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5 IN THE UNITED STATES DISTRICT COURT  
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
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8 JOSEPH E. JOHNSON, JR.,

No. C 08-05148 SI

9 Petitioner,

**ORDER GRANTING APPLICATION  
FOR A CERTIFICATE OF  
APPEALABILITY**

10 v.

11 ROBERT L. AYERS, et al.,

12 Respondents.  
13 \_\_\_\_\_/14 Petitioner Joseph Johnson has filed an application for a certificate of appealability. For the  
15 reasons set forth below, the Court GRANTS the application.  
1617 **DISCUSSION**18 Petitioner filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 on November 12,  
19 2008, challenging the upper-term sentence imposed after his state court convictions for auto theft,  
20 possession of a firearm by a felon, possession of ammunition by a felon, possession of drug  
21 paraphernalia, and receipt of stolen property. This Court denied the petition on October 27, 2009, and  
22 petitioner subsequently filed the present request for a certificate of appealability (“COA”).23 Before a habeas petitioner may appeal the denial of a petition for writ of habeas corpus, he must  
24 obtain a COA from the court. 28 U.S.C. § 2253(c)(1). “As a result, until a COA has been issued federal  
25 courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners.” *Miller-El*  
26 *v. Cockrell*, 537 U.S. 322, 336 (2003). To obtain a COA, the petitioner must make “a substantial  
27 showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). To meet this standard, the  
28 petitioner “must demonstrate that the issues are debatable among jurists of reason; that a court could

1 resolve the issues in a different manner; or that the questions are adequate to deserve encouragement  
2 to proceed further.” *Doe v. Woodford*, 508 F.3d 563 (9th Cir. 2007) (quoting *Barefoot v. Estelle*, 463  
3 U.S. 880, 893 n.4 (1983)) (alteration omitted). The petitioner need not, however, show that his appeal  
4 is likely to succeed. *Miller-El*, 537 U.S. at 337.

5         Petitioner’s habeas petition raised serious questions regarding the imposition of an upper-term  
6 sentence in his case. In particular, as the Court observed in its ordering denying the habeas petition, the  
7 Supreme Court has not yet ruled on the question of whether the prior conviction exception embodied  
8 in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) permits a sentencing judge to determine  
9 the “number and increasing severity” of a defendant’s prior convictions for sentencing purposes. This  
10 question has resulted in disagreement among the circuits that have considered it. *Compare, e.g., Butler*  
11 *v. Curry*, 528 F.3d 634, 644 (9th Cir. 2008) (sentencing judge may not make “qualitative evaluations  
12 of the nature or seriousness of past crimes, because such determinations cannot be made solely by  
13 looking to the documents of conviction”) with *United States v. Smith*, 474 F.3d 888, 892 (6th Cir. 2007)  
14 (district court’s determination that criminal history was “extensive and egregious” did not violate  
15 defendant’s Sixth Amendment rights). There is also some tension among cases within the Ninth Circuit.  
16 *Compare Butler, supra*, and *Kessee v. Mendoza-Powers*, 574 F.3d 674 (9<sup>th</sup> Cir. 2009).

17         Under these circumstances, the Court concludes that reasonable jurists could disagree as to the  
18 proper outcome of petitioner’s case, and therefore GRANTS the application for a COA.

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20                                   **CONCLUSION**

21         For the foregoing reasons and for good cause shown, petitioner’s application for a certificate of  
22 appealability is hereby GRANTED. (Docket No. 11).

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24                   **IT IS SO ORDERED.**

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26         Dated: April 8, 2010

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                                  SUSAN ILLSTON  
                                  United States District Judge