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2 UNITED STATES DISTRICT COURT  
3 EASTERN DISTRICT OF WASHINGTON

4 TYLER JAMISON,

5 )  
6 Petitioner,

7 vs.

8 MARGARET GILBERT,

9 Respondent.  
10

No. 2:16-CV-00079-JLQ

MEMORANDUM OPINION AND  
ORDER DENYING PETITION FOR  
HABEAS CORPUS

11 BEFORE THE COURT is Petitioner's Petition under 28 U.S.C. § 2254 for Writ of  
12 Habeas Corpus (ECF No. 11), Respondent's Answer (ECF No. 17), and Petitioner's Reply  
13 (ECF No. 20). Pursuant to Rule 8(a) of the Rules Governing Section 2254 Cases, this  
14 court has reviewed the record and determined no evidentiary hearing is warranted.

15 **I. Introduction and Factual Background**

16 Petitioner was convicted, after a jury trial, of two counts of Assault of a Child in  
17 the First Degree on July 20, 2012. On October 1, 2012, Petitioner was sentenced to a  
18 total term of 360 months, composed of 180 months on each count to be served  
19 consecutively. (ECF No. 19<sup>1</sup>, Ex. 1). The abuse inflicted on Petitioner's infant daughter is  
20 set forth in great detail in the May 20, 2014 unpublished opinion of the Washington  
21 Court of Appeals. (*Id.* at Ex. 2). A detailed factual recitation will not be repeated here,  
22 but the introductory paragraph of the Washington Court of Appeals' Opinion gives a brief  
23 summary of the nature of the offense:

24 Tyler Jamison choked, smothered, squeezed, and bounced his infant daughter, S.J.,  
25 on multiple occasions, in an attempt to stop the baby's crying. Jamison fractured  
26 his daughter's ribs, bruised much of her body, and caused her severe brain damage.  
27 As a result of the horrific acts, S.J. is now blind. A feeding tube sustains her. She  
is nonresponsive. (*Id.* at Ex. 2 p. 1).

28 <sup>1</sup>Portions of the State Court record are referenced on the docket  
at ECF No. 19 and available in paper format in Clerk's Office.

1 The instant Petition argues his two convictions were for the same criminal conduct  
2 and that such is a violation of the Double Jeopardy provision of the Constitution. He  
3 argues his two 180-month sentences were required to be run concurrently, and it was  
4 error to run them consecutively. Respondent contends Petitioner's claim is barred by the  
5 one-year statute of limitations contained in the Antiterrorism and Effective Death Penalty  
6 Act ("AEDPA"). Respondent further argues that if this court does reach the merits,  
7 Petitioner is not entitled to relief as the state court adjudication was not an unreasonable  
8 application of clearly established federal law.

## 9 **II. Discussion**

### 10 **A. Statute of Limitations**

11 Respondent, Margaret Gilbert, Superintendent of Stafford Creek Corrections  
12 Center, filed her Answer on July 18, 2016 in which she claims the Petition for Writ of  
13 Habeas Corpus is untimely under the so called Antiterrorism and Effective Death Penalty  
14 Act ("AEDPA"), 28 U.S.C. § 2244, *et. seq.* Respondent seeks denial of the Petition with  
15 prejudice on the basis that it is time-barred.

#### 16 **1. Timeline of Events Relevant to Statute of Limitations**

17 1. **July 20, 2012** - Petitioner is convicted by the jury of two counts of First Degree  
18 Assault of a Child.

19 2. **October 1, 2012** - Judgment and Sentence is entered in Washington Superior  
20 Court of Spokane County.

21 3. Petitioner timely appealed to the Washington Court of Appeals. Petitioner was  
22 represented by counsel on appeal.

23 4. **May 20, 2014** - the Washington Court of Appeals affirmed in an unpublished  
24 opinion.

25 5. **July 16, 2014** - Petitioner filed a pro se Petition for Review with the  
26 Washington Supreme Court.

27 6. **November 5, 2014** - Washington Supreme Court issued an Order denying the  
28 Petition for Review.

1           7. **November 18, 2014** - Washington Court of Appeals issued its mandate stating  
2 that as of November 5, 2014, its Opinion of May 20, 2014, became the decision  
3 terminating review.

4           8. **March 22, 2016** - Petition for Writ of Habeas Corpus filed in this court.

