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

11 ROBIN TAYLOR SCHREIBER,

12 Petitioner,

13 v.

14 MIKE OBENLAND,

15 Respondent.

CASE NO. 3:17-cv-05357-RJB-JRC

ORDER ON REPORT AND
RECOMMENDATION

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17 THIS ORDER comes before the Court on the Report and Recommendation of Magistrate
18 Judge J. Richard Creatura. Dkt. 8. The Court has considered the R&R, Petitioner's Objections
19 (Dkt. 9), Respondent's Response (Dkt. 10), the underlying Petition for Writ of Habeas Corpus
20 Pursuant to 28 U.S.C. §2254 (Dkt. 1) and related briefing, and the remainder of the file herein.

21 The R&R recommends that the Court dismiss the Petition and deny the request for the
22 certificate of appealability. Dkt. 8 at 11. The R&R should be adopted in its entirety, except for
23 the recommendation to deny the certificate of appealability, which should be issued.
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1 The below analysis addresses (1) Objections raised by Petitioner and (2) issuance of the
2 certificate of appealability.

3 **1. Objections raised by Petitioner.**

4 a. Background.

5 The Objections state, in summary:

6 [Petitioner] received an increased sentence because of an “aggravating factor” that was
7 not legislatively authorized at the time of his crime. The [R&R] concludes that
8 [Petitioner’s] sentence does not violate *ex post facto* separation of powers/notice
9 protections because the aggravating element was judicially recognized and both the
10 United States Supreme Court and the Ninth Circuit Court of Appeals have recognized the
11 existence and legitimacy of non-statutory aggravating factors.

12 Dkt. 9 at 1 (internal citations and quotations omitted). Petitioner then attempts to distinguish the
13 three cases relied upon by the R&R for this conclusion, *Loving v. United States*, 517 U.S. 748,
14 768 (1996), *Barclay v. Florida*, 463 U.S. 939, 966-67 (1983), and *United States v. Mitchell*,
15 502F.3d 931, 973 (9th Cir. 2007).

16 In context, the R&R stated:

17 An aggravating factor that increases the sentence of a crime becomes an “element” of the
18 crime that must be found by the jury rather than merely a “sentencing factor” to be
19 considered by a judge. *See Alleyne v. United States*, 133 S.Ct. 2151, 2155 (2013). Though
20 Congress and state legislatures are endowed with the power to legislate aggravating
21 factors, both the United States Supreme Court and the Ninth Circuit Court of Appeals
22 have recognized the existence and legitimacy of non-statutory aggravating factors.
23 *Barclay v. Florida*, 462 U.S. 939, 966-67 (1983) (holding that non-statutory aggravating
24 factors were appropriate in death penalty cases so long as the death penalty was not
imposed based solely on these factors); *United States v. Mitchell*, 502 F.3d 931, 973
(2007)(holding the same). Further, the Supreme Court has also explicitly recognized that
other entities other than legislatures have the power to define aggravating factors. *See*
Loving v. United States, 517 U.S. 748, 768 (1996) (recognizing the President’s power to
establish aggravating factors for military crimes).

Dkt. 8 at 10.

b. Discussion.

1 Petitioner faults the R&R for relying on *Loving* for the proposition that an exceptional
2 sentence may be based on non-statutory aggravating factors. *Loving* held that the President’s
3 power to define aggravating factors for military crimes, a power delegated by Congress, does not
4 violate the Eighth Amendment and separation-of-powers doctrine. *Loving*, 517 U.S. at 768 (“In
5 the circumstances presented here, so too may Congress delegate authority to the President to
6 define the aggravating factors that permit imposition of a statutory penalty”). Petitioner argues
7 that *Loving* is premised on a rule derived from *Walton v. Arizona*, 497 U.S. 639, and *Walton* was
8 eviscerated by the “*Apprendi* revolution,” which was distilled in *Ring v. Arizona*, 526 U.S. at
9 584, 609 (2002). Dkt. 9 at 3.

