

1 was critical because, unlike the Federal Rules of Evidence, California evidentiary law does not
2 prohibit juror testimony showing juror bias. (Id. at 1-4). Consequently, according to Petitioner, the
3 Magistrate Judge’s conclusion that Federal Rule of Evidence 606(b) prohibits consideration of the
4 juror affidavit submitted by petitioner was erroneous, at least as applied to Petitioner’s theory that
5 counsel erred in failing to move for a new trial based on juror bias under California law. Moreover,
6 according to Petitioner, the juror affidavit proves that relief was warranted because an unnamed
7 juror’s pre-deliberation statements that he “already kn[ew] what [he was] going to do” and that he
8 “wonder[ed] if the defense [was] going to put on a case” conclusively established that the juror was
9 biased under California law. (Id. at 2-3).

10 Petitioner’s objection is not well-taken. First, as the Magistrate Judge explained in his
11 Report and Recommendation, the Federal Rules of Evidence governing competency of jurors as
12