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6 UNITED STATES DISTRICT COURT
7 SOUTHERN DISTRICT OF CALIFORNIA
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9 LIONEL QUINTEROS,

10 Petitioner,

11 v.

12 DANIEL PARAMO, Warden,

13 Respondent.
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Case No.: 16-CV-583 JLS (JLB)

**ORDER DENYING MOTION FOR
RECONSIDERATION**

(ECF No. 21)

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17 Presently before the Court is Petitioner’s Motion to Permit Late Filing of Objections
18 (“MTN”, ECF No. 21). The Court construed Petitioner’s motion as one for reconsideration
19 of the Court’s Order adopting Magistrate Judge Burkhardt’s Report and Recommendation.
20 (ECF No. 22.) Respondent did not file a Reply to Petitioner’s objections. After considering
21 Petitioner’s arguments and the law, the Court **DENIES** Petitioner’s motion.

22 **BACKGROUND**

23 Judge Burkhardt’s Report and Recommendation (“R&R”) contains a thorough and
24 accurate recitation of the factual and procedural histories underlying the instant motion.
25 (*See* ECF No. 16, at 1–6.) The R&R recommended denying Petitioner’s Petition for Writ
26 of Habeas Corpus. (*Id.* at 23–24.) Any objections to the R&R were due by May 29, 2017.
27 (*Id.* at 24.) No objections were filed by this date, and on June 21, 2017, the Court adopted
28 the R&R. (ECF No. 17.) On July 14, 2017, Petitioner filed a Motion to Permit Late Filing

1 of Objections. (ECF No. 21.) Due to Petitioner’s untimely filing, the Court construed
2 Petitioner’s motion as one for reconsideration. (ECF No. 22.) In his motion, Petitioner
3 objects to various aspects of the R&R.¹

4 **LEGAL STANDARD**

5 In the Southern District of California, a party may apply for reconsideration
6 “[w]henver any motion or any application or petition for any order or other relief has been
7 made to any judge and has been refused in whole or in part.” Civ. L.R. 7.1(i)(1). The
8 moving party must provide an affidavit setting forth, *inter alia*, new or different facts and
9 circumstances which previously did not exist. *Id.*

10 Generally, reconsideration of a prior order is “appropriate if the district court (1) is
11 presented with newly discovered evidence, (2) committed clear error or the initial decision
12 was manifestly unjust, or (3) if there is an intervening change in controlling law.” *Sch. Dist.*
13 *No. 1J, Multnomah Cty. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993).
14 Reconsideration is an “extraordinary remedy, to be used sparingly in the interests of finality
15 and conservation of judicial resources.” *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d
16 877, 890 (9th Cir. 2000). Ultimately, whether to grant or deny a motion for reconsideration
17 is in the “sound discretion” of the district court. *Navajo Nation v. Norris*, 331 F.3d 1041,
18 1046 (9th Cir. 2003) (citing *Kona Enters.*, 229 F.3d at 883). A party may not raise new
19 arguments or present new evidence if it could have reasonably raised them earlier. *Kona*
20 *Enters.*, 229 F.3d at 890 (citing *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th
21 Cir. 1999)).

22 **ANALYSIS**

23 Petitioner outlines three objections to the R&R. (*See generally* MTN.) The Court
24 considers each in turn.

25 First, Petitioner argues Judge Burkhardt erred in concluding Petitioner’s Sixth and
26 Fourteenth Amendment rights were not violated by his co-defendant’s attack on counsel
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28 ¹ Petitioner’s objections are attached to his Motion. (*See* MTN 5–11.)

