

1
2 UNITED STATES DISTRICT COURT
3 DISTRICT OF NEVADA

4 * * *

5 Cary Wallace Williams,

Case No. 2:98-cv-00056-APG-VCF

6 Petitioner,

v.

Order

7 William Gittere,¹ et al.,

8 Respondents.
9

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11 This is a habeas corpus proceeding under 28 U.S.C. § 2254 on remand from the United
12 States Court of Appeals for the Ninth Circuit. *See Williams v. Warden*, 908 F.3d 546 (9th Cir.
13 2018). I have conducted an evidentiary hearing and entertained briefing on the remanded claims
14 in petitioner Cary Williams' habeas petition. For reasons that follow, I deny habeas relief.

15 **I. SCOPE OF REMAND**

16 The Ninth Circuit affirmed in part and reversed in part this court's final order denying
17 habeas relief (ECF No. 196). The Ninth Circuit held that this court erred in dismissing Claims
18 1(C), 1(D), 1(E), 1(H), 1(I), 1(J), 9, and 14 in Williams' third amended petition (ECF No. 135)
19 because he is entitled to equitable tolling for those claims. *Williams*, 908 F.3d at 561. The Ninth
20 Circuit also held that, because Claims 1(D), 1(E), 1(H), 1(I), and 1(J) are ineffective assistance of
21 counsel (IAC) claims that were procedurally defaulted under state law, this court needs to
22 determine whether the default is excused under the rule established in *Martinez v. Ryan*, 566
23 U.S. 1 (2012). *Id.* at 580. In addition, the Ninth Circuit held "that the district court abused its
24 discretion in denying an evidentiary hearing on Claim 1(F) and remand[ed] for such a hearing."
25 *Id.* at 571.

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27 ¹ The current warden of Ely State Prison, William Gittere, is substituted for his predecessor, William
28 Reubart, as the primary respondent. *See* Fed. R. Civ. P. 25(d).

1 **II. PROCEEDINGS ON REMAND**²

2 In accordance with my scheduling order on remand (ECF No. 241), the respondents filed
3 an answer responding to Claims 1(C), 1(D), 1(E), 1(H), 1(I), 1(J), 9, and 14 and presenting
4 argument as to why the procedural default of Claims 1(D), 1(E), 1(H), 1(I), and 1(J) should not
5 be excused under *Martinez*. ECF No. 253. Williams filed a reply to the answer and a motion for
6 evidentiary hearing asking to expand the evidentiary hearing beyond Claim 1(F) to include the
7 remaining claims. ECF Nos. 262/264. The respondents opposed the motion for all claims except
8 Claim 1(H), which is encompassed by Claim 1(F). ECF No. 277. I granted the motion with
9 respect to Claim 1(H) only and denied it for the remaining claims. ECF No. 286.

10 In May 2022, I held a three-day evidentiary hearing on Claims 1(F) and 1(H). Both
11 parties filed post-hearing briefs. ECF Nos. 334, 336.

12 **III. DISCUSSION**³

13 **A. *Tollett v. Henderson***

14 The respondents argue that Claims 1(D), 1(I), 1(J), 9, and 14 are barred as a result of
15 Williams' guilty pleas. In *Tollett v. Henderson*, the Supreme Court of the United States held that
16 "when a criminal defendant has solemnly admitted in open court that he is in fact guilty of the
17 offense with which he is charged, he may not thereafter raise independent claims relating to the
18 deprivation of constitutional rights that occurred prior to the entry of the guilty plea." 411 U.S.
19 258, 267 (1973). An exception to this general rule is "that a habeas petitioner may 'attack the
20 voluntary and intelligent character of the guilty plea' based on pre-plea ineffective assistance of
21 counsel 'by showing that the advice he received from counsel was not within the' 'range of
22 competence demanded of attorneys in criminal cases.'" *Mahrt v. Beard*, 849 F.3d 1164, 1170
23 (9th Cir. 2017) (citing *Tollett*, 411 U.S. at 267–69). The court in *Mahrt* clarified that this

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25 ² The factual and procedural history of this case prior to remand are detailed in this court's final order
26 denying relief (ECF 195 at 1-5) and in the Ninth Circuit's opinion (*Williams*, 908 F.3d at 553-57).

27 ³ For ease of reading, I use footnotes to cite to the record in this section. All citations to "exhibits" refer
28 to evidentiary hearing exhibits.

1 exception to the *Tollett* bar is not limited to incompetent advice from counsel and extends to
2 instances in which “the action, or inaction, of counsel prevent[ed] petitioner from making an
3 informed choice whether to plead.” *Id.*

4 In Claim 1(D), Williams alleges that his trial counsel failed to provide effective
5 assistance during the jury selection process. He contends that counsel made statements to the
6 jury panel that denigrated her own status as a public defender and exacerbated juror prejudice by
7 highlighting the issue of race. He further alleges that counsel failed to challenge the racial
8 composition of the jury and failed to elicit information necessary to challenge jurors for cause.
9 According to Williams, counsel’s deficient performance resulted in the selection of biased jurors.

10 The respondents contend that the claim is barred under *Tollett* “because it does not
11 involve advice from counsel.”⁴ As noted, however, the exception to the *Tollett* bar is not limited
12 to incompetent advice from counsel. *Mahrt*, 849 F.3d at 1170. Trial counsel, Shelly O’Neill,
13 testified in post-conviction proceedings that unfavorable jury selection was one of the factors in
14 Williams’ decision to enter a guilty plea to manslaughter and first-degree murder.⁵ Because it is
15 arguable that “the action, or inaction, of counsel prevent[ed] petitioner from making an informed
16 choice whether to plead” (*id.*), Claim 1(D) is not barred under *Tollett*. I address the claim on the
17 merits in section III.C. below.

18 In Claim 1(I), Williams alleges that his trial counsel provided ineffective assistance
19 because her investigator revealed the theory of Williams’ defense to an attorney who shared
20 office space with the attorney representing one of Williams’ separately-charged co-defendants.
21 The defense theory was that, although he participated in the burglary, Williams did not
22 personally kill the victim, Katherine Carlson, and her unborn child. Williams also alleged in
23 Claim 1(I) that O’Neill’s performance was deficient because she did not make an opening
24 statement in the guilt phase of his trial. Unlike with Claim 1(D), there is no indication that the

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26 ⁴ ECF No. 280 at 2.

27 ⁵ ECF No. 173-14 at 33-35.

1 deficiencies alleged in Claim 1(I) may have affected Williams' decision to enter guilty pleas.
2 Thus, Claim 1(I) is barred under *Tollett*.

3 In Claim 1(J), Williams alleges that his trial counsel provided ineffective assistance
4 throughout the criminal proceedings against him by failing to raise and litigate objections and
5 motions necessary to protect his constitutional rights. As explained below in section III.C., the
6 only portion of the claim that is properly pleaded is an allegation that counsel was ineffective by
7 failing to establish that Williams' statements to the police were inadmissible under *Edwards v.*
8 *Arizona*, 451 U.S. 477 (1981). Claims of ineffective assistance based on counsel's failure to
9 suppress a confession are not barred under *Tollett*. See *Mahrt*, 849 F.3d at 1170–71. So, I
10 address the claim on the merits below.

11 In Claim 9, Williams alleges a violation of his constitutional rights due to the trial court's
12 admission of his statements made in custody after his request to consult with an attorney. He
13 claims that, when asked to take a polygraph test upon returning to Reno after waiving extradition
14 from California, he requested appointment of counsel. According to Williams, the State's failure
15 to honor that request rendered inadmissible his custodial statements made in subsequent
16 interviews. He contends that the trial court's denial of his motion to suppress the statements
17 contributed to his involuntary decision to plead guilty and infected his sentencing proceeding.

18 With respect to the guilt phase of Williams' trial, Claim 9 falls squarely within the *Tollett*
19 bar. See, e.g., *Marrow v. United States*, 772 F.2d 525, 527 (9th Cir. 1985) (finding that claim that
20 the petitioner confessed because he was threatened was barred by *Tollett*). However, Williams
21 argues that *Tollett* has no bearing on his challenge to the admission of the statements during the
22 penalty phase of his trial. While he does not cite any authority for this position, the respondents
23 fail to address it in their response.⁶ I need not resolve the issue because, as discussed below, I
24 conclude that the state court's decision to not exclude the statements is entitled to deference
25 under 28 U.S.C. § 2254(d) and, alternatively, that any error was harmless.

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27 ⁶ ECF No. 280 at 2, 17-19.

1 In Claim 14, Williams alleges a violation of his constitutional rights because his trial was
2 held in an unfairly prejudicial atmosphere and the trial court refused to change the venue of the
3 trial. He claims that extensive media coverage prior to his trial unfairly affected the jury's
4 consideration of his case. According to Williams, the responses of some of the jurors who were
5 ultimately selected for his jury demonstrate the negative impact pre-trial publicity had on the
6 fairness of the proceedings.

7 Claim 14 alleges a deprivation of constitutional rights that occurred prior to the entry of
8 the Williams' guilty plea. Williams contends that it is not barred by *Tollett* because the trial
9 court's denial of his motion for a change of venue rendered his guilty plea involuntary. *Tollett*
10 clearly holds, however, Williams "may only attack the voluntary and intelligent character of the
11 guilty plea by showing that the advice he received from counsel was not within the standards set
12 forth in *McMann* [*v. Richardson*, 397 U.S. 759 (1970)]." *Tollett*, 411 U.S. at 267. Because
13 Claim 14 does not allege pre-plea ineffective assistance of counsel, it is barred under *Tollett*.

14 **B. *Martinez v. Ryan***

15 As noted above, the court of appeals directed me to determine whether the procedural
16 defaults of Claims 1(D), 1(E), 1(H), and 1(J)⁷ should be excused under the rule established in
17 *Martinez v. Ryan*, 566 U.S. 1 (2012). Instead of conducting a strict *Martinez* analysis, I address
18 below the merits of each of these ineffective assistance of claims under *Strickland v.*
19 *Washington*, 466 U.S. 668 (1984). Having determined that Williams cannot satisfy the
20 *Strickland* standard, I conclude that Williams is not entitled to relief on any of the claims
21 irrespective of whether he can meet the *Martinez* standard.

22 **C. Merits of Remaining Claims**

23 1. *Ineffective assistance of trial counsel*

24 Claims 1(C), 1(D), 1(E), 1(H), and 1(J) all allege that O'Neill failed to provide Williams
25 effective assistance of counsel. *Strickland* governs the analysis of IAC claims. Under
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27 ⁷ Having found that it is barred under *Tollett*, Claim 1(I) is omitted from this list.
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1 *Strickland*, Williams must demonstrate that his counsel's performance was constitutionally
2 deficient and that the deficient performance prejudiced him. 466 U.S. at 687. To establish
3 deficient performance, Williams must show that his counsel's performance “fell below an
4 objective standard of reasonableness.” *Id.* at 688. For prejudice, he must “show that there is a
5 reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding
6 would have been different.” *Id.* at 694. Because he challenges counsel’s performance in relation
7 to guilty pleas, Williams can show prejudice by demonstrating a “reasonable probability that, but
8 for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.”
9 *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

10 Claim 1(C) -- In Claim 1(C), Williams alleges that he was deprived of his constitutional
11 right to effective assistance of counsel when O’Neill advised him to enter a guilty plea to
12 burglary. He claims that O’Neill advised him to enter the plea without letting him know the plea
13 would establish his guilt of first-degree murder under the felony murder rule. He points to a
14 statement O’Neill made during of his plea colloquy that shows she was not aware that the State
15 had charged him under the felony murder theory. He further claims that there is nothing in the
16 record indicating that she notified him that the plea would establish an aggravating circumstance
17 making him eligible for the death penalty.

18 Williams entered his guilty plea to the burglary charge on the first day of jury selection
19 for his trial. Prior to accepting his plea, the trial court confirmed that Williams understood the
20 rights he was waiving by entering the plea.⁸ The court also confirmed that he understood the
21 nature of the charge, that he had been advised by his attorney of the possible penalty, and that his
22 decision was not based on any threats or promises.⁹ The prosecutor then interjected that, in
23 addition to a possible one to ten-year sentence, the plea also included collateral consequences
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26 ⁸ ECF No. 173-4 at 35.

27 ⁹ *Id.* at 36-36.
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1 under the felony murder rule and the doctrine of conspiracy, which had the potential of “locking
2 [Williams] into a first degree murder.”¹⁰

3 The following exchange then occurred:

4 MISS O’NEILL: First, I would object to [the prosecutor’s] statements
5 regarding the felony murder. And I would like the record to reflect that no felony
6 murder charge has been maintained by the District Attorney’s Office.

7 [PROSECUTOR]: That’s incorrect.

8 MISS O’NEILL: Additionally, Mr. Williams has been so advised.

9 [PROSECUTOR]: Your Honor, just to clarify the matter. The Indictment
10 itself says that the offense was committed in the general language of first degree
11 murder; that is, with malice aforethought, deliberation, and premeditation. But it
12 also stated . . . that the murder was committed in the course, furtherance and
13 perpetration of the burglary of the victim’s home. Necessarily bringing into play
14 the doctrine of felony murder.

15 So he should be aware of that, and counsel has indicated that he is aware
16 of it. But I’d like him to state that as well.

17 THE COURT: All right. Mr. Williams, you’ve heard what [the
18 prosecutor] has said, and counsel’s indicated to the Court it has been explained to
19 you. I’m going to ask you again, is your plea this morning to Count III, burglary,
20 contained within the Indictment . . . a voluntary one at this time?

21 THE DEFENDANT: Yes.

22 THE COURT: All right. The Court at this time finds the defendant’s plea
23 is voluntary, that he fully understands the nature of the offense and the
24 consequences of his plea, and therefore accepts his plea of guilty at this time.¹¹

25 At the evidentiary hearing on Williams’ initial post-conviction petition, O’Neill testified
26 that in the months leading up to trial she had prepared a defense conceding Williams’
27 participation in the burglary, but claiming that he was not the one who killed Katherine.¹² She
28 noted that “all the evidence pointed to the fact that Cary was inside the house.”¹³ That evidence

23 ¹⁰ *Id.* at 37-39.

24 ¹¹ *Id.* at 39.

25 ¹² ECF No. 173-14 at 11, 33. Two other defendants, Charles Wilkinson and Harvey Young, were charged
26 in separate proceedings with participating in the burglary and murder.

27 ¹³ *Id.* at 11.

1 included Williams' palm print in the house, his own statements to the police, and Katherine's
2 jewelry being discovered at a pawn shop in Los Angeles, where Williams had fled after the
3 murder.¹⁴ O'Neill reasoned that "it would add credibility to Cary's statement, when he was on
4 the stand, to testify that he was actually in the house, but he did not commit the murder."¹⁵

5 Williams argues that the above excerpt from the plea canvass shows that O'Neill advised
6 him to plead guilty based on her misunderstanding that the State had not charged him with felony
7 murder. He challenges O'Neill's statement that she had advised him about the felony murder
8 rule, arguing that she would have had no reason to do so if she was not aware that the State was
9 charging him under that theory. According to Williams, O'Neill's statement to the court that she
10 had informed him of felony murder rule was a self-serving afterthought.

11 While that is a plausible interpretation of the excerpt, I cannot find, based on the cold
12 transcript alone, that O'Neill failed to advise Williams about the consequences of his plea. An
13 equally plausible interpretation of the excerpt is that O'Neill was in the process of making two
14 points when the prosecutor interrupted her because the first point was not accurate. Just because
15 she was raising an objection (albeit an unfounded one) to the prosecutor's comments about
16 felony murder does not mean that she did not inform Williams about the theory. And, in any
17 case, Williams confirmed that his guilty plea was voluntary after the felony murder rule had been
18 explained to him.¹⁶

19 Faced with overwhelming evidence that Williams was at the scene of the crime,
20 O'Neill's options for a viable defense were clearly limited. She reasonably concluded that the
21 best way, perhaps the only way, to reduce Williams' culpability and avoid the death penalty

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23 ¹⁴ *Id.* at 11, 17, 27-28, and 47.

24 ¹⁵ *Id.* at 11.

25 ¹⁶ Williams insists an evidentiary hearing is necessary to resolve whether O'Neill advised him of the
26 felony murder rule prior to entering his plea. But as I concluded in ruling on his motion to expand the
27 evidentiary hearing in this case (ECF No. 264), Williams had the opportunity to develop facts in support
28 of Claim 1(C) in state court and failed to do so. ECF No. 286 at 1-3.

1 would be to concede that he was present at the time, but claim that another intruder committed
2 the actual murder. In addition, the concession was the only way for Williams to maintain
3 credibility, to the extent his testimony was necessary to support the theory.

4 As for the guilty plea providing the State with an aggravating circumstance, Williams has
5 not demonstrated that O'Neill did not explain that consequence to him. The likelihood of
6 Williams receiving the death penalty would have been significantly lessened if the defense
7 succeeded and Williams was not found to be the actual killer. So, providing the State with an
8 aggravating circumstance was a reasonable risk under the circumstances.

9 In sum, counsel made a reasonable strategic decision by advising Williams to enter a
10 guilty plea to burglary. Such decisions cannot support a claim of ineffective assistance of
11 counsel. *See Strickland*, 466 U.S. at 690; *Mickey v. Ayers*, 606 F.3d 1223, 1238–39 (9th Cir.
12 2010). Williams has not shown that his guilty plea was involuntary due to ineffective assistance
13 of counsel. Claim 1(C) is denied.

14 Claim 1(D) -- As described above, Claim 1(D) is a claim that trial counsel performed
15 ineffectively during the jury selection process. Williams faults O'Neill for making statements to
16 the jury panel that denigrated her own status as a public defender and exacerbated juror prejudice
17 by highlighting the issue of race. With respect to the latter, he claims that questioning the entire
18 panel about race injected the issue into the proceeding in a way that did not yield information
19 about jurors' views because she was essentially asking the jurors to self-identify as racists.

20 I agree that O'Neill's statements and questions to the entire panel were unlikely to elicit
21 responses that would assist her in removing biased jurors. However, Williams has not shown
22 that it had an appreciable effect on the composition of the jury that was ultimately selected. In
23 addition, O'Neill filed a successful motion for individual voir dire, which allowed her to ask
24 sensitive questions and have potential jurors answer them outside the presence of other panel
25 members.¹⁷

26 ¹⁷ ECF No. 173-14 at 20-21.
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1 Williams also contends that O’Neill failed to develop and raise meritorious challenges for
2 cause. He cites the following examples.

3 For Juror Felker, Williams notes that, when asked his position on the death penalty, “he
4 indicated he believed in ‘[an] eye for an eye.’”¹⁸ When questioned further, however, he
5 indicated that he understood that a finding of guilt does not automatically warrant the death
6 penalty.¹⁹ He also confirmed that he would be willing to consider the alternative penalties for
7 murder.²⁰ I am not convinced that the record shows that there was a sound basis for challenging
8 Felker for cause or that there is a reasonable probability that the trial court would have granted
9 the challenge.

10 For Juror Eriksen, Williams notes that she “indicated, ‘Well, I’m not especially fond of
11 black guys.’”²¹ That response occurred when O’Neill was posing general questions about race to
12 the entire panel. O’Neill neglected to follow up on this issue when Eriksen was brought up for
13 individual questioning. O’Neill did, however, use one of her peremptory challenges to remove
14 Eriksen from the jury.²² So, Williams cannot claim that her presence on the jury affected to his
15 decision to enter a guilty plea.²³

16 For Juror Pease, Williams alleges that he “knew a great deal about the case, including
17 information he received from law enforcement,” and that his connection to the case due to his
18 work with Job Corps and his “stated concern about ‘public relations of the University’ rendered
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20 ¹⁸ ECF No. 262 at 41 (citing ECF No. 263-1 at 54).

21 ¹⁹ ECF No. 263-1 at 56, 58-59.

22 ²⁰ *Id.* at 58.

23 ²¹ ECF No. 262 at 41 (citing ECF No. 263-1 at 29).

24 ²² ECF No. ECF No. 263-4 at 69.

25 ²³ By posing additional questions regarding racial bias, O’Neill may have been able to successfully
26 challenge Eriksen for cause, which would have allowed her to save the peremptory challenge for another
27 juror. That possibility alone, however, is not sufficient to satisfy the prejudice prong under
28 *Strickland/Lockhart*.

1 him biased.”²⁴ Pease testified that he learned about the case before it was reported in the media
2 because the Chief of the University Police Department reports to the same supervisor that he
3 does.²⁵ He further testified that he did not recall the details of the case, but he was sure that he
4 would recall them as the trial progressed.²⁶ He also indicated that he learned through the
5 University Police and through employees at the Jobs Corps Center that “it was a Job Corps man
6 or an ex-Job Corps man that was involved in the case,” but that he was not provided a name and
7 was not privy to any additional information about Williams.²⁷

8 O’Neill questioned Pease extensively about his relationship with Job Corps and the
9 University and how it might impact his deliberations.²⁸ None of his answers suggested that he
10 would harbor a bias against Williams. In fact, O’Neill could have reasonably viewed Pease’s
11 allegiance to Job Corps as favorable to Williams.²⁹ In addition, Pease responded to questions
12 about serving on a prior jury indicating that he thought the defendant was treated unfairly (“I
13 don’t think justice was carried out by convicting him.”) and the prosecuting attorney had abused
14 his power.³⁰ In sum, the record reflects that O’Neill did not perform below the *Strickland*
15 standard by not challenging Pease for cause.

16 For Juror Davis, Williams alleges that she “described being raped in her home, how her
17 mother worked as a dispatcher, and how news coverage of the case convinced her the crime was
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20 ²⁴ ECF No. 262 at 42 (citing ECF No. 263-1 at 68-70).

21 ²⁵ ECF No. 263-1 at 69-70.

22 ²⁶ *Id.*

23 ²⁷ *Id.* at 72-73.

24 ²⁸ *Id.* at 78-80.

25 ²⁹ O’Neill testified in post-conviction proceeding that she had colleagues from her office sit in the
26 audience during jury selection to assess the reactions and body language of potential jurors to help her
determine “whether or not a person will be positive or negative.” ECF No. 173-14 at 19.

27 ³⁰ *Id.* at 77.

1 ‘heinous.’”³¹ With respect to the rape, Davis indicated that it had occurred 12 years earlier and
2 that, though it happened in her home, it was not during a burglary.³² Davis also testified that her
3 mother, in her current position, rarely handled incoming calls and, to Davis’ knowledge, had no
4 close acquaintances who were police officers.³³ Davis testified that her personal opinion of the
5 crime, based on the media coverage of she had seen, was that it was “a heinous crime.”³⁴
6 However, she confirmed in responding to several follow-up questions that she would set aside
7 that opinion and consider only what was presented at trial.³⁵ She also testified that her opinion
8 of the death penalty “depends on the situation” and that she would consider age, lack of a
9 criminal record, and lack of a history of violence as mitigating factors.³⁶ The record does not
10 show a sound basis for challenging Davis for cause or that there is a reasonable probability that
11 the trial court would have granted the challenge. I also find that O’Neill had a valid strategic
12 reason for not raising such a challenge.

13 For Juror Gabriel, Williams notes that her daughter worked for the Sparks Police
14 Department.³⁷ Gabriel testified that her daughter was a matron for the department, not a
15 uniformed officer, and that she had worked there for about two years.³⁸ Gabriel also testified she
16 did not know any of her daughter’s co-workers. The record does not show a sound basis for
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19 ³¹ ECF No. 262 at 42 (citing ECF No. 263-3 at 104, 110).

20 ³² ECF No. 263-3 at 104, 110.

21 ³³ *Id.* at 107.

22 ³⁴ *Id.* at 100.

23 ³⁵ *Id.* at 111.

24 ³⁶ *Id.* at 112, 114.

25 ³⁷ ECF No. 262 at 42 (citing ECF No. 263-4 at 14). Williams does not allege, nor does it appear from the
26 record, that the Sparks Police Department was involved in the investigation of this case or in
27 apprehending Williams.

28 ³⁸ ECF No. 263-4 at 18.

1 challenging Gabriel for cause or that there is a reasonable probability the trial court would have
2 granted the challenge.

3 For Juror Cheeks, Williams notes that he was a uniformed police officer.³⁹ Cheeks
4 testified that he formerly worked as a police officer for the Department of Defense for about
5 three years and a peace officer for a college campus for one year.⁴⁰ O'Neill questioned him
6 extensively on how those positions might impact his ability to serve as an impartial juror.⁴¹
7 None of his answers suggested that he would be a biased juror.⁴² The record does not show a
8 sound basis for challenging Cheeks for cause or that there is a reasonable probability the trial
9 court would have granted the challenge.

10 For Juror Hengerer, Williams alleges that he "indicated he could not devote full attention
11 to the trial because, he testified, 'I just don't believe I can split myself from my work.'"⁴³
12 Hengerer testified that he was the manager of a liquor store.⁴⁴ When he indicated that he would
13 not be able to devote one hundred percent of his attention to the trial, O'Neill developed
14 testimony indicating the trial would be occurring during the holiday season, the busiest time of
15 the year for store, and that Hengerer would be distracted from his duties as a juror.⁴⁵ She then
16 twice challenged him for cause on that basis.⁴⁶ The trial court denied both challenges.⁴⁷ O'Neill
17 performed effectively in attempting to remove Hengerer as a juror.

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19 ³⁹ ECF No. 262 at 42 (citing ECF No. 263-5 at 11).

20 ⁴⁰ ECF No. 263-5 at 11, 15.

21 ⁴¹ *Id.* at 11-17.

22 ⁴² *Id.*

23 ⁴³ ECF No. 262 at 42 (citing ECF No. 263-6 at 45).

24 ⁴⁴ ECF No. 263-6 at 35.

25 ⁴⁵ *Id.* at 45-47.

26 ⁴⁶ *Id.* at 47,55.

27 ⁴⁷ *Id.* at 49, 56.

1 For Juror Mongolo, Williams alleges that “he indicated all murders should be punished
2 with the death penalty [and] that there were no factors he would consider to negate that.”⁴⁸ After
3 Mongolo expressed this opinion, O’Neill explained to him the penalty phase process, including
4 the presentation of aggravating and mitigating evidence, and the three possible penalties – life
5 with the possibility of parole, life without the possibility of parole, or death.⁴⁹ When asked
6 follow-up questions, Mongolo testified that he could consider the sentencing options, that he
7 would follow the law, that he did not believe that all murderers should die, and that he
8 understood that the law required him to consider factors irrespective of his personal feelings.⁵⁰
9 Mongolo confirmed these points when responding to questions posed by the prosecuting
10 attorney.⁵¹ The record does not show a reasonable probability that the trial court would have
11 excused Mongolo for cause if O’Neill had raised such a challenge.

12 For Juror Parker, Williams alleges that she “admitted knowing about the crime through
13 the media and that it ‘sounded bad.’”⁵² While she testified that she had seen media reports about
14 the crime, Parker also testified that she “didn’t know the details.”⁵³ Her opinion that the crime
15 “sounded bad” was followed up with, “I mean, there were others that did sound bad also.”⁵⁴ So
16 her opinion was not necessarily focused on Williams’ case, as much as murders in general.
17 When asked her opinion of the death penalty, she responded, “The only thing I can say about it
18 is, I really don’t like it, but in cases [sic], I guess it has to be.”⁵⁵ The record does not show a

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20 ⁴⁸ ECF No. 262 at 42 (citing ECF No. 263-3 at 23).

21 ⁴⁹ *Id.* at 23-24.

22 ⁵⁰ *Id.*

23 ⁵¹ *Id.* at 29-30.

24 ⁵² No. 262 at 42 (citing ECF No. 263-3 at 8).

25 ⁵³ ECF No. 263-3 at 8.

26 ⁵⁴ *Id.*

27 ⁵⁵ *Id.* at 10.
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1 sound basis for challenging Parker for cause or that there is a reasonable probability the trial
2 court would have granted the challenge. I also find that O’Neill had a valid strategic reason for
3 not raising such a challenge.

4 For the foregoing reasons, I am unable to conclude that O’Neill provided ineffective
5 assistance in failing to challenge certain jurors for cause. I also note that, while only two were
6 excused, O’Neill challenged five jurors and two alternate jurors for cause.⁵⁶ Williams claims
7 that O’Neill failed to ask sufficient questions to support challenges for cause but does not
8 support the claim with specific examples. He also alleges that many of the jurors were exposed
9 to pretrial publicity, but that alone is not grounds for challenging a juror for cause. *See Gallego v.*
10 *McDaniel*, 124 F3d 1065, 1071 (9th Cir. 1997) (holding that “a defendant is entitled to an
11 impartial jury, [but] he is not entitled to a jury completely ignorant of the facts.” (quoting *United*
12 *States v. Sherwood*, 98 F3d 402, 410 (9th Cir. 1996)).

13 Finally, Williams alleges that O’Neill was ineffective by not challenging the racial
14 composition of the jury. While a defendant has the right to be tried by a jury drawn from a
15 representative cross-section of the community, there is “no requirement that petit juries actually
16 chosen must mirror the community and reflect the various distinctive groups in the population.”
17 *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975). To prevail on a fair cross-section claim, the
18 defendant must show: “(1) that the group alleged to be excluded is a ‘distinctive’ group in the
19 community; (2) that the representation of this group in venires from which juries are selected is
20 not fair and reasonable in relation to the number of such persons in the community; and (3) that
21 this underrepresentation is due to systematic exclusion of the group in the jury selection
22 process.” *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

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26 ⁵⁶ The challenges for cause are located in the record as follows: Juror Comer (ECF No. 263-3 at 88),
27 Juror Hull (*Id.* at 180), Juror Kline (ECF No. 263-5 at 44), Juror Seymour (*Id.* at 60), Juror Hengerer
28 (ECF No. 263-6 at 47, 55), Juror Amendola (*Id.* at 940), and Juror Olson (*Id.* at 112).

1 According to Williams' own statistics, African-Americans comprised less than two
2 percent of the population of Washoe County at the time of his trial.⁵⁷ Thus, the absence of an
3 African-American from his jury pool was not unreasonable in relation to the number of African-
4 Americans in the community. And even if it was, Williams makes no showing that African-
5 Americans were systematically excluded in the selection process for his jury pool. Accordingly,
6 he has not shown a reasonable probability that O'Neill could have successfully challenged the
7 racial composition of the jury. Claim 1(D) is denied.

8 Claim 1(E) – In Claim 1(E), Williams alleges counsel was ineffective by inducing him to
9 plead guilty based upon her claim that she was personal friends with the trial judge, Robert
10 Schouweiler, and that he would not vote to sentence him to death. Williams claims that advising
11 him to plead guilty on that basis was unreasonable and that, but for that advice, he would not
12 have pleaded guilty.

13 Williams pleaded guilty to murder in the first degree and manslaughter after four days of
14 jury selection and one day of testimony. O'Neill advised the court that one of the reasons for
15 entering the plea was so that Williams would be sentenced by a three-judge panel rather than the
16 jury that had been empaneled.⁵⁸ She stated that "we feel we didn't receive a fair and impartial
17 jury, and we'd like to go forward with a 3-judge panel."⁵⁹ Prior to entering his plea, Williams
18 confirmed that he had "spent considerable time" over the weekend discussing with O'Neill the
19 sentencing procedure and the entry of his plea.⁶⁰ The trial court had Williams confirm that
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21

22 ⁵⁷ ECF No. 262 at 43.

23 ⁵⁸ ECF No. 173-5 at 3. Under Nevada law at the time, a three-judge sentencing panel was appointed
24 when a defendant pleaded guilty to first-degree murder. Nev. Rev. Stat. § 175.558 (repealed by Laws
25 2003, c. 366, § 8, eff. June 9, 2003).

26 ⁵⁹ *Id.* at 4.

27 ⁶⁰ *Id.* at 6.

1 O'Neill had not promised him anything in exchange for his plea⁶¹ and that no one had coerced
2 him to enter the plea.⁶²

3 As noted above, O'Neill testified in post-conviction review proceedings that she had
4 prepared a defense conceding Williams' participation in the burglary, but claiming that he was
5 not the one who killed Katherine Carlson.⁶³ According to her testimony, she and Williams
6 "went over and over his testimony regarding the facts, and the many inconsistencies in his
7 testimony."⁶⁴ Eventually, Williams broke down and "confessed to [her] that he had actually
8 done the killing, and [said] he didn't feel he could hold up under cross examination."⁶⁵ Those
9 revelations, combined with "the fact that we didn't believe that we had ... a fair and impartial
10 jury," caused them to consider other options. She then conferred with several members of her
11 office and had the most experienced attorney, Lew Carnahan, explain the three-judge panel
12 option to Williams.⁶⁶ When she "was assured that all his questions had been answered ...
13 regarding the three-judge panel," she left the decision to Williams, who decided "to change his
14 plea on Monday."⁶⁷

15 Williams testified at the same hearing. According to his testimony, he did not tell
16 O'Neill that he committed the murder.⁶⁸ He pleaded guilty to murder because O'Neill told him
17 that he would have a better chance with a three-judge panel than with a jury and that Judge
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19 ⁶¹ *Id.* at 6-7.

20 ⁶² *Id.* at 8

21 ⁶³ ECF No. 173-14 at 11, 33.

22 ⁶⁴ *Id.* at 34.

23 ⁶⁵ *Id.*

24 ⁶⁶ *Id.* at 35.

25 ⁶⁷ *Id.*

26 ⁶⁸ *Id.* at 39.

1 Schouweiler was a very good friend of hers.⁶⁹ She told him that the most he “would probably
2 get was life without” and that Judge Schouweiler did not believe in the death penalty.⁷⁰ On
3 cross-examination, Williams testified that he did not want to plead guilty but that he and O’Neill
4 “debated with it for quite a while” and “[t]hen she persuaded me, with the help of Lew Carnahan,
5 to plead guilty, because she thought it was the best for me.”⁷¹

6 Williams’ aunt, Mozelle Williams, also testified at the hearing. According to her
7 testimony, O’Neill told her and Williams that Williams “would come out better with a three-man
8 judge trial,” that “she knew one of the judges very well, and he was against the death penalty,”
9 and that “the most Cary would get was 20 years” if he went with the three-judge panel.⁷² When
10 recalled as a witness by the State, O’Neill testified that she never told Williams or any of his
11 relatives that his sentence would be 20 years at the most.⁷³

12 Finally, the prosecuting attorney, Don Nomura, also testified at the post-conviction
13 hearing. According to his testimony, he advised O’Neill that “he was not receptive to any type
14 of negotiation on the case,” that he was “seeking the death penalty,” and that he was “not going
15 to alter his position in that regard.”⁷⁴ In addition, the “evidence in this case [was]
16 overwhelming” and that, while he had not sought the death penalty in previous murder cases, it
17 was “mandated” in this case “by virtue of the facts and circumstances.”⁷⁵

18 I conclude that, while O’Neill may have discussed with Williams her acquaintance with
19 Judge Schouweiler, the record does not support a finding that it was a significant factor in

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21 ⁶⁹ *Id.*

22 ⁷⁰ *Id.* at 40-41.

23 ⁷¹ *Id.* at 48.

24 ⁷² ECF No. 173-15 at 5.

25 ⁷³ *Id.* at 7-8.

26 ⁷⁴ *Id.* at 10.

27 ⁷⁵ *Id.* at 11.

1 Williams' decision to plead guilty. The evidence against Williams, which included his multiple
2 confessions to the police that he did the stabbing,⁷⁶ was very strong. O'Neill reasonably
3 determined, and advised Williams, that he stood a better chance of avoiding the death penalty if
4 he entered a guilty plea so that he could be sentenced by a three-judge panel rather than a jury
5 that she viewed as biased. O'Neill's testimony that the decision was discussed at length among
6 her, Williams, and Carnahan is corroborated by Williams' own testimony.

7 In addition, Williams' testimony that he never admitted to the murder to O'Neill and that
8 she and Carnahan persuaded him to plead guilty against his will lacks credibility. Compared to
9 Williams, O'Neill would have little reason to fabricate a claim that he had confessed to her.
10 When asked on cross-examination how O'Neill and Carnahan persuaded him, Williams testified
11 that they told him that compared to a jury the three-judge panel would not be swayed by "brutal
12 pictures" because O'Neill was "pretty sure that at least two of the Judges that were on the three-
13 judge panel had been to Vietnam, and had seen worse[] crimes than this."⁷⁷ This testimony is
14 highly suspect given that the two judges who would join Judge Schouweiler on the panel would
15 not be selected until after the plea was entered. Similarly, Mozelle Williams' claim that O'Neill
16 guaranteed that Williams would get 20 years at the most is inconsistent with Williams' testimony
17 that she told him that life without the possibility of parole would be the maximum sentence.⁷⁸

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19 ⁷⁶ ECF No. 173-5 at 14, ECF No. 173-14 at 50.

20 ⁷⁷ ECF No. 173-14 at 49.

21 ⁷⁸ Williams cites to a declaration from one of his post-conviction attorneys to support Claim 1(E). ECF
22 No. 135 at 34-35 (citing No. 136-3 at 487-89). Executed in 1999 and presented with Williams' defaulted
23 2003 state petition, the declaration is excluded from my consideration by 28 U.S.C. § 2254(e)(2). *See*
24 *Williams v. Taylor*, 529 U.S. 420, 437 (2000) (holding that § 2254(e)(2) prohibits the federal habeas court
25 from considering evidence not presented to the state court in the manner prescribed by state law unless
26 the stringent requirements of the subsection are met); *see also Shinn v. Ramirez*, 142 S. Ct. 1718, 1734
27 (2022) (holding that *Martinez v. Ryan* does not allow a habeas petitioner to bypass the restrictions
28 imposed by 28 U.S.C. § 2254(e)(2)). Even if I were to consider it, I would assign the declaration little
weight. The attorney states in the declaration that O'Neill had told him that she was convinced that Judge
Schouweiler would not vote for the death penalty. ECF No. 136-3 at 489. However, the same attorney
did not raise the issue presented in Claim 1(E) in either of the post-conviction petitions he filed in 1988.
ECF No. 173-17 at 9-23.

1 In sum, I am unable to conclude there is a reasonable probability that, but for
2 unreasonable advice from O'Neill, Williams would not have pleaded guilty and would have
3 insisted on going to trial. Claim 1(E) is denied.

4 Claims 1(F) and 1(H)

5 In Claim 1(F), Williams alleges counsel was ineffective by unreasonably failing to
6 investigate and present substantial mitigating evidence regarding his abusive and traumatic
7 childhood. The respondents concede that “a fair reading of the Ninth Circuit’s decision
8 implicitly finds that trial counsel was deficient in preparing Williams’ mitigation case.”⁷⁹ Thus,
9 they do not contest the *Strickland* performance prong in this court, but reserve the right to
10 address the issue on appeal.⁸⁰

11 With respect to the *Strickland* prejudice analysis, the Ninth Circuit instructed as follows:

12 Once the evidence underlying [Claim 1(F)] has been further developed, the
13 district court will be in a position to determine whether Williams is entitled to
14 relief. In assessing whether there is a reasonable probability that Williams would
15 have received a different sentence, the district court should consider “the totality
16 of the available mitigation evidence,” including the evidence of brain damage,
and “reweigh[] it against the evidence in aggravation,” bearing in mind that two
of the four aggravating factors considered at Williams' sentencing have since been
stricken.

17 *Williams*, 908 F.3d at 571 (citation omitted). The court added a footnote indicating that any
18 prejudice flowing from Claim 1(H) should also be included in the prejudice analysis if the
19 district court determines that counsel’s failure to obtain Williams’ juvenile records amounts to
20 deficient performance under *Strickland*. *Id.* n. 3. The respondents concede that the juvenile
21 records are to be included in the prejudice analysis.⁸¹ The “evidence of brain damage”

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24 _____
25 ⁷⁹ ECF No. 299 at 3.

26 ⁸⁰ ECF No. 334 at 9, n. 4.

27 ⁸¹ ECF No. 299 at 3.
28

1 mentioned in the excerpt above is the evidence Williams used to support Claim 1(A).⁸²

2 “A reasonable probability is a probability sufficient to undermine confidence in the
3 outcome.” *Strickland*, 466 U.S. at 694. Typically, when examining the penalty phase of a capital
4 case, the standard requires “a reasonable probability that at least one juror” would have
5 recommended a sentence of life instead of death. *Wiggins v. Smith*, 539 U.S. 510, 537 (2003).
6 As noted above, however, Williams’ guilty plea to first-degree murder resulted in his penalty-
7 phase being held before a three-judge sentencing panel. Thus, the analysis is whether there is a
8 reasonable probability that the three-judge panel would have concluded that Williams should not
9 be sentenced death. *See Strickland*, 466 U.S. at 695 (framing the prejudice inquiry when a
10 defendant challenges a death sentence as whether there is a reasonable probability that “the
11 sentencer” would have reached a different outcome).

12 The three-judge panel found four aggravating circumstances: (1) the murder was
13 committed while the defendant was engaged in the commission of a burglary, (2) the murder was
14 committed while the defendant was engaged in the commission of a robbery with the use of a
15 deadly weapon, (3) the murder was committed by the defendant for the purpose of avoiding and
16 preventing his lawful arrest, and (4) the murder committed by the defendant involved depravity
17 of mind and torture. The panel found only one statutory mitigating circumstance: Williams was
18 19 years old at the time of the offense. The Supreme Court of Nevada later ruled that the
19 burglary and robbery aggravators should be stricken under a then-recent case (*McConnell v.*
20 *State*, 102 P.3d 606 (Nev. 2004)).⁸³ Even so, the court reweighed the two remaining aggravators
21 and concluded beyond a reasonable doubt that the three-judge sentencing panel still would have
22 found Williams death-eligible and imposed a death sentence.⁸⁴

23 _____
24 ⁸² The Ninth Circuit determined that the evidence of brain damage used to support Claim 1(A) “was not
25 sufficient on its own” to establish *Strickland* prejudice, but that this court’s prejudice analysis on remand
26 must include the evidence. *Williams*, 908 F.3d at 561.

26 ⁸³ ECF No. 145-2 at 7-15.

27 ⁸⁴ *Id.*

1 1. Aggravating evidence presented at trial

2 Under Nevada law, evidence that does not prove an aggravating circumstance is still
3 admissible if it relates to the offense, the defendant, or the victim and its probative value is not
4 substantially outweighed by the danger of unfair prejudice. *McKenna v. State*, 968 P.2d 739, 744
5 (Nev. 1998). At the penalty hearing, the State first presented the testimony of three residents of
6 Horizon Hills, the housing development where the murder occurred. Each testified that their
7 respective homes had been burglarized in June of 1982.⁸⁵ When Williams testified later in the
8 hearing, he admitted to committing the burglaries.⁸⁶

9 The State then presented the testimony of Detective Loyal Means, who testified about
10 Williams' flight from Washoe County the day after the murder and his arrest in Los Angeles the
11 following month.⁸⁷ He also provided an account of his interview of Williams wherein Williams
12 admitted to being in a gang in Los Angeles, to burglarizing homes in Horizon Hills, and to
13 planning to burglarize the Carlson home.⁸⁸ According to Means' testimony, Williams also
14 initially identified a person named Victor Conway as the killer, but subsequently confessed that
15 he was the one who killed Katherine.⁸⁹ After Detective Means, Sergeant Richard Putnam
16 testified briefly about Williams providing statements with three different versions of the burglary
17 and murder.⁹⁰

18 The State also presented the testimony of Katherine's husband, Alan Carlson, who
19 provided background information about Katherine (she was a 26 year-old nurse who worked in
20 the neonatal intensive care unit at Washoe County Medical Center) and himself (he was a

21 _____
22 ⁸⁵ ECF No. 173-6 at 11-12, 16, 20-21.

23 ⁸⁶ ECF No. 173-9 at 37-38.

24 ⁸⁷ ECF No. 173-6 at 35-36.

25 ⁸⁸ *Id.* at 36-41.

26 ⁸⁹ *Id.*

27 ⁹⁰ ECF No. 173-7 at 2-4.

1 firefighter for the Airport Authority of Washoe County).⁹¹ He testified about Katherine’s
2 healthy pregnancy after having had three miscarriages.⁹² He also recounted his discovery of
3 Katherine’s body upon returning home from work the morning after the murder.⁹³

4 Finally, the State presented the testimony of Dr. Roger Ritzlin, a medical doctor and
5 pathologist. He testified that he observed Katherine’s body at the scene of the murder, attended
6 the autopsy, and reviewed the autopsy report and photographs.⁹⁴ (The doctor who performed the
7 autopsy, Dr. J. Cobb Malin, testified in the abbreviated guilt phase.⁹⁵) He testified that Katherine
8 had 38 identifiable stab wounds that were large enough to be counted and several smaller ones,
9 all of which were inflicted before she died.⁹⁶ As noted by the Ninth Circuit, Ritzlin, testified
10 that:

11 Ms. Carlson suffered several different types of knife wounds during the attack: three
12 potentially fatal wounds to the chest; a number of defensive wounds on Ms. Carlson's
13 hands and arms; and a third type of wound that Dr. Ritzlin described as “punctate”
14 wounds—small, superficial cuts where the skin had been punctured, consistent with the
15 victim having been poked with a knife. Dr. Ritzlin concluded that these superficial
16 puncture wounds were non-fatal and non-defensive in nature. On that basis, he
17 concluded that Ms. Carlson had been tortured before being killed.

18 *Williams*, 908 F.3d at 574.

19 2. Mitigation evidence presented a trial

20 O’Neill’s case for mitigation consisted of the testimony of several friends and relatives
21 who described Williams’ redeeming qualities and provided information about his upbringing in
22 South-Central Los Angeles.

23 ⁹¹ *Id.* at 9-11.

24 ⁹² *Id.* at 11-12.

25 ⁹³ *Id.* at 13-17.

26 ⁹⁴ *Id.* at 28-29.

27 ⁹⁵ ECF No. 263-7 at 89-104.

28 ⁹⁶ ECF No. 173-7 at 30.

1 Williams' aunt, Inez Kelly,⁹⁷ provided family background information and explained that
2 Williams and his siblings lived with her after his mother died when he was nine years old.⁹⁸ She
3 testified that Williams, as the eldest, would take care of his four younger sisters and that he was
4 "so sweet."⁹⁹ She also testified that Williams was very close with his grandmother, Lois
5 Williams, and that when he was about 12, he went to live with Lois and her daughter, Katheryn
6 Carter.¹⁰⁰ She further testified that, when he was about 15 or 16, Williams moved in with his
7 aunt, Jean Williams.¹⁰¹

8 Williams' sister, Cynthia Williams, testified about living in several different homes
9 during their childhood and described her close relationship with Williams.¹⁰² She explained that
10 she only saw her and Williams' biological father one time after her mother died, that Williams
11 was the closest thing she had to a father, and that Williams was in charge of taking care of her
12 and her sisters.¹⁰³ Another sister, Latonia Enge, also testified about Williams taking care of her
13 and her sisters.¹⁰⁴ A third sister, April Enge, testified that Williams should not be sentenced to
14 death because he was a good person and that he was never mean to her.¹⁰⁵ Williams' then-
15 fiancée, Maurica Hawkins, testified that Williams should not be sentenced to death because "you
16

17 ⁹⁷ Inez Kelly identified herself as Inez Armstrong when she testified at the penalty hearing but later
18 provided a declaration for Williams' post-conviction proceedings under the name Inez Kelly, which is
19 also the name that appears in the Ninth Circuit's decision remanding this case. So, to avoid confusion, I
20 refer to her here as Inez Kelly.

21 ⁹⁸ ECF No. 173-7 at 43-44.

22 ⁹⁹ *Id.* at 44-46.

23 ¹⁰⁰ *Id.* at 51.

24 ¹⁰¹ ECF No. 173-8 at 3.

25 ¹⁰² *Id.* at 15-17.

26 ¹⁰³ *Id.* at 19-20.

27 ¹⁰⁴ *Id.* at 31-33.

28 ¹⁰⁵ *Id.* at 26-37.

1 shouldn't take a life for a life" and because "he is young and he hasn't begun yet to live his
2 life."¹⁰⁶

3 Williams' aunt, Mozelle Washington,¹⁰⁷ testified about Williams coming to live with her
4 for about three months when Jean Williams was not getting along with her husband.¹⁰⁸ She
5 described some of Williams' redeeming qualities, but also noted that he had some personal
6 troubles and that he had a difficult upbringing because there was "a lot of women and not enough
7 boys in the house."¹⁰⁹ She also testified that Williams lost both his grandmother and his Uncle
8 John (Mozelle's husband), two people he loved dearly, within seven months in 1980 (when
9 Williams was 17 years old). Williams' great uncle, Jessie Williams, testified that he had
10 employed Williams for four years and described him as smart, reliable, and the best worker he
11 had ever seen.¹¹⁰ He further testified that Williams should not receive the death penalty because
12 he had not had a chance to grow up.¹¹¹

13 Williams' close friend, Russell Duckworth, testified about he and Williams lifting weights
14 together and going to community college together.¹¹² He also testified about the rough
15 neighborhood he and Williams lived in and their desire to get out of it.¹¹³ Williams' former
16 neighbor, Danine Perry, testified about Williams helping her fix up her house and take care of
17 her children even though they did not know each other.¹¹⁴ She also commented on how rough

18 ¹⁰⁶ *Id.* at 40.

19 ¹⁰⁷ This is the same aunt who testified as Mozelle Williams in Williams' state post-conviction
20 proceedings.

21 ¹⁰⁸ *Id.* at 48.

22 ¹⁰⁹ *Id.* at 50.

23 ¹¹⁰ ECF No. 173-9 at 6.

24 ¹¹¹ *Id.* at 8.

25 ¹¹² *Id.* at 14-15.

26 ¹¹³ *Id.* at 16-17.

27 ¹¹⁴ *Id.* at 21.

1 their neighborhood was and confirmed that there was parts of it “where white people would fear
2 to go.”¹¹⁵

3 Williams testified about his family and the people who raised him.¹¹⁶ He testified about
4 attending numerous schools growing up and then briefly attending community college until he
5 was shot in a drive-by shooting.¹¹⁷ According to his testimony, he then moved San Diego for a
6 short time, where he worked mixing cement and cleaning up parks.¹¹⁸ He returned to Los
7 Angeles but did not want to stay, so he used connections he had established while boxing in the
8 Job Corps program a few years earlier to relocate to Reno.¹¹⁹ He testified about living with his
9 boxing manager in Horizon Hills, training for boxing, and working as a maintenance person in
10 the subdivision prior to the murder.¹²⁰ He also testified about his daily drinking and marijuana
11 use at the time of the offense.¹²¹ He recounted the circumstances of the murder and claimed that
12 it was the result of him panicking upon finding Katherine in what he assumed was an empty
13 house.¹²² He also described what happened afterward and how he turned himself in.¹²³

14 The defense’s final witness was Jean Williams, the aunt Williams lived with in his late
15 teens. She testified that she was aware of Williams’ crimes and misbehavior as a juvenile and
16 tried to straighten him out by talking to his probation officer, trying to send him to camp, and
17

18 ¹¹⁵ *Id.* at 24.

19 ¹¹⁶ *Id.* at 28-29.

20 ¹¹⁷ *Id.* at 29-31.

21 ¹¹⁸ *Id.* at 31- 32.

22 ¹¹⁹ *Id.* at 32-34.

23 ¹²⁰ *Id.* at 34-35.

24 ¹²¹ *Id.* at 41.

25 ¹²² *Id.* at 40-45.

26 ¹²³ *Id.* at 46-51.

1 consulting with him.¹²⁴ She also testified that she was aware of how gruesome the murder was
2 but that she still loved Williams and thought he should be given a second chance.¹²⁵

3 3. Mitigation evidence presented in federal habeas proceedings

4 The Ninth Circuit's opinion faulted O'Neill for presenting a mitigation case that
5 "portrayed Williams as a thoughtful and dutiful child who grew up with the support of a loving
6 family, despite being 'bounced around a little bit' between homes and schools." *Williams*, 908
7 F.3d at 567. The opinion noted that, "[i]n light of Williams' proffered evidence, we now know
8 that an adequate investigation would have revealed an upbringing marred by violence and
9 upheaval, and a family life rife with abuse and neglect." *Id.* The opinion includes an overview of
10 what the proffered evidence would have demonstrated. The proffered evidence included 15
11 declarations from relatives and friends and expert reports prepared in 1999 by Dr. David
12 Schmidt, a clinical neuropsychologist, and Dr. Dennis DePry, a psychiatrist.

13 As a starting point, I find, for reasons that follow, that much of the Ninth Circuit's
14 overview of the proffered evidence was not borne out by the evidence presented to this court on
15 remand.¹²⁶ The overview begins with a paragraph detailing the physical abuse inflicted by
16 Williams' stepfather, Tommy Enge, "beginning when Williams was five years old." *Id.* at 567-
17 68. It includes a statement that "Williams' sister remembers one occasion on which Mr. Enge
18 beat an eight-year-old Williams 'like he was hitting a man.'" *Id.* at 568. Three of Williams'
19 sisters (Cynthia, Yolanda Williams, and Latonia) mentioned Enge being physically abusive in
20 their declarations, but none of the three mentioned it when they testified at the evidentiary

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22 ¹²⁴ ECF No. 173-10 at 43.

23 ¹²⁵ *Id.* at 43-45.

24 ¹²⁶ On this point, I note the various expert reports admitted at the hearing mention some of the same
25 events and occurrences contained in the Ninth Circuit's overview. But those reports rely heavily on
26 secondhand sources that were not admitted as an exhibit or on interviews with Williams, who did not
27 testify at the hearing. Indeed, two of the experts relied heavily on "social history" reports that were not
28 only not admitted as exhibits, but have not been provided to this court in any form. Exhibits 13 and 16.
When cross-examined at the evidentiary hearing, neither expert was able to identify who had drafted the
reports. ECF No. 329 at 76; ECF No. 330 at 82.

1 hearing.¹²⁷ In fact, Latonia characterized the household with her mother, Sophia, and Enge as
2 “nothing but love” and “the happy house.”¹²⁸ Also, the “like he was hitting a man” quote did not
3 come from one of Williams’ sisters but instead from the declaration of Williams’ Aunt
4 Katheryn,¹²⁹ which was not admitted as an exhibit at the hearing. So, while Tommy Enge may
5 have been physically abusive, there is only secondhand support for it in the admitted evidence.¹³⁰

6 The Ninth Circuit opinion then discusses the abuse and neglect the kids endured when
7 they were taken in by Aunt Inez and her husband Roosevelt after Sophia’s death. *Williams*, 903
8 F.3d. at 568. This was better supported with evidence presented at the hearing, but not quite as
9 dramatically as portrayed in the opinion. Williams’ sisters and his Aunt Jean testified at the
10 hearing about Inez whipping the children with extensions cords and making them stay in a dark
11 closet for hours. With respect to the latter, however, Latonia testified that Williams did not get
12 the closet punishment,¹³¹ and neither Aunt Jean or Cynthia could say whether he did or did
13 not.¹³² There is also a lack of direct evidence that Roosevelt “frequently beat Williams,” as the
14 Ninth Circuit stated in its opinion. *Williams*, 908 F.3d at 568. Aunt Jean testified that she did not
15 know whether Roosevelt ever hit Williams.¹³³ Yolanda testified that she “believe[d] there was
16 one time they had a physical altercation.”¹³⁴ Latonia testified that Williams escaped to his Uncle
17

18 ¹²⁷ The final sister, April, is deceased but her declaration was admitted as an exhibit at the hearing
19 (Exhibit 25). Her declaration does not mention any abuse, but she likely would not have been old enough
20 to remember events that occurred while the family lived with Enge.

21 ¹²⁸ ECF No. 328 at 93.

22 ¹²⁹ ECF No. 136-3 at 141.

23 ¹³⁰ For example, the reports of Dr. DePry and Dr. Schmidt, which were admitted as exhibits at the hearing,
24 both mention Enge’s abusiveness. Exhibit 10 at 6; Exhibit 11 at 2.

25 ¹³¹ ECF No. 328 at 101.

26 ¹³² *Id.* at 31, 134.

27 ¹³³ ECF No. 328 at 33.

28 ¹³⁴ *Id.* at 49.

1 Jessie's house when Roosevelt "beat him up pretty bad,"¹³⁵ but did not mention any other
2 beatings. In her testimony, Cynthia also mentioned only one physical altercation between the
3 two, after which Williams went to live with his uncle.¹³⁶ The quote in the opinion about
4 Roosevelt hitting Williams "like he was hitting a punching bag" (*Williams*, 908 F.3d at 568)
5 comes from Cynthia's declaration describing the same incident.¹³⁷ April's declaration, which
6 was admitted as an exhibit because she is deceased, states that it was usually Inez who imposed
7 the punishment, but that sometimes it was Roosevelt.¹³⁸ Her declaration also mentions Williams
8 running away at about 12 years old after being beaten by Roosevelt.¹³⁹ So, the evidence clearly
9 supports a beating that caused Williams to run away to Uncle Jessie's, but not frequent
10 beatings.¹⁴⁰

11 The Ninth Circuit's opinion also twice mentions Williams being left helpless to prevent
12 the sexual abuse of his sisters -- once in reference to Roosevelt and once in reference to Aunt
13 Katheryn's husband Larry Joe Carter. *Williams*, 908 F.3d at 568. The hearing testimony,
14 however, does not support a finding that the sexual abuse was a prevalent or pronounced as the
15 opinion suggests, or that it had a significant impact on Williams. With respect to Roosevelt,
16 Yolanda testified that he tried to inappropriately touch Cynthia and that he tried to touch her
17 "one time," but never tried again after she reported it to Inez.¹⁴¹ Cynthia's only testimony on the
18 subject was that Roosevelt "touched me and Yolanda before" and that Inez didn't do anything
19

20 ¹³⁵ *Id.* at 105-06.

21 ¹³⁶ *Id.* at 138-39.

22 ¹³⁷ ECF No. 136-3 at 241-42.

23 ¹³⁸ Exhibit 25 at 4.

24 ¹³⁹ *Id.*

25 ¹⁴⁰ I also note that the declaration of Inez's neighbor at the time, which was admitted as an exhibit at the
26 hearing, indicates that Roosevelt's presence in the home was sporadic. Exhibit 23 at 2,4.

27 ¹⁴¹ ECF No. 328 at 50.

1 when she told her about it.¹⁴² Neither sister mentioned whether Williams was aware of the
2 incidents. With respect to Larry Joe Carter, Yolanda testified that he was a “pedophile” who
3 “would always try to break in the bathroom on the girls when they were trying to take baths” and
4 “tried to make it a game where it would be a feely-touchy-type thing where he’s trying to play
5 with you.”¹⁴³ Latonia testified that he was a “like a sexual predator” who “would be trying to
6 feel on your body parts” and “trying to give a sneak feel.”¹⁴⁴ Cynthia testified that Larry Joe
7 would “touch and feel on us.”¹⁴⁵ Of the three sisters, only Cynthia testified about informing
8 Williams about Larry Joe’s conduct¹⁴⁶ and none of them testified about what impact it may have
9 had on Williams. April’s declaration does not mention any sexual abuse at all.¹⁴⁷

10 The hearing testimony shows that Aunt Jean’s husband, Lawrence Enge, was a threat to
11 the Williams’ sisters and Aunt Jean.¹⁴⁸ However, it also shows that, rather than feeling helpless,
12 Williams (who was around 17 years old at the time) would confront Lawrence and “call him out
13 to fight like a man.”¹⁴⁹

14 Finally, the Ninth Circuit opinion discusses violence, drug use, and suicide attempts that
15 occurred in Williams’ teenage years. *Williams*, 908 F.3d at 569. Much of this information
16 appears to have come from what Williams told Dr. DePry or Dr. Schmidt when they evaluated
17 him in 1999¹⁵⁰ and is either not corroborated or contradicted by other evidence presented at the

18 ¹⁴² *Id.* at 126.

19 ¹⁴³ *Id.* at 57-58.

20 ¹⁴⁴ *Id.* at 111.

21 ¹⁴⁵ *Id.* at 141.

22 ¹⁴⁶ *Id.* at 142.

23 ¹⁴⁷ Exhibit 25.

24 ¹⁴⁸ *Id.* at 62, 116, 146.

25 ¹⁴⁹ *Id.* at 116.

26 ¹⁵⁰ Exhibit 10 at 3,8; Exhibit 11 at 4.

1 hearing. For example, there was no evidence or testimony presented at the hearing about a group
2 of teenagers placing a sawed-off shotgun in Williams' mouth, with him being saved by a passing
3 police car and returning home to find his family already mourning his death. And, while medical
4 records show that Williams was shot two different times (once in the leg and once in the side of
5 his chest), they also show that he did not undergo three surgeries to remove the bullet from his
6 chest as the opinion indicates. Instead, they show that, after initially being treated at the hospital,
7 Williams opted not to have the bullet removed because it did not seem to bother him.¹⁵¹ When it
8 did start to bother him a few months later, he had it removed from under his rib in a single,
9 uneventful surgery, with him being released from the hospital the following day.¹⁵²

10 The information about Williams' alcohol and drug abuse is well-supported by evidence
11 and testimony presented at the hearing, but there is no credible evidence to support a finding that
12 he attempted to commit suicide by overdosing on sleeping pills when he was 16 years old. As
13 for the car wreck when Williams was 18 years old, Cynthia, Aunt Jean, and Yolanda all
14 mentioned it in their declarations, but not in their hearing testimony. Only Cynthia's declaration
15 suggests that it was a suicide attempt in response to the death of Williams' grandmother.¹⁵³ In
16 addition, the declarations also indicate that Williams was drunk at the time¹⁵⁴ and fled the
17 scene.¹⁵⁵ And, none of the declarations mention a "severe head injury" (or any injury at all), and
18 one of the declarations states that Williams was "unhurt."¹⁵⁶

19 While the evidence presented on remand does not fully substantiate the Ninth Circuit's
20 overview of Williams' childhood and adolescence, the evidence does add considerable weight to
21

22 ¹⁵¹Exhibit 35 at 17, 35.

23 ¹⁵² *Id.* at 34-36.

24 ¹⁵³ ECF No. 136-3 at 245-46.

25 ¹⁵⁴ *Id.* at 245-6, 273.

26 ¹⁵⁵ *Id.* at 245-46, 257.

27 ¹⁵⁶ *Id.* at 245-6, 257, 273.

1 the mitigation case O'Neill presented at Williams' trial. Without question, Williams' upbringing
2 included traumatic events, abuse, and neglect that O'Neill failed to convey to the three-judge
3 panel. Beyond what I discuss above in relation to the Ninth Circuit's overview, the evidence
4 revealed the following details of that upbringing.

5 Sophia gave birth to Williams when she was 16 years old.¹⁵⁷ Williams' father was
6 married at the time and was never a significant presence in Williams' life.¹⁵⁸ Over the next six
7 years, Sophia had a daughter (Cynthia) with the same father, a second daughter (Yolanda) by a
8 different father, and two more daughters (Latonia and April) with Tommy Enge, whom she
9 married.¹⁵⁹ As noted above, there is conflicting evidence as to what life was like for Sophia and
10 the children while living with Enge. One thing is certain, however: Williams' life was soon
11 turned upside down by Sophia's death when he was 9 years old.

12 Working as a nurse at the time, Sophia was diagnosed with cancer when she was 26 years
13 old.¹⁶⁰ Williams was extremely close to his mother and was devastated when she passed away a
14 few days before Christmas.¹⁶¹ Cynthia remembers Williams trying to pull their mom out of the
15 casket at the funeral.¹⁶² And, although he was only 9 years old, Williams felt that it was his
16 responsibility to take over the care of his four younger sisters.¹⁶³ His countenance became much
17 more serious and he was no longer a "happy-go-lucky" child.¹⁶⁴

18 Rather being allowed to grieve the passing of their mother in a supportive atmosphere,
19

20 ¹⁵⁷ Exhibits 26 and 35.

21 ¹⁵⁸ ECF No. 328 at 22; Exhibit 26 at 3-4.

22 ¹⁵⁹ Exhibits 28-31, 48.

23 ¹⁶⁰ ECF No. 328 at 69-70.

24 ¹⁶¹ Exhibit 22 at 1; ECF No. 328 at 85, 128.

25 ¹⁶² ECF No. 328 at 128.

26 ¹⁶³ *Id.* at 79-80, 85.

27 ¹⁶⁴ *Id.* at 85, 97.

1 Williams and his sisters were taken in by an aunt who was clearly not looking out for their best
2 interests. Aunt Inez, who lived in Englewood with Roosevelt, was extremely strict with the
3 children, giving them numerous chores to complete and not permitting them to play outside
4 when she was not home.¹⁶⁵ She also kept her and Roosevelt's food separate from the children's
5 and confined the children to certain parts of the house.¹⁶⁶ Yolanda was Inez's favorite and was
6 treated better than the others.¹⁶⁷ Williams, on the other hand, was tasked with taking care of his
7 younger siblings and often took the blame, and the punishment, for their misconduct.¹⁶⁸ As
8 noted above, Inez's chosen punishment was a whipping with an extension cord, which left scars
9 on Williams, Cynthia, and Latonia that they still have.¹⁶⁹ In addition, the relationship between
10 Inez and Roosevelt was beset with physical violence, alcohol abuse, and infidelity, which added
11 yet more trauma to the lives of Williams and his sisters.¹⁷⁰

12 After the violent altercation with Roosevelt when he was about 12 years old, Williams
13 moved to Aunt Jean's apartment while his sisters remained with Inez and Roosevelt.¹⁷¹ He left
14 there after a few months to live with Aunt Katheryn and Larry Joe Carter in Watts.¹⁷² That
15 household included Grandma Lois, the Carters' children, and various other relatives.¹⁷³ Soon
16 thereafter, Williams' sisters (except for Yolanda) joined him there.¹⁷⁴ The abuse and neglect of

17 ¹⁶⁵ *Id.* at 28, 46, 99, 131; Exhibit 23 at 1.

18 ¹⁶⁶ ECF No. 328 at 28, 99; Exhibit 25 at 1-2.

19 ¹⁶⁷ ECF No. 328 at 28, 102-03.

20 ¹⁶⁸ *Id.* at 28-29, 48, 135; Exhibit 23 at 1, 3-4.

21 ¹⁶⁹ ECF No. 328 at 30, 99-100, 132-33; Exhibits 47 and 49.

22 ¹⁷⁰ ECF No. 328 at 103, 106, 135-36; Exhibit 25 at 3.

23 ¹⁷¹ Exhibit 22 at 2; Exhibit 25 at 4.

24 ¹⁷² ECF NO. 328 at 107; Exhibit 22 at 2.

25 ¹⁷³ ECF No. 328 at 31, 52-54, 108.

26 ¹⁷⁴ *Id.* at 54-56; Exhibit 25 at 4-5.

1 Williams and his sisters continued at the Carters, who were more concerned with the children's
2 social security benefits than their well-being.¹⁷⁵ Like Inez, Katheryn imposed odd rules
3 regarding food, restricting the children's access to food reserved for Larry Joe and making them
4 eat "different food" than her and Larry Joe.¹⁷⁶ Larry Joe wanted to be in charge of the children's
5 social security checks.¹⁷⁷ When the checks arrived each month, the adults in the house would get
6 in physical fights over them.¹⁷⁸ The children's needs were secondary, with Grandma Lois being
7 the only adult who would make sure they were provided for.¹⁷⁹ Larry Joe and Katheryn would
8 also try to take Grandma Lois' money, so Williams would try to protect her, which was another
9 source of friction between him and Larry Joe.¹⁸⁰ On one occasion, after he had left to stay with
10 his Uncle John, Williams got into a physical fight with Katheryn, Larry Joe, and another aunt
11 when he returned to claim his check.¹⁸¹

12 After staying at Aunt Katheryn's house for a few years, Williams left to live with Aunt
13 Jean and Lawrence in Compton.¹⁸² For varying periods of time, his sisters lived there with him
14 after Katheryn's house caught fire in 1980.¹⁸³ Jean was not physically abusive, but she made the

15
16 ¹⁷⁵ *Id.*

17 ¹⁷⁶ ECF No. 328 at 32, 110-11, 140-41.

18 ¹⁷⁷ *Id.* at 34.

19 ¹⁷⁸ *Id.* at 34, 110.

20 ¹⁷⁹ *Id.* at 110.

21 ¹⁸⁰ *Id.* at 56-59.

22 ¹⁸¹ *Id.* at 142-43. The Ninth Circuit's opinion states that "[t]he Carters beat Williams and his sisters for a
23 range of small infractions." *Williams*, 908 F.3d at 568. The declaration of April Enge makes some
24 reference to this (Exhibit 25 at 6) but none of the three sisters who testified at the evidentiary hearing
mentioned any of the children being beaten while living with Katheryn and Larry Joe.

25 ¹⁸² ECF No. 328 at 59, 63-64.

26 ¹⁸³ Cynthia and Latonia joined him there right after the house fire, and April followed later that year. *Id.* at
27 112, 144; Exhibit 22 at 6-7. Yolanda moved over from Inez's when she was in the seventh grade but
28 stayed for only one school year. ECF No. 328 at 60.

1 Williams' children do all the chores and take care of her children.¹⁸⁴ Rather than act like a
2 parent figure to Williams, she encouraged him to steal food for the family and took him out to
3 nightclubs.¹⁸⁵ Lawrence was an alcoholic and smoked marijuana in the house "all the time."¹⁸⁶
4 He had a bad temper and on several occasions beat up Jean in front of the children.¹⁸⁷ Williams
5 stood up for Jean and tried to protect her from Lawrence.¹⁸⁸ Williams' sisters recognized that
6 Lawrence was a pedophile and resorted to drastic measures to protect themselves, such as
7 sleeping with weapons.¹⁸⁹ Latonia had to fight off Lawrence on two occasions, but he stopped
8 bothering her after she told her father about the second incident.¹⁹⁰

9 Without a doubt, Williams lacked adequate adult supervision, guidance, and support in
10 these various living situations. By his early teens, he was drinking alcohol and smoking
11 marijuana at least weekly and missing school for several days at a time.¹⁹¹ He was arrested for
12 sniffing glue just prior to his fourteenth birthday and, about a month later, was sniffing glue
13 again when he was arrested for battery on a woman who had confronted him after he jumped
14

15 _____
16 ¹⁸⁴ ECF No. 328 at 60, 114, 145.

17 ¹⁸⁵ *Id.* at 61, 115, 117.

18 ¹⁸⁶ *Id.* at 62; Exhibit 25 at 7.

19 ¹⁸⁷ ECF No. 328 at 116; Exhibit 25 at 8.

20 ¹⁸⁸ ECF No. 328 at 37, 116; Exhibit 25 at 8.

21 ¹⁸⁹ ECF No. 328 at 62, 116-17.

22 ¹⁹⁰ *Id.* at 116-17. The Ninth Circuit's opinion states that when "Williams and his sisters ... returned to
23 live with Aunt Jean and Lawrence," Lawrence "continued to sexually abuse one of Williams' sisters."
24 *Williams*, 903 F.3d at 568. I respectfully note that this a mischaracterization of the information contained
25 in the declarations submitted to the Ninth Circuit. First, there is no indication in the declarations that any
26 of Williams' sisters accompanied Williams when he briefly lived with Aunt Jean and Lawrence the first
27 time. Second, only Latonia's declaration mentions being sexually abused by Lawrence and, consistent
28 with her hearing testimony, it recounts only the two attempted molestations before she told her father
about it. ECF No. 136-3 at 184. Indeed, she testified that the second incident may have occurred the day
after the first. ECF No. 328 at 116-17.

¹⁹¹ Exhibit 22 at 2; Exhibit 33 at 4-5, 6.

1 over her fence and tried to grab her 3-year-old daughter.¹⁹² When Williams was taken for
2 medical treatment after this incident, Aunt Jean signed him out of the hospital against medical
3 advice.¹⁹³ A psychiatrist who evaluated Williams a few months later recommended individual
4 and group psychotherapy,¹⁹⁴ but there is no evidence that was ever provided to him.

5 Without any meaningful adult intervention or treatment, Williams' substance abuse,
6 truancy, and criminal activity continued for the next few years as he bounced from school to
7 school.¹⁹⁵ When he did attend school, he put forth little effort and was disruptive in class.¹⁹⁶
8 When he was 16 years old, Williams entered the Job Corps program in Reno for a few months
9 before resigning when faced with a disciplinary action and returning to Los Angeles.¹⁹⁷

10 In March of 1980, just before Williams turned 17, Grandma Lois died.¹⁹⁸ She had been
11 like a "second mom" to the Williams children and was the adult who had provided the most love
12 and support for Williams.¹⁹⁹ Williams took her death very hard.²⁰⁰ He was arrested for robbery
13 a few months later and ordered to attend a camp for juvenile offenders.²⁰¹ Shortly thereafter, he
14 was dealt another blow when his Uncle John died in November 1980.²⁰² Williams was also very
15 close to Uncle John, a positive role model for him who would visit him often and take him

16 ¹⁹² Exhibit 33 at 2-3.

17 ¹⁹³ Exhibit 35 at 4.

18 ¹⁹⁴ Exhibit 36 at 5-6.

19 ¹⁹⁵ Exhibits 32, 33, 34; ECF No. 330 at 54.

20 ¹⁹⁶ Exhibits 33, 34.

21 ¹⁹⁷ Exhibit 33 at 73; Exhibit 39 at 24, 31.

22 ¹⁹⁸ ECF No. 328 at 118.

23 ¹⁹⁹ ECF No. 328 at 35, 62, 119.

24 ²⁰⁰ *Id.*; Exhibit 25 at 8.

25 ²⁰¹ Exhibit 33 at 97, 100.

26 ²⁰² ECF No. 328 at 118.

1 places.²⁰³ Williams’ relatives say that his demeanor changed for the worse after the two deaths
2 and that he started hanging out with the wrong people.²⁰⁴ Even so, he reportedly did well at the
3 camp, making “excellent progress” in his behavior, work habits, and academics and graduating
4 from the 18-week program in March of 1981.²⁰⁵ After his brief stints attending community
5 college and working in San Diego, Williams moved to Reno a few months before his 19th
6 birthday.

7 As for evidence of brain damage, the Ninth Circuit noted that Dr. Schmidt “reported that
8 Williams’ brain damage likely hampered his ‘ability to anticipate the long term consequences of
9 his actions’ and made him ‘more likely to act-out in a criminal manner.’” *Williams*, 908 F.3d at
10 561–62. The court further noted that “Dr. DePry concurred in these diagnoses, and added that
11 Williams suffered from mixed personality disorder with dependent and schizoid traits.” *Id.* at
12 562. On remand, Williams presented the testimony and findings of Paul Connor, Ph.D., a
13 clinical neuropsychologist who evaluated Williams in 2021. Because Dr. Schmidt is deceased
14 and the data supporting his report are no longer available, Dr. Connor was asked “to readminister
15 as many of the same tests as possible from the 1999 evaluation.”²⁰⁶ Williams also presented the
16 deposition testimony of Dr. Erin Bigler, another neuropsychologist, who confirmed that the type
17 of testing conducted by Dr. Schmidt and Dr. Connor could have been conducted in 1982.²⁰⁷

18 In his 1999 report, Dr. Schmidt opined that Williams had suffered sufficient brain
19 damage to cause a change of functioning that “include increased impulsivity, problems with
20 judgment, poor overall problem solving abilities, and difficulty incorporating significant
21

22 ²⁰³ *Id.* at 35-36, 62, 118-19, 139.

23 ²⁰⁴ *Id.* at 36, 63, 144; Exhibit 25 at 8.

24 ²⁰⁵ Exhibit 33 at 101-02.

25 ²⁰⁶ Exhibit 5 at 1.

26 ²⁰⁷ ECF No. 310-2 at 11.

1 information (e.g., important facts) into his decision making process.”²⁰⁸ Dr. Connor reached
2 similar conclusions.²⁰⁹ He testified that Williams was “demonstrating mild neurocognitive
3 deficit, neurocognitive disorder, in multiple domains of functioning, especially visuospatial
4 abilities, executive functions, planning, problem solving, reasoning, things like that.”²¹⁰ He
5 agreed with Dr. Schmidt that the likely culprit was head injuries Williams had received
6 combined with polysubstance abuse during his developmental years.²¹¹ Dr. Connor’s
7 intelligence testing showed that Williams’ full scale-IQ is 89 with verbal comprehension in the
8 average range but processing speed in the low average range.²¹² Overall, Williams performed
9 well on tests related to language-based skills, overall attention, and motor coordination, but
10 showed impairment on tests related to processing speed, math, nonverbal intellectual skills,
11 executive functions, abstract reasoning, and problem-solving.²¹³ Both Dr. Connor and Dr. Bigler
12 noted in their testimony that even a “mild” neurological deficiency can significantly impact an
13 individual’s ability to function in day-to-day life.²¹⁴

14 When it denied Claim 1(A) on the merits, this court reasoned that “Dr. Schmidt’s report
15 contains information that may have actually hurt Williams’ chances for a more lenient
16 sentence.”²¹⁵ The court cited Dr. Schmidt’s finding that individuals sharing Williams’
17 personality profile are “angry, argumentative, and resentful of any demands being placed upon
18

19 ²⁰⁸ Exhibit 11 at 12.

20 ²⁰⁹ ECF No. 329 at 155.

21 ²¹⁰ *Id.* at 103.

22 ²¹¹ *Id.* at 115; Exhibit 11 at 12.

23 ²¹² ECF No. 329 at 120. This is consistent with a full scale-IQ score of 90 when Williams was tested in
24 1982. Exhibit 40 at 4.

25 ²¹³ *Id.* at 131-34; Exhibit 9 at 13-16.

26 ²¹⁴ ECF No. 329 at 105; ECF No. 310-2 at 11-12.

27 ²¹⁵ ECF No. 196 at 11.

1 them” and may “become hostile and angry [when] their expectations are not met.”²¹⁶ That
2 finding was based on the result of a Minnesota Multiphasic Personality Inventory - 2nd Edition
3 (MMPI-2) that Dr. Schmidt had administered.²¹⁷ James N. Butcher, Ph.D, a psychologist who
4 administered the prior version of the MMPI on Williams just before his trial in 1982, produced a
5 report with similar, and even more troubling, findings. According to that report, individuals with
6 Williams’ personality profile are “among the most difficult criminal offenders,” “tend to have
7 antisocial, aggressive, and hostile attitudes toward others,” and “engage in violent crimes against
8 other people.”²¹⁸ The report also states that these individuals present “a difficult case for
9 rehabilitation,” may require “segregate[ion] from weaker inmates during incarceration,” and are
10 “not likely to benefit much from individual insight-oriented psychotherapy.”²¹⁹ Both reports
11 contain disclaimers as to the validity of the profile, but the similarity of their findings cannot be
12 overlooked. And, while both Dr. Connor and Dr. Bigler testified about the MMPI in the general
13 sense, neither expert addressed the personality profile findings of Dr. Schmidt or Dr. Butcher.

14 Finally, Williams presented the testimony and reports of two additional experts -- Cheryl
15 Paradis, Psy.D, a clinical and forensic psychologist, and Jorja Leap, Ph.D., an expert in social
16 work and psychocultural studies within anthropology. Prior to the evidentiary hearing, the
17 respondents moved to exclude this testimony on the grounds that Williams’ habeas petition does
18 not allege that counsel was ineffective by failing to present such testimony and the testimony is
19 beyond the scope of the Ninth Circuit’s remand.²²⁰ I agreed that the respondents’ arguments had
20 some merit, but decided to allow the testimony while reserving judgment as to what weight, if
21

22 _____
23 ²¹⁶ Id. (citing ECF No. 136-3, p. 110).

24 ²¹⁷ Exhibit 11 at 5-6.

25 ²¹⁸ Exhibit 40 at 2.

26 ²¹⁹ Id.

27 ²²⁰ ECF No. 305.

1 any, I would give it.²²¹

2 Dr. Leap was asked to look at “the relationship between Mr. Williams, what occurred in
3 his family, what occurred in his life trajectory, and the interaction of that with the surrounding
4 environment in South Los Angeles,” and to offer an expert opinion on the impact those factors
5 taken together had “on self-determination and agency.”²²² She identified and discussed four
6 themes relevant to understanding Williams’ life history: (1) attachment, separation, loss;
7 (2) community violence; (3) agency and trauma; and (4) institutional failure.²²³ Among her
8 conclusions was that the losses and traumas Williams experienced, the violence and lawlessness
9 of his environment growing up, and his untreated substance abuse and mental health issues all
10 combined to deprive him of control over his own life (i.e., agency) and “the ability to judge the
11 dangerousness of a situation or the damage it could engender.”²²⁴

12 While Dr. Leap’s testimony and report may have provided some insight into the factors
13 contributing to Williams’ conduct, I am not convinced that I can consider it as part of my
14 prejudice analysis. The Ninth Circuit’s mandate is that I am to “consider ‘the totality of the
15 available mitigation evidence,’ including the evidence of brain damage.” *Williams*, 908 F.3d at
16 571. Read in context, this is limited to the evidence supporting Claims 1(A), 1(F), and 1(H).
17 Claim 1(F) of Williams’ petition refers to “competent expert evaluation” but cites only the
18 reports of Dr. Schmidt and Dr. DePry.²²⁵ In addition, Williams has not demonstrated that
19 testimony similar to that provided by Dr. Leap was “available mitigation evidence” in 1982, at
20 least not in the sense that it was the type of evidence capital attorneys were expected to present
21 under the “prevailing professional norms” of the time. *See Strickland*, 466 U.S. at 688. He cites

22 _____
23 ²²¹ ECF No. 316 at 2.

24 ²²² ECF No. 330 at 28.

25 ²²³ *Id.* at 37-80.

26 ²²⁴ Exhibit 16 at 43-44.

27 ²²⁵ ECF No. 135 at 53.

1 to some sources that, according to him, “recognize that social workers and psychosocial
2 expertise were being used as early as 1981 to provide context to a defendant’s life,”²²⁶ but he
3 makes no showing that it was common practice.

4 Dr. Paradis was asked “to evaluate the case in terms of what a competent mental health
5 professional would have done in ... the early 1980s in terms of evaluating Mr. Williams to assess
6 the presence of trauma and how it affected him and ... what a competent mental health
7 professional would have testified to at the sentencing phase.”²²⁷ She identified and discussed
8 five categories of trauma Williams experienced: (1) loss, (2) physical abuse, (3) emotional abuse,
9 (4) neglect, and (5) additional trauma outside of the home.²²⁸ Summarizing her conclusions, she
10 testified that a competent mental health professional at the time of Williams’ trial would have
11 testified that “Williams suffered severe losses and severe traumas that affected him greatly
12 psychologically, that he developed psychiatric illness, and that he did not receive the treatment
13 he needed,” all of which was exacerbated by substance abuse.²²⁹ In addition, she opined in her
14 report that a competent professional could have testified that Williams’ criminal behavior
15 “stemmed from the many traumas he experienced interacting with the circumstances he faced at
16 the time of the instant offense.”²³⁰

17 While the evidence presented through Dr. Paradis is marginally closer to the type of
18 evidence I am to consider on remand, the respondents established on cross-examination that her
19 report and testimony were largely based on unconfirmed information and focused on events that
20 fit her narrative, while ignoring those that did not.²³¹ Among other things, cross-examination

21 ²²⁶ ECF No. 336 at 28.

22 ²²⁷ ECF No. 329 at 15-16.

23 ²²⁸ *Id.* at 20-44.

24 ²²⁹ *Id.* at 72-73.

25 ²³⁰ Exhibit 13 at 55.

26 ²³¹ ECF No. 329 at 74-87.

1 revealed that she did not interview family members (she just read their declarations) and did not
2 know who prepared the social history memorandum that she relied on as a source for her
3 report.²³² It also revealed that she knew very little about the various programs and special
4 schools Williams had been enrolled in as part of his juvenile probation.²³³ She noted in her
5 report that Uncle John was the only positive male role model in Williams' life, but made no
6 mention of Uncle Jessie and was not aware that Uncle Jessie had testified on Williams' behalf at
7 the penalty hearing.²³⁴ She also selectively quoted portions of the 1982 MMPI report that
8 supported her ultimate conclusions and overlooked the more troubling aspects of the report
9 discussed above.²³⁵ In sum, it is likely the three-judge panel would have found ample reasons to
10 question the validity of Dr. Paradis' report and testimony.

11 *4. Reweighing*

12 As noted, the two aggravating circumstances remaining in this case are: (1) Williams
13 committed the murder for the purpose of avoiding and preventing his lawful arrest and (2) the
14 murder involved depravity of mind and torture. Even without the two stricken aggravating
15 circumstances, which were "in effect one significant aggravator based on the circumstances of
16 the killing,"²³⁶ these two aggravating circumstances far outweigh the lone mitigating
17 circumstance. Thus, like the Supreme Court of Nevada, I conclude beyond a reasonable doubt
18 that the three-judge panel would have found Williams death-eligible without the two stricken
19 aggravating circumstances.

20 Williams argues that the torture and depravity of mind aggravator should not be part of
21 my reweighing analysis because the depravity of mind portion has been ruled unconstitutional by

22
23 ²³² *Id.* at 75-76.

24 ²³³ *Id.* at 78-80.

25 ²³⁴ *Id.* at 82-83.

26 ²³⁵ *Id.* at 83-85; Exhibit 13 at 32-33.

27 ²³⁶ ECF No. 145-2.

1 the Supreme Court, the Ninth Circuit, and the Supreme Court of Nevada, and the testimony
2 supporting torture was “successfully impeached.”²³⁷ This argument lacks merit. First, the
3 torture and depravity of mind aggravating circumstance has not been stricken in this case.
4 Williams raised a challenge to the aggravator as Claim 15 of his habeas petition,²³⁸ but this court
5 determined the claim was barred by the doctrine of procedural default.²³⁹ That determination
6 was affirmed by the Ninth Circuit on appeal. *See Williams*, 908 F.3d at 580 (“Because Nevada
7 Revised Statutes § 34.726 is an independent and adequate state procedural bar to federal review,
8 we affirm the district court’s order dismissing the following claims: 3, 5–7, 10–13, 15, and 17–
9 38.”).

10 Second, the aggravator has been successfully challenged in other cases, but only the
11 depravity of mind aspect of the aggravator has been invalidated. *See Valerio*, 306 F.3d at 751
12 (“We held that the torture and mutilation parts of the instruction were ‘sufficiently clear and
13 objective to satisfy the requirements of *Godfrey*,’ but held that the depravity of mind part of the
14 instruction was unconstitutionally vague.”). Here, the three-judge panel found both depravity of
15 mind and torture.²⁴⁰ While this court previously found that O’Neill effectively cross-examined
16 Dr. Ritzlin’s testimony on the issue of torture, the court did not rule that there was insufficient
17 evidence to support torture as an aggravating circumstance.²⁴¹ O’Neill’s cross-examination
18 notwithstanding, Dr. Ritzlin’s testimony together with autopsy photographs²⁴² provided
19 sufficient evidence to support the three-judge panel’s decision on torture. Finally, Williams
20

21 ²³⁷ ECF No. 300 at 3-6; ECF No. 336 at 39 (both citing *Godfrey v. Georgia*, 446 U.S. 420, 432-33 (1980);
22 *Valerio v. Crawford*, 306 F.3d 742, 750–51 (9th Cir. 2002) (en banc); and *Robins v. State*, 798 P.2d 558,
570 (Nev. 1990)).

23 ²³⁸ ECF No. 135 at 112-14.

24 ²³⁹ ECF No. 165 at 15.

25 ²⁴⁰ ECF No. 173 at 4.

26 ²⁴¹ ECF No. 196 at 15-16.

27 ²⁴² ECF No. 333.

1 attempts to analogize this case to *Valerio* and a Nevada state supreme court case, *Chappell v.*
2 *State*, 972 P.2d 838, 842 (Nev. 1998). But in *Valerio* the prosecutor conceded the evidence did
3 not support a finding of torture (306 F.3d at 762), and in *Chappell*, unlike in this case, “there
4 [was] no evidence that Chappell stabbed [his victim] with any intention other than to deprive her
5 of life” (972 P.2d at 842).

6 Having reweighed “the totality of the available mitigation evidence” against the evidence
7 in aggravation, I conclude that the mitigation evidence would not have significantly “altered the
8 sentencing profile” presented to the three-judge panel. *See Strickland*, 466 U.S. at 700. Thus, the
9 available mitigating evidence does not satisfy the “high bar” established by the Supreme Court
10 for granting relief in cases “involving claims of ineffective assistance of counsel at the penalty
11 phase of a capital trial.” *See Shinn v. Washington*, 46 F.4th 915, 931 (9th Cir. 2022) (citing
12 *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v.*
13 *Beard*, 545 U.S. 374 (2005); and *Porter v. McCollum*, 558 U.S. 30 (2009)); *see also Rhoades v.*
14 *Henry*, 638 F.3d 1027, 1051 (9th Cir. 2011) (“Even the more complete picture portrayed in the
15 proffer of Rhoades’s dysfunctional family with its alcoholism, abuse, aberrant sexual behavior,
16 and criminal conduct does not depict a life history of Rhoades himself that is nightmarish as it
17 was for the petitioners in cases such as *Rompilla*, *Wiggins*, and *Williams* . . .”).

18 I cannot overlook that the victims in this case were a nurse in her mid-20s and her unborn
19 child, who were brutally murdered in their own home. *See Ochoa v. Davis*, 50 F.4th 865, 900
20 (9th Cir. 2022) (citing the fact that Ochoa’s two victims were “very sympathetic” as a reason
21 Ochoa failed to establish *Strickland* prejudice). Her husband, a firefighter, came home from
22 working all night to discover that his young family had been taken from him in an unspeakably
23 grisly manner. In short, it is hard to envision more sympathetic victims than those in this case.
24 Next, this is not a case in which the sentencer heard practically no mitigating evidence. *Cf.*
25 *Rompilla*, 545 U.S. at 378, (“*Rompilla*’s evidence in mitigation consisted of relatively brief
26 testimony . . .”); *Wiggins*, 539 U.S. at 516 (“At no point did [counsel] proffer any evidence of
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1 petitioner’s life history or family background.”). As recounted above and in this court’s prior
2 order denying habeas relief, the three-judge panel heard extensive testimony about “the adverse
3 conditions Williams faced growing up in violent and crime-ridden communities in southern
4 California,” which included the death of his mother when he was 9 years old, the responsibility
5 of taking care of his sisters as they bounced from home to home, falling into substance abuse and
6 being the victim of a drive-by shooting, and the loss of two of the family members closest to him
7 when he was 17.²⁴³ The panel also heard about Williams’ more positive attributes and his efforts
8 to improve his situation.²⁴⁴

9 What the three-judge panel did not hear about was the abuse and neglect Williams was
10 subjected to in his various living situations or the full extent of his substance abuse and mental
11 health problems. On remand, Williams was provided the opportunity to further develop the
12 evidence in these areas, but much of the evidence he presented was conflicting or confusing. For
13 example, testimony about how the Williams children were treated during their stays with various
14 relatives varied significantly depending on the witness’ perspective. While Aunt Jean and most
15 of Williams’ sisters described the unfavorable conditions at Aunt Inez’s, Yolanda testified that
16 Inez loved and took care of all the kids and that Williams was “happy there” and “had his friends
17 to hang out with.”²⁴⁵ Similarly, most of the sisters described being mistreated by Aunt Jean, but
18 Cynthia testified that Aunt Jean made them feel welcome and did not treat them “like a
19 commodity” or try to take their money.²⁴⁶ All the siblings seemed to agree that life at Aunt
20 Katheryn and Larry Joe’s was a crowded mess where they were either ignored or treated poorly
21 while the adults fought over their social security benefits, but April states in her declaration that
22 Williams “stayed there off and on, but never for a very long at a time” and was, instead, “shifting

23 ²⁴³ ECF No. 196 at 9-10.

24 ²⁴⁴ *Id.*

25 ²⁴⁵ ECF No. 328 at 45-46, 51-52.

26 ²⁴⁶ *Id.* at 145-46.

1 around from my aunt Jean's, to my uncle John's, to my aunt Mozelle's, to my uncle Jessie's."²⁴⁷
2 And because the siblings were scattered among various relatives at different times (especially
3 after Williams left Inez's home at 12 or 13), I am able determine whether Williams witnessed or
4 endured much of what his sisters and Aunt Jean testified about. For example, Cynthia testified
5 that Lawrence tried to touch her inappropriately when she lived at Aunt Jean's house, but when
6 asked whether Williams was able to protect her, she responded that he was not living there
7 anymore.²⁴⁸

8 I further find that the brain damage evidence O'Neill could have presented at Williams'
9 penalty hearing does not add significant weight to his case for mitigation. The evidence does not
10 show that his ability to appreciate the wrongfulness of his conduct at the time of the offense was
11 significantly impaired. And while I accept as true Dr. Connor and Dr. Bigler's testimony that
12 even mild neurological impairment can significantly impact a person's ability to function in day-
13 to-day life, neither expert testified that Williams' brain damage prevented him from controlling
14 his conduct.

15 On balance, the evidence shows that most of the adult caretakers in Williams' life failed
16 to provide him with the nurturing environment a child needs and deserves, especially a child who
17 has lost his only true parent at such a young age. Williams also experienced physical abuse that
18 no child should be forced to endure, struggled with substance abuse throughout his adolescence,
19 and, at 17 years old, lost two of the few people he could rely on for love and support. In a closer
20 case, adding the mitigation evidence Williams presented to this court on remand to the evidence
21 he presented at his penalty hearing might be sufficient to establish prejudice under *Strickland*. In
22 this case, however, because the evidence in aggravation is so strong, the mitigating evidence
23 would need to depict a life history akin to that presented in *Rompilla*, *Wiggins*, and *Williams*. See
24 *Rhoades*, 638 F.3d at 1051-52 (comparing the mitigating evidence to the aggravating evidence in

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26 ²⁴⁷ Exhibit 25 at 5.

27 ²⁴⁸ ECF No. 146-47.

1 those Supreme Court cases). Williams had a very difficult childhood, but the evidence falls far
2 short of showing a “life history” as “nightmarish as it was for the petitioners in [those] cases.”
3 *Id.*; see also *Washington v. Shinn*, 46 F.4th at 934 (finding that Washinton’s mitigating evidence
4 “is not nearly as substantial or extreme as the mitigating evidence in the four Supreme Court
5 decisions”). In sum, “the aggravating circumstances were too strong, and the new mitigating
6 evidence added too little, to create a reasonable probability of a different outcome.” *Id.* at 1049.

7 Claims 1(F) and 1(H) are denied.

8 Claim 1(J) -- In Claim 1(J), Williams alleges counsel was ineffective by failing to raise
9 certain objections or file certain motions. For the most part, Williams claims without elaboration
10 that he is entitled to relief due to his trial counsel’s failure to raise or adequately litigate nearly all
11 the errors alleged throughout his petition.²⁴⁹ The only claim he supports with specific factual
12 allegations is his claim that counsel was ineffective by failing to establish that Williams’
13 statements to the police were inadmissible under *Edwards v. Arizona*, 451 U.S. 477 (1981).
14 Therefore, all of Claim 1(J) except for Williams’ IAC claim premised on *Edwards* is dismissed
15 for failure to state a claim. See *Jones v. Gomez*, 66 F.3d 199, 204 (9th Cir. 1995) (“It is well-
16 settled that ‘[c]onclusory allegations which are not supported by a statement of specific facts do
17 not warrant habeas relief.’” (alteration in original) (quoting *James v. Borg*, 24 F.3d 20, 26 (9th
18 Cir. 1994))).

19 Williams alleges that O’Neill was ineffective by not presenting evidence to establish that
20 his statements to the police were taken in violation of *Edwards* and instead allowing the
21 prosecutor to present his unsworn testimony as to the circumstances of the interrogation. In
22 considering an accused’s rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court in
23 *Edwards* held “that an accused [who has] expressed his desire to deal with the police only
24 through counsel, is not subject to further interrogation by the authorities until counsel has been
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27 ²⁴⁹ ECF No. 135 at 57-58.
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1 made available to him, unless the accused himself initiates further communication, exchanges, or
2 conversations with the police.” 451 U.S. at 484–85.

3 In moving to suppress the statements, O’Neill argued that a report compiled by a
4 detective for the Washoe County Sheriff’s Office demonstrated that Williams had invoked his
5 right to counsel when asked to take a polygraph examination.²⁵⁰ Accordingly, she contended
6 that detectives violated Williams’ rights under *Miranda* by taking his statements without
7 honoring his request for counsel.²⁵¹ The State argued that, because Williams had repeatedly
8 waived his rights under *Miranda* up to that point and his request “to see district attorney or an
9 attorney” prior to taking the examination was equivocal, Supreme Court precedent allowed
10 police to clarify with him whether he wanted questioning to stop until he was provided a
11 lawyer.²⁵² According to the State, Williams indicated that he was willing to talk without a
12 lawyer present. *Id.* The trial court denied the motion to suppress.²⁵³

13 Williams contends that O’Neill should have presented testimony from Williams and
14 “evidence of [his] neurological and psychological impairments which made him excessively
15 compliant to the demands of authority figures.”²⁵⁴ He does not describe, however, the testimony
16 he would have provided if given the opportunity. In addition, he failed to develop any such
17 evidence in state court in the manner prescribed by state law. *See* U.S.C. § 2254(e)(2); *Shinn v.*
18 *Ramirez*, 142 S. Ct. at 1736-37. Thus, he has not shown that, but for O’Neill’s ineffectiveness,
19 there is a reasonable probability that the motion to suppress would have been granted. Claim
20 1(J) is denied.

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23 ²⁵⁰ ECF No. 173-3 at 17-23.

24 ²⁵¹ *Id.*

25 ²⁵² ECF No. 285-1 at 32-45.

26 ²⁵³ ECF No. 285-2.

27 ²⁵⁴ ECF No. 135 at 58.

1 2. *Penalty phase admission of custodial statements*

2 As described above, Williams alleges in Claim 9 a violation of his constitutional rights
3 due to the trial court's admission of his statements made in custody after his request to consult
4 with an attorney. By pleading guilty, Williams waived the claim with respect to the guilt phase
5 of his criminal proceeding. He argues, however, that the admission of the statements in the
6 penalty phase contributed to the three-judge panel's decision to sentence him to death.

7 In *Smith v. Illinois*, 469 U.S. 91 (1984), a case that was controlling authority at the time
8 Williams' conviction became final, the Court held that the threshold inquiry in determining
9 whether police questioning must stop is whether the accused has "invoked his right to counsel in
10 the first instance." 469 U.S. at 95. The Court noted that, when the asserted request for counsel is
11 "ambiguous or equivocal," the courts "have developed conflicting standards for determining the
12 consequences of such ambiguities." *Id.* The Court did not resolve the conflict because, in *Smith*,
13 the "alleged ambiguities or equivocations" neither "precede[d] ... [the] request for counsel" nor
14 were they "part of the request itself." *Id.* at 96.

15 Because the state court adjudicated Williams' constitutional claim on the merits, habeas
16 relief may be granted only if the state court's adjudication was contrary to or involved an
17 unreasonable application of clearly established federal law or was based on an objectively
18 unreasonable determination of facts in light of the evidence presented in state court. 28 U.S.C.
19 § 2254(d)(1), (2). Williams did not demonstrate to the state court that his asserted request for
20 counsel was unequivocal in light of the circumstances that preceded it or the request itself. Thus,
21 as acknowledged in *Smith*, the standard to be applied to his motion to suppress remained an open
22 question in the Supreme Court. Accordingly, no clearly established Supreme Court precedent
23 required the state court to exclude the statements, and § 2254(d) precludes relief. *See Carey v.*
24 *Musladin*, 549 U.S. 70, 77 (2006).

25 I also conclude that any error was harmless. On federal habeas review of a state
26 conviction, the court applies the harmless standard announced in *Brecht v. Abrahamson*, 507

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1 U.S. 619 (1993). *Fry v. Pliler*, 551 U.S. 112 (2007); *Taylor v. Maddox*, 366 F.3d 992, 1016 (9th
2 Cir.), *overruled on other grounds by Murray v. Schriro*, 745 F.3d 984, 999–1000 (9th Cir. 2014);
3 *see also Sims v. Brown*, 425 F.3d 560, 572-73 (9th Cir. 2005) (assessing under *Brecht* whether
4 admission of statements obtained in violation of *Miranda* likely had substantial and injurious
5 effect in determining capital habeas petitioner’s sentence), *amended*, 430 F.3d 1220 (9th Cir.
6 2005). Under the *Brecht* harmless error standard, habeas relief may be granted only if a federal
7 court has “grave doubt” about whether a non-structural constitutional error had a “substantial and
8 injurious effect or influence in determining the jury’s verdict.” *Davis v. Ayala*, 135 S. Ct. 2187,
9 2197-98 (2015) (citation and internal quotation marks omitted). A “reasonable probability” that
10 an error was harmful is insufficient. *Id.* at 2198 (quoting *Brecht*, 507 U.S. at 637) (internal
11 quotation marks omitted). A petitioner must have been “actually prejudiced” by the
12 constitutional error to merit federal habeas relief. *Id.* (quoting *Calderon v. Coleman*, 525 U.S.
13 141, 146 (1998) (per curiam)) (internal quotation marks omitted).

14 In the penalty phase of William’s trial, the State presented a transcript and an audio tape
15 of Williams’ statement to a detective that included his confession that he killed Katherine.²⁵⁵
16 When the State attempted to present a videotape of a statement Williams made in the presence of
17 a sergeant with the sheriff’s department, O’Neill objected on the grounds that it was cumulative
18 and irrelevant.²⁵⁶ The panel sustained the objection. So the transcript and audiotape of the
19 statement to the detective was the only statement admitted among those that were subject to
20 Williams’ motion to suppress. At the time of the penalty hearing, Williams had already admitted
21 in open court that he had killed Katherine Carlson.²⁵⁷ Williams does show how the transcript
22 and audio tape of his statement added significant weight to the aggravating evidence. Thus, it is
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25 ²⁵⁵ ECF No. 173-6 at 40-42.

26 ²⁵⁶ ECF No. 173-7 at 5-7.

27 ²⁵⁷ ECF No. 173-5 at 14.

1 not likely that their admission at the penalty hearing had a substantial and injurious effect on the
2 three-judge panel's decision to sentence him to death. Ground Nine is denied.

3 IV. CONCLUSION

4 For the reasons set forth above, Williams is not entitled to habeas relief.

5 V. CERTIFICATE OF APPEALABILITY

6 Because this is a final order adverse to Williams, Rule 11 of the Rules Governing Section
7 2254 Cases requires me to issue or deny a certificate of appealability (COA). Accordingly, I
8 have *sua sponte* evaluated the claims within the petition for suitability for the issuance of a COA.
9 *See* 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002).

10 A COA may issue only when the petitioner "has made a substantial showing of the denial
11 of a constitutional right." 28 U.S.C. § 2253(c)(2). With respect to claims rejected on the merits,
12 a petitioner "must demonstrate that reasonable jurists would find the district court's assessment
13 of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)
14 (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will
15 issue only if reasonable jurists could debate (1) whether the petition states a valid claim of the
16 denial of a constitutional right and (2) whether the court's procedural ruling was correct. *Id.*

17 The COA standard is not high. Williams must only "'sho[w] that reasonable jurists could
18 debate'" the district court's resolution or that the issues are "'adequate to deserve encouragement
19 to proceed further.'" *Hayward v. Marshall*, 603 F.3d 546, 553 (9th Cir. 2010) (en banc)
20 (citations omitted). Having reviewed my determinations and rulings in adjudicating Williams'
21 petition, I conclude that the *Slack* standard is met with respect to my resolution of Claims 1(F)
22 and 1(H). I therefore grant a certificate of appealability as to those claims. I decline to issue a
23 certificate of appealability for my resolution of any procedural issues or any of Williams' other
24 habeas claims.

25 I THEREFORE ORDER that Williams' third amended petition for writ of habeas corpus
26 (ECF No. 135) is DENIED. The Clerk shall enter judgment accordingly and close this case.

1 I FURTHER ORDER that a certificate of appealability is GRANTED as to my resolution
2 of the following issue:

3 Whether Williams has demonstrated prejudice, under *Strickland*, due to
4 counsel's failure to investigate and present available mitigating evidence.

5 A certificate of appealability is otherwise DENIED.

6 I FURTHER ORDER that the respondents' motion for leave to file excess pages (ECF
7 No. 335) is GRANTED *nunc pro tunc* as of December 5, 2022.

8 Dated: May 25, 2023

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12 ANDREW P. GORDON
13 UNITED STATES DISTRICT JUDGE
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