10 Petitioner correctly notes that *Ring* resolved the *Apprendi*/*Walton* conflict in favor of
11 *Apprendi*, so *Ring* is controlling case law, but even if *Loving* is partially overruled, it can be
12 reconciled with *Ring* at least in part. Under *Ring*, aggravating factors that increase the penalty for
13 a crime are the functional equivalent to an “element” that must be proved to a jury. *Ring*, 526
14 U.S. at 609. *Loving* confirms Congress’ authority to delegate to another branch, the Executive,
15 the power to define aggravating factors that may result in a harsher sentence. *Loving*, 517 U.S. at
16 768. In this case, consistent with *Ring*, the judge submitted to a jury the factual sufficiency of an
17 aggravating factor, which formed the basis for an exceptional sentence. Consistent with *Loving*,
18 the judge relied on authority delegated by the legislature to another branch, the judiciary. The
19 applicable state law gave judges discretion to decide whether there were “facts supporting
20 aggravating sentences,” with a non-exhaustive, “illustrative” enumeration of factors. 2003 Wash.
21 Legis. Serv. Ch. 267 §4 (S.H.B. 1175)(“the following are illustrative factors which the court may
22 consider in the exercise of its discretion to impose an exception sentence. The following are
23 illustrative only and are not intended to be exclusive”.)

1 In sum, reading *Ring* and *Loving* in concert, it would be unconstitutional to impose an
2 exceptional sentence based on an aggravating factor without first submitting that factor to a jury.
3 Here, the judge submitted a special verdict form on the issue of the aggravating factor¹ to the
4 jury, the jury found the evidence sufficient, and thereafter the judge imposed an exceptional
5 sentence.

6 Petitioner faults the R&R for relying on *Barclay* and *Mitchell* on two grounds. First,
7 Petitioner opines that the R&R fails to recognize “the constitutional distinction between
8 aggravating factors that make a defendant eligible and those used in the discretionary penalty
9 selection process.” Dkt. 9 at 5. While concededly *Barclay* and *Mitchell* analyze aggravating
10 factors to ensure the sufficiency of jury findings at the sentencing phase under Florida law and
11 the Federal Death Penalty Act (FDCPA), respectively, the distinction between phases is not
12 critical to the analysis in this case. The R&R relied upon *Barclay* and *Mitchell* for the
13 proposition that courts have recognized “the existence and legitimacy of non-statutory
14 aggravating factors,” Dkt. 8 at 10, a point of law illustrated by any number of cases.

15 Second, according to Petitioner, the R&R misuses *Barclay* and *Mitchell* because neither
16 case stands for the proposition that non-statutory aggravating factors alone can be used to
17 increase a defendant’s punishment. *Id.* at 4. The R&R did not rely on the cases to make this
18 point. Instead, the R&R relies on both cases for the proposition that “non-statutory aggravating
19 factors were appropriate in death penalty cases so long as the death penalty was not imposed
20 based solely on these factors.” Dkt. 8 at 10 (emphasis added). *See Mitchell*, 502 F.3d at 978-79

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23 ¹ The parties do not dispute that committing an offense against a law enforcement officer was an aggravating factor
24 clearly established under Washington law at the time of the offense. *See In re Schreiber*, 189 Wn.App. 110 (Div. II,
2015), citing *State v. Anderson*, 72 Wn.App. 453, 466 (Div. I, 1994) (“[A] defendant’s assault on a victim he knows
is a police officer justifies an exceptional sentence.”).

1 (“there are a number of limitations on the government’s power to pursue non-statutory
2 aggravators, including. . . the jury find at least one statutory aggravating factor”).

3 In sum, the Objections are unpersuasive and do not raise any basis for the Court to reject
4 the recommendation of the R&R to deny the petition for writ of habeas corpus.

5 **2. Certificate of Appealability.**

6 The undersigned submits that the Petition (Dkt. 1) should be denied, because Petitioner
7 has not met his burden to show an exceptional sentence “contrary to, or involv[ing] an
8 unreasonable application of, clearly established Federal law,” 28 U.S.C. 2254(d). Nonetheless, a
9 certificate of appealability should be issued. The key issue is whether an exceptional sentence
10 may be imposed from a single non-statutory aggravating factor, where the aggravating factor is
11 clearly established under state case law, submitted to a jury, and later codified.

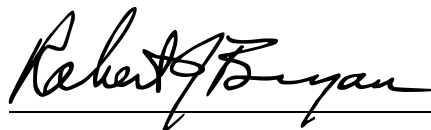
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13 THEREFORE, the Report and Recommendation (Dkt. 8) is ADOPTED IN PART, as to
14 the Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. §2254, which should be DENIED.
15 Petitioner’s request for issuance of a certificate of appealability to the Ninth Circuit is
16 GRANTED.

17 It is so ordered.

18 The Clerk is directed to send uncertified copies of this Order to all counsel of record and
19 to any party appearing pro se at said party’s last known address.

20 Dated this 31st day of October, 2017.

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23 ROBERT J. BRYAN
24 United States District Judge