 16, 2009 (Document 38) denying Petitioner’s due process/equal  
 25 protection claim under the Fourteenth Amendment; and a final order (Document 51) denying  
 26 Petitioner’s Eighth Amendment claim. Petitioner seeks certification of both claims.

27       The AEDPA requires a district court to issue a COA as to an order denying a state  
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1 prisoner's habeas petition or a § 2255 motion when "the applicant has made a substantial  
2 showing of the denial of a constitutional right." To meet this threshold inquiry, the petitioner  
3 must demonstrate that the issues are debatable among jurists of reason; that a court could resolve  
4 the issues in a different manner; or that the questions are adequate to deserve encouragement to  
5 proceed further." *Lambright v. Stewart*, 220 F.3d 1022, 1024-25 (9th Cir. 2000). As *Lambright*  
6 further explains,

7 In non-capital, as well as capital cases, the issuance of a COA is not precluded where the  
8 petitioner cannot meet the standard to obtain a writ. *See Jefferson v. Wellborn*,  
9 222 F.3d 286, 289 (7th Cir. 2000) (explaining that a COA should issue unless the  
10 claims are "utterly without merit"). [FN 4]. This general principle reflects the fact  
11 that the COA requirement constitutes a gatekeeping mechanism that prevents us  
from devoting judicial resources on frivolous issues while at the same time  
affording habeas petitioners an opportunity to persuade [the Court of Appeals]  
through full briefing and argument of the potential merit of issues that may  
appear, at first glance, to lack merit.

12 *Lambright*, 220 F.3d at 1025.

13 Consistent with these principles, any doubt as to whether the petitioner has met this  
14 standard must be resolved in his favor. *Id.*; *see also Slack v. McDaniel*, 529 U.S. 473 (2000).

15 The Court must either issue a COA or state why a Certificate should not issue in order  
16 for petitioner to take an appeal. Petitioner's anticipatory notice of appeal was filed on January  
17 27, 2010.

18 Neither of Petitioner's claims are frivolous. As such, the within COA should issue.

19 Dated: February 16, 2010

Respectfully submitted,

20  
21 /s/ Nina Wilder  
22 NINA WILDER  
23 Attorney for Petitioner  
24 TOMMY LEE FRYMAN  
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1 ~~PROPOSED~~ ORDER

2 The following claims are certified for appeal:

3  X  Claim One: The Fourteenth Amendment's guarantees of Equal Protection and  
4 Due Process command that Petitioner be afforded the opportunity for probation and drug  
5 treatment under Proposition 36, in that his conviction was not final at the effective date of that  
6 enactment, July 1, 2001; and

7  X  Claim Two: The harshness of Petitioner's life sentence under California's Three  
8 Strikes law is grossly disproportionate to the gravity of his most recent offense and criminal  
9 history in violation of the Eighth Amendment's prohibition against cruel and unusual  
10 punishment.

11 IT IS SO ORDERED.

12  
13 Dated: 2/17/2010

