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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

PHILIP JONES,)	Case No. CV 13-7792-JWH (JPR)
)	
Petitioner,)	
)	ORDER ACCEPTING FINDINGS AND
v.)	RECOMMENDATIONS OF U.S.
)	MAGISTRATE JUDGE
KELLY SANTORO, ¹ Warden,)	
)	
Respondent.)	
)	

The Court has reviewed the Second Amended Petition, records on file, and Report and Recommendation of U.S. Magistrate Judge, which recommends that judgment be entered denying the SAP and dismissing the action with prejudice. See 28 U.S.C. § 636(b)(1). Petitioner filed objections to the R. & R. on June 16, 2021; Respondent did not reply.

Most of Petitioner’s objections simply reargue points made in his SAP and Traverse. A few warrant discussion, however. To show deficient performance by his trial counsel, he again points to counsel’s testimony during the evidentiary hearing that he did not “investigate a mental state defense.” (Objs. at 2.) As he argues, in many cases that might be “significant.” (Id.) But as the Magistrate Judge pointed out, defense counsel’s testimony

¹ Kelly Santoro is the warden of North Kern State Prison, where Petitioner is housed, and is substituted in under Federal Rule of Civil Procedure 25(d) as the proper Respondent. See also R.2(a), Rules Governing § 2254 Cases in U.S. Dist. Cts.

1 as a whole made clear that he at least somewhat investigated a
2 mental-state defense before reasonably deciding not to pursue the
3 issue further. (See R. & R. at 26-31 (summarizing defense
4 counsel's evidentiary-hearing testimony); see also id. at 39.)
5 He reviewed all five expert reports then available concerning
6 Petitioner's mental state and discussed with Petitioner's mother
7 and girlfriend his mental state immediately before the crimes.
8 (See id. at 27-29.) When Petitioner's mother mentioned a family
9 history of mental illness, he followed up by asking that she
10 provide him with more information, but she never did. (Id. at
11 28.) And counsel knew from talking to the mother that Petitioner
12 had never been in mental-health treatment and had no medical
13 records concerning it. (Id.)

14 Defense counsel also knew from reading the expert reports
15 that many of Petitioner's doctors suspected that he was
16 malingering. (See id. at 27-28; see also id. at 36-39.) As the
17 Magistrate Judge explained, he therefore reasonably decided to
18 pursue another defense at trial rather than risk having
19 Petitioner rely entirely on a flawed mental-state one. (See
20 id. at 36-41.)

21 On habeas review, "a federal court may grant relief only if
22 every 'fairminded juris[t]' would agree that every reasonable
23 lawyer would have made a different decision." *Dunn v. Reeves*,
24 141 S. Ct. 2405, 2411 (2021) (emphasis and alteration in
25 original) (quoting *Harrington v. Richter*, 562 U.S. 86, 101
26 (2011)). Given the evidence of malingering, Petitioner's
27 insistence to counsel that he did not commit the crimes (see R. &
28 R. at 26-27, 29), and the reasonableness of an identification

1 defense given many witnesses' failure to identify Petitioner and
2 the flaws in the identifications of those who did (see *id.* at 41-
3 42), that is clearly not the case here.²

4 Having reviewed de novo those portions of the R. & R. to
5 which Petitioner objects, see 28 U.S.C. § 636(b)(1)©, the Court
6 accepts the findings and recommendations of the Magistrate Judge
7 in the R. & R. as well as in the January 19, 2017 order granting
8 a stay, which the Court has read. Therefore, Judgment shall be
9 entered denying the SAP and dismissing this action with
10 prejudice.

11 **IT IS SO ORDERED.**

12
13 DATED: November 17, 2021



14 _____
15 JOHN W. HOLCOMB
16 U.S. DISTRICT JUDGE
17
18
19

20 _____
21 ² Petitioner argues that the Magistrate Judge erroneously
22 found that he raised his argument that "the superior court
23 'unreasonably determined the facts by inserting its own opinions
24 and recollections into the record'" for the first time in his
25 Traverse and therefore had forfeited it. (Objs. at 3 (citing R.
26 & R. at 44).) He points to a short statement in his SAP
27 complaining about the superior court's "leading questions" as
28 preserving the argument. (*Id.* at 3-4.) But a trial court asking
leading questions is not the same thing as it relying on its own
factual observations. In any event, as the Magistrate Judge
observed, "before the court questioned him, [defense counsel] had
testified that he considered the mental-state defense, and he
confirmed on redirect that he had weighed both defenses." (R. &
R. at 44 (citation omitted).) Thus, any leading questions and
personal observations did not play a significant role in the
state court's findings. (See also *id.* at 43-46.)