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CLERK US DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**

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11 ROBERT SESMA,  
12  
13 vs. Petitioner,  
14 ROBERT J. HERNANDEZ,  
Respondent.

CASE NO. 07cv539 WQH (JMA)  
**ORDER**

15  
16 HAYES, Judge:

17 The matter before the Court is the Motion for Certificate of Appealability filed by  
18 Petitioner Robert Sesma. (Doc. # 16).

19 **BACKGROUND**

20 This action challenges a denial of parole. On March 21, 2007, Petitioner, a state  
21 prisoner, initiated this action by filing his Petition for Writ of Habeas Corpus in the Central  
22 District of California. (Doc. # 1 at 8). On March 22, 2007, the case was transferred to this  
23 Court. *See id.* at 1. On October 30, 2007, the Court denied the Petition. (Doc. # 8). On  
24 November 11, 2007, Petitioner filed a Notice of Appeal. (Doc. # 10). On the same date,  
25 Petitioner filed a Motion for a Certificate of Appealability from this Court. (Doc. # 11). On  
26 November 28, 2007, this Court denied the motion on the grounds that a Certificate of  
27 Appealability was “not required where a state prisoner challenges an administrative decision  
28 regarding the execution of his sentence.” (Doc. # 12 at 2) (citing *Rosas v. Nielsen*, 428 F.3d

1 1229, 1231 (9th Cir. 2005)). On April 22, 2010, the United States Court of Appeals for the  
2 Ninth Circuit issued a decision in *Hayward v. Marshall*, 603 F.3d 546, 552 (9th Cir. 2010) (en  
3 banc), which held that a certificate of appealability is required where a state prisoner  
4 challenges a parole decision. On May 28, 2010, the Ninth Circuit issued an order remanding  
5 this case “for the limited purpose of granting or denying a certificate of appealability at the  
6 court’s earliest convenience.” On June 1, 2010, Petitioner filed a Motion for Certificate of  
7 Appealability. (Doc. # 16). On June 8, 2010, Respondent filed an opposition to the motion.  
8 (Doc. # 17).

### 9 ANALYSIS

10 “The standard for a certificate of appealability is lenient.” *Hayward*, 603 F.3d at 553.  
11 However, a certificate of appealability should be issued only where the petition presents a  
12 substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). A  
13 certificate should issue where the prisoner shows that jurists of reason would find it debatable  
14 whether the petition states a valid claim of the denial of a constitutional right, and whether the  
15 district court was correct in its procedural ruling. *See Slack v. McDaniel*, 529 U.S. 473, 484  
16 (2000).

17 Petitioner raised three grounds in his petition: (1) application of the new Determinate  
18 Sentencing Law in adjudicating Petitioner’s parole violated the ex post facto clause; (2) the  
19 denial of Petitioner’s parole was not supported by the evidence in the record, violating his due  
20 process rights; and (3) deferring Petitioner’s next parole hearing for an extra year violated due  
21 process. *See* Doc. # 1 at 16-17.

22 Petitioner contends that a certificate of appealability should be granted because the  
23 decision to deny parole relied on “the immutable facts of Petitioner’s offense and prior record  
24 which, according to *Lawrence* and *Hayward* no longer constitute some evidence of a current  
25 unreasonable parole risk after decades of intervening reform.” (Doc. # 16 at 2). Petitioner  
26 contends that “[t]he only other ground used by the Board in 2005 to deny parole was an alleged  
27 need for further substance abuse treatment, but Petitioner had completed all such available  
28 programs . . . .” *Id.* Petitioner contends that this finding was also at odds with the opinion of

1 “all of the Board’s forensic psychologists who had evaluated [Petitioner] since 1991 . . . and  
2 specifically determined that he does not require further substance abuse treatment or further  
3 programming in order to successfully parole.” *Id.*

4 Respondent contends that Petitioner has failed to make a substantial showing of the  
5 denial of a constitutional right. (Doc. # 17 at 2). Respondent contends that *Hayward*  
6 determined that there was no constitutional requirement that “some evidence” support a denial  
7 of parole and that habeas review of parole proceedings is limited to determining “only whether  
8 California’s parole review procedures are fundamentally fair [] and . . . whether California  
9 provided the procedures promised.” *Id.* at 3-4. Respondent contends that reasonable jurists  
10 could not disagree as to whether California “provided [Petitioner] with the state procedures it  
11 promised him, including judicial review by the state courts for the existence of some  
12 evidence.” *Id.* at 4.

13 The Ninth Circuit has rejected the argument that the application of California’s  
14 Determinate Sentencing Law in adjudicating a prisoner’s parole where the prisoner was  
15 sentenced under the prior Indeterminate Sentencing Law violates the ex post facto clause.  
16 *See Conner v. Estelle*, 981 F.2d 1032, 1033-34 (9th Cir. 1992) (“We agree with the  
17 California courts that have considered the issue and hold that the application of the DSL  
18 parole suitability guidelines to prisoners sentenced under the ISL does not disadvantage  
19 them, and therefore does not violate the federal constitutional prohibition against ex post  
20 facto laws.”). In light of this ruling, Petitioner is not entitled to a certificate of appealability  
21 as to his first ground for relief.

22 In reviewing a petition for a writ of habeas corpus by a California state prisoner  
23 based on a denial of parole, a federal court must determine “whether the California judicial  
24 decision approving . . . [a] decision rejecting parole was an ‘unreasonable application’ of  
25 the California ‘some evidence’ [of future dangerousness] requirement, or was ‘based on an  
26 unreasonable determination of the facts in light of the evidence.’” *Hawyard*, 603 F.3d at  
27 563. The board relied on a number of factors in denying Petitioner parole including the  
28 “cruel and callous manner” in which Petitioner committed his crimes, the fact that there

1 were multiple victims, and Petitioner's failure to "sufficiently participate[] in self-help or  
2 therapy programs." (Doc. # 6 at 10-11). Petitioner contends, however, that he had already  
3 completed all available self-help and therapy programs and that the Board's own forensic  
4 psychiatrists concluded Petitioner did not need further treatment. (Doc. # 1 at 47-48).  
5 Although the Court denied Petitioner's habeas Petition, the Court finds that Petitioner  
6 raised colorable, nonfrivolous, constitutional arguments with respect to Petitioner's second  
7 ground for relief.

8 California law permits the parole board to issue a two-year denial. *See* Cal. Penal  
9 Code § 3041.5(b)(2). There is no clearly established federal law requiring prisoners to  
10 receive yearly parole adjudications. Petitioner is not entitled to a certificate of appealability  
11 as to his third ground for relief.

12 **CONCLUSION**

13 IT IS HEREBY ORDERED THAT Petitioner's Motion for a Certificate of  
14 Appealability (Doc. # 16) is **GRANTED**.

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18 DATED: 6/24/10

  
19 WILLIAM Q. HAYES  
20 UNITED STATES DISTRICT JUDGE  
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