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8 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
9 AT TACOMA

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11 DERIK L. MAPLES,

Petitioner,

12  
13 v.

14 MARGARET GILBERT,

15 Respondent.

CASE NO. 16-cv-5209 RJB-JRC

ORDER ON REPORT AND  
RECOMMENDATION

16 This matter comes before the Court on the Report and Recommendation of U.S.  
17 Magistrate Judge J. Richard Creatura. Dkt. 24. The Court has considered the Report and  
18 Recommendation and the remaining record.

19 Petitioner challenges his state court conviction, for second-degree felony murder and first  
20 degree assault both while armed with a firearm, and sentence, totaling 456 months, pursuant to  
21 28 U.S.C. §2254. Dkt. 1. On January 31, 2017, the Report and Recommendation was filed,  
22 recommending that Petitioner's grounds for relief 1, 2, 3, and 4 be denied on the merits; and  
23 ground five be dismissed as unexhausted and procedurally barred. Dkt. 24. In the alternative,  
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1 the Report and Recommendation recommends that ground five be denied on the merits. *Id.* The  
2 Report and Recommendation recommends that a certificate of appealability not issue. *Id.*

3 **Petition.** The Report and Recommendation’s recommendation that grounds for relief 1,  
4 2, 3, and 4 be denied on the merits should be adopted. The Report and Recommendation’s  
5 recommendations that ground five be dismissed as unexhausted and procedurally barred, as well  
6 as denied on the merits should also be adopted.

7 **Certificate of Appealability.** The district court should grant an application for a  
8 Certificate of Appealability only if the petitioner makes a “substantial showing of the denial of a  
9 constitutional right.” 28 U.S.C. § 2253(c)(3). To obtain a Certificate of Appealability under 28  
10 U.S.C. § 2253(c), a *habeas* petitioner must make a showing that reasonable jurists could disagree  
11 with the district court’s resolution of his or her constitutional claims or that jurists could agree  
12 the issues presented were adequate to deserve encouragement to proceed further. *Slack v.*  
13 *McDaniel*, 529 U.S. 473, 483–485 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4  
14 (1983)).

15 A certificate of appealability should issue here. In this case, while it is questionable that  
16 Petitioner has made a “substantial showing of the denial of a constitutional right,” 28 U.S.C.  
17 § 2253(c)(3), his sentence is for 38 years. Jurists could agree that the issues presented were  
18 adequate to deserve encouragement to proceed further. *Slack*, at 483-485. The Report and  
19 Recommendation’s recommendation that a certificate of appealability should not issue here (Dkt.  
20 22) should not be adopted.

21 Accordingly, it is **ORDERED** that:

22 The Report and Recommendation (Dkt. 24) **IS ADOPTED** in all respects except for the  
23 recommendation that a certificate of appealability should not issue:  
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1 (1) Petitioner's grounds for relief **ARE DENIED** on the merits;

2 (2) Further, Petitioner's ground five **IS DISMISSED** as unexhausted and procedurally  
3 barred; and

4 (3) A certificate of appealability **IS ISSUED**.

5 The Clerk is directed to send uncertified copies of this Order to U.S. Magistrate Judge J.  
6 Ricard Creatura, all counsel of record and to any party appearing *pro se* at said party's last  
7 known address.

8 Dated this 2<sup>nd</sup> day of March, 2017.

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11 ROBERT J. BRYAN  
United States District Judge