UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DERIK L. MAPLES, Petitioner, v. MARGARET GILBERT, Respondent.	CASE NO. 16-cv-5209 RJB-JRC ORDER RECONSIDERING CERTIFICATE OF APPEALABILITY

This matter comes before the Court on remand from the Ninth Circuit Court of Appeals. Dkt. 33. The Court has considered the order remanding the case and the remaining record.

Petitioner challenges his state court conviction, for second-degree felony murder and first degree assault both while armed with a firearm, and sentence, totaling 456 months, pursuant to 28 U.S.C. §2254. Dkt. 1. On January 31, 2017, the Report and Recommendation was filed, recommending that Petitioner's grounds for relief 1, 2, 3, and 4 be denied on the merits; and ground five be dismissed as unexhausted and procedurally barred. Dkt. 24. In the alternative, the Report and Recommendation recommended that ground five be denied on the merits. *Id.*

The Report and Recommendation recommended that a certificate of appealability not issue. *Id.* The facts are in the Report and Recommendation and are adopted here.

On March 2, 2017, the Report and Recommendation was adopted in part, and Petitioner's grounds for relief 1-4 were denied on the merits. Dkt. 25. Further, as recommended, ground five was dismissed as unexhausted and procedurally barred, as well as denied on the merits. *Id.* Although the Report and Recommendation recommended denying a certificate of appealability, a certificate of appealability was issued. *Id.*

On April 28, 2017, the Ninth Circuit Court of Appeals issued an order, remanding the case for the "limited purposed of clarifying the issue(s) on which the district court granted a certificate of appealability." Dkt. 33.

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

Upon further consideration, the certificate of appealability was improvidently granted. Petitioner has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(3). Jurists could not agree that the issues presented were adequate to deserve encouragement to proceed further. *Slack,* at 483-485. The prior order granting the certificate of appealability should be reconsidered and the certificate of appealability should be denied.

It is **ORDERED** that:

The Court's March 2, 2017 Order on Report and Recommendation (Dkt. 25) is reconsidered and the certificate of appealability **IS DENIED**.

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

Dated this 1st day of May, 2017.

ROBERT J. BRYAN
United States District Judge