5           The AEDPA imposes a one-year statute of limitations on habeas corpus petitions  
6 filed by state prisoners in federal court. Specifically, 28 U.S.C. § 2244 provides in  
7 relevant part:

8           (d)(1) A 1-year period of limitations shall apply to an application for writ of  
9 habeas corpus by a person in custody pursuant to the judgment of a State court. The  
10 limitation period shall run from the latest of –

11           (A) the date on which the judgment became final by the conclusion of direct  
12 review or the expiration of the time for seeking such review;  
13           \*                                 \*                                 \*                                 \*                                 \*

14           (2) The time during which a properly filed application for State post-conviction or  
15 other collateral review with respect to the pertinent judgment or claim is pending shall  
16 not be counted toward any period of limitation under this subsection. 18 U.S.C. §  
17 2244(d)(1) - (2).

18           Respondent argues after the Washington Supreme Court denied the Petition for  
19 Direct Review, Petitioner had 90-days to file a petition for writ of certiorari with the  
20 United States Supreme Court. (U.S. Supreme Court Rule 13.1) Respondent argues the  
21 judgment became final on February 3, 2015, 90 days after the denial of direct review  
22 because Petitioner did not file a petition for writ of certiorari in the United States  
23 Supreme Court. If Respondent's position is correct, under AEDPA, the one-year statute  
24 of limitations began to run on February 3, 2015 and expired on February 3, 2016, unless  
25 the statute was tolled. Under § 2244(d)(2), the statute of limitations is tolled when a state  
26 application for post-conviction relief is pending. The Record submitted by Respondent  
27 does not reflect any post-conviction relief proceedings in state court. Respondent states,  
28 "Jamison did not file a post-conviction collateral challenge in state court." (ECF No. 17,  
p. 10). Petitioner does not refute this assertion.

          The one-year AEDPA statute of limitations has been upheld as constitutional. See  
*Green v. White*, 223 F.3d 1001 (9th Cir. 2000)("We join the other circuits that have  
considered the issue and hold that AEDPA's one-year limitation does not constitute a per

1 se violation of the Suspension Clause."). The one-year limitation does not render the writ  
2 of habeas corpus inadequate or ineffective as it allows a petitioner a reasonable  
3 opportunity to have his claims heard on the merits. *Id.* at 1004. Further, the limitations  
4 period is not jurisdictional and is subject to equitable tolling. *Id.* at 1003-1004. Petitioner  
5 has advanced no argument for equitable tolling.

6 In his Reply brief (ECF No. 20), Petitioner cites to RCW 10.73.100 and argues the  
7 1-year statute of limitations does not apply because he is asserting a Double Jeopardy  
8 claim. The statute he cites in support of his argument is a Washington state statute,  
9 which reads in part: "The time limit specified in RCW 10.73.090 does not apply to a  
10 petition or motion that is based solely on one or more of the following grounds ... (3) The  
11 conviction was barred by double jeopardy under Amendment V of the United States  
12 Constitution...". RCW § 10.73.100. This statute, by its plain terms, applies to RCW  
13 10.73.090, which sets a one-year time limit for petitions or motions for collateral attack  
14 which are filed in state court. The state statute does not extend the federal one-year  
15 statute of limitations contained in the AEDPA. *See Ferguson v. Palmateer*, 321 F.3d 820,  
16 823 (9th Cir. 2003)("It is unreasonable for a federal habeas petitioner to rely on a state  
17 statute of limitations rather than the AEDPA's statute of limitations.").

18 On the record before the court, Respondent's argument is well taken. Petitioner did  
19 not file a petition for writ of certiorari to the United States Supreme Court, nor did he file  
20 a petition for post-conviction relief in state court. Accordingly, the AEDPA one-year  
21 period of limitation began to run on February 3, 2015. The filing of his Petition in this  
22 court, on March 22, 2016, was untimely.

### 23 **B. The Merits**

24 As Petitioner's filing was untimely, this court need not address the merits.  
25 However, Respondent has presented argument on the merits, and the court will briefly  
26 address the claims. Petitioner raises two arguments: 1) Double Jeopardy - - Petitioner  
27 contends he was charged and convicted of two counts of Assault of a Child in the First  
28 Degree; and 2) Same Criminal Conduct - Petitioner claims he can show the two

1 convictions were for the same criminal conduct which requires concurrent sentences.  
2 (ECF No. 11, p. 5-7). Both of these issues were raised on direct appeal and addressed by  
3 the Washington Court of Appeals. The Court of Appeals stated: "Jamison's two  
4 convictions do not offend the double jeopardy prohibition because he committed more  
5 than one offense, act, or transaction." (ECF No. 19, Ex. 2 at p. 13). The Court of Appeals  
6 additionally found "each count required proof of a legal element, which the other does  
7 not." (*Id.*). Specifically, the court stated: "Count two uniquely required the jury find that  
8 the defendant had previously engaged in a pattern or practice of assaulting S.J., which  
9 resulted in bodily harm that was greater than transient physical pain or minor temporary  
10 marks." (*Id.*).