1 during trial. (MTN 1–3.) Specifically, Petitioner argues he was prejudiced by the attack,
2 and the “Magistrate [Judge] has not put forth any case law wherein a violent act by a
3 defendant did not result in a prejudiced jury.” (*Id.* at 2.) Petitioner raises no new evidence
4 or cites to any change in the law. Further, the Court finds no evidence Judge Burkhardt
5 committed clear error or the R&R was manifestly unjust. Judge Burkhardt concluded the
6 California Court of Appeal followed clearly established federal law in concluding the
7 presumption of prejudice to Petitioner by the jurors’ exposure to extrinsic evidence (i.e. the
8 attack on counsel) was rebutted by other evidence, which was collected by the trial court
9 at an in camera review. (R&R 11.) Judge Burkhardt also concluded even if it were
10 constitutional error not to declare a mistrial due to the jury’s exposure to extrinsic evidence,
11 any such error would be harmless. (*Id.* at 12.) Judge Burkhardt found Petitioner has not
12 shown that juror misconduct, if any, had a “substantial and injurious effect or influence in
13 determining the jury’s verdict[.]” under *Brecht v. Abrahamson*, 507 U.S. 619 (1993) (R&R
14 12.) The Court agrees. Finally, Petitioner argues Juror Number Two’s statements proved
15 Petitioner’s co-defendant’s attack on counsel affected the jury. (MTN 3.) The Court finds
16 no clear error or manifest injustice in Judge Burkhardt’s conclusion that it was objectively
17 reasonable for the trial court to determine Juror Number Two could be a fair and impartial
18 juror based on the in camera review. (R&R 15.) Therefore, the Court **DENIES** Petitioner’s
19 Motion on this claim.

20 Second, Petitioner argues Judge Burkhardt erred in concluding Petitioner’s right to
21 due process of law was not violated by being restrained during trial in front of the jury.
22 (MTN 3–4.) Judge Burkhardt concluded Petitioner’s claim was procedurally defaulted
23 because Petitioner did not challenge the use of physical restraints at trial and raised his
24 challenge for the first time on appeal. (R&R 18.) In his motion, Petitioner argues he can
25 show “cause and prejudice excusing the default” due to ineffective assistance of counsel.
26 (MTN 3 (citing *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Clabourne v. Ryan*, 745
27 F.3d 362 (9th Cir. 2014)). Petitioner argues because his trial counsel failed to object to
28 Petitioner’s restraints during trial, this amounts to ineffective assistance of counsel. (*Id.* at

1 4.) Petitioner has not raised an ineffective assistance of counsel argument prior to the
2 current motion. The Court finds there is no evidence Petitioner could not have reasonably
3 raised this argument earlier and it is therefore improper under a motion for reconsideration.
4 *See Kona Enters.*, 229 F.3d at 890. Even if this argument was procedurally proper,
5 Petitioner has not shown his counsel’s actions rose to the level of ineffective assistance of
6 counsel under *Strickland v. Washington*, 466 U.S. 668. Petitioner merely states his
7 counsel’s failure to object to the restraints was “below any objective standard of
8 reasonableness, and prejudiced the Petitioner, in that he was lumped together with the mad
9 actions of [his co-Defendant].” (MTN 4.) Accordingly, this argument fails.

10 Petitioner also argues Judge Burkhardt erred in concluding even if Petitioner’s claim
11 was not procedurally barred, or even if the use of physical restraints during trial violated
12 Petitioner’s right to due process, any error was harmless. (R&R 18, 22.) Petitioner argues
13 the use of restraints “clearly tainted the jury against the Petitioner[.]” and unduly prejudiced
14 him. (MTN 4–5.) Petitioner raises no new evidence or cites to any change in the law. The
15 Court finds no clear error or manifest unjust in Judge Burkhardt’s conclusion of harmless
16 error. Accordingly, the Court **DENIES** Petitioner’s Motion on this claim.

17 Third, Petitioner argues the facts set forth in his Petition entitle him to an evidentiary
18 hearing. (MTN 6.) Judge Burkhardt found Petitioner failed to satisfy 28 U.S.C.
19 § 2254(d) and denied Petitioner’s request for an evidentiary hearing. (R&R 23.) In his
20 motion, Petitioner provides little argument to support his position and states he “contends
21 he has put forth facts in his petition that entitle him to relief. Therefore, at a minimum, the
22 Court should order an evidentiary hearing” (MTN 6.) Finding no basis to reconsider
23 Judge Burkhardt’s decision denying an evidentiary hearing, the Court **DENIES**
24 Petitioner’s Motion on this claim.

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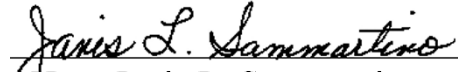
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1 **CONCLUSION**

2 Given the foregoing, the Court **DENIES** Plaintiff's Motion for Reconsideration
3 (ECF No. 21).

4 **IT IS SO ORDERED.**

5 Dated: September 18, 2017

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7 Hon. Janis L. Sammartino
8 United States District Judge
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