11 Petitioner has not established the Washington Court of Appeals decision is  
12 "contrary to, or involved an unreasonable application of, clearly established Federal law,  
13 as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d); *Visciotti*  
14 *v. Martel*, 839 F.3d 845 (9th Cir. 2016). The Washington Court of Appeals found the  
15 counts required different legal elements, and found the facts supported a finding he had  
16 committed more than one offense. The court stated: "He committed multiple attacks or  
17 intrusions on the safety of his daughter." (ECF No. 19, Ex. 2 at p. 13). Petitioner has not  
18 established this is an "unreasonable determination of the facts in light of the evidence  
19 presented in the State court proceeding." 28 U.S.C. 2254(d).

20 Concerning the same criminal conduct argument, Jamison states: "I can meet the  
21 requirements to show same criminal conduct which would require concurrent sentences."  
22 (ECF No. 11, p. 7). However, even if Jamison could now, on federal habeas review,  
23 "meet the requirements to show same criminal conduct," that was his burden before the  
24 trial court. The Washington Supreme Court in *State v. Graciano*, 176 Wash.2d 531  
25 (2013), held a defendant bears the burden of production and persuasion on same criminal  
26 conduct claims. The Washington Supreme Court stated a same criminal conduct finding  
27 favors the defendant by lowering his offender score, and "because this finding favors the  
28 defendant, it is the defendant who must establish the crimes constitute the same criminal

1 conduct." *Id.* at 539. The Washington Supreme Court further stated "same criminal  
2 conduct does not have a constitutional dimension" and the legislature could allocate the  
3 burden of proof. *Id.* at 539-540. "Two crimes manifest the same criminal conduct only if  
4 they require the same criminal intent, are committed at the same time and place, and  
5 involve the same victim." *Id.* at 540. In evaluating whether Jamison's convictions  
6 constituted "same criminal conduct," the Washington Court of Appeals stated: "Tyler  
7 Jamison intentionally assaulted S.J. repeatedly over the course of several weeks." (ECF  
8 No. 19, Ex. 2 at p. 18). The Washington Court of Appeals observed that although both  
9 counts of conviction encompassed Jamison's conduct on April 5th, "count two  
10 encompasses more than just the morning of the 5th. Count two includes when Jamison  
11 bounced S.J. on the couch previously, when Jamison fractured S.J.'s ribs about two weeks  
12 prior, and when Jamison first choked S.J. prior to her March 17 emergency room visit."  
13 (*Id.* at 19). Petitioner has not established this is an "unreasonable determination of the  
14 facts in light of the evidence presented in the State court proceeding." 28 U.S.C. 2254(d).

### 15 **III. Conclusion**

16 Defendant's Petition was not filed within one-year of the date on which his  
17 judgment became final and is time-barred. 28 U.S.C. § 2244(d)(1). In reviewing the  
18 merits, *ex gratia*, the court finds Petitioner has not made a showing his sentence was the  
19 result of unreasonable application of clearly established federal law, or involved an  
20 unreasonable determination of facts. 28 U.S.C. § 2254(d)(1)&(2).

### 21 **IT IS HEREBY ORDERED:**

22 1. Petitioner's Petition for Writ of Habeas Corpus (ECF No. 11) is untimely under  
23 the one-year AEDPA statute of limitations and Petitioner has presented no valid reason  
24 for the tolling of the statute.

25 2. Petitioner's Petition for Writ of Habeas Corpus (ECF No. 11) is **DENIED**. The  
26 Petition and the claims therein are **dismissed with prejudice**.

27 3. Pursuant to Rule 11 of the Rules Governing Section 2254 Proceedings, this  
28 court "must issue or deny a certificate of appealability when it enters a final order adverse

1 to the applicant." A certificate of appealability may issue only if the applicant has made a  
2 substantial showing of the denial of a constitutional right, and the certificate must  
3 indicate which specific issue or issues satisfy the showing. *Slack v. McDaniel*, 529 U.S.  
4 473, 483 (2000). A "substantial showing" includes demonstrating reasonable jurists  
5 could debate whether the petition should have been resolved in a different manner or the  
6 issues presented were adequate to deserve encouragement to proceed further. *Id.* at 483-  
7 84. Petitioner has not made such showing and the court **DENIES** a certificate of  
8 appealability.

9 **IT IS SO ORDERED.** The Clerk is hereby directed to file this Order, **enter**  
10 **Judgment in favor of Respondent**, furnish copies to counsel and Mr. Jamison, and close  
11 the file.

12 DATED this 2nd day of December, 2016.

13 s/ Justin L. Quackenbush  
14 JUSTIN L. QUACKENBUSH  
15 SENIOR UNITED STATES DISTRICT JUDGE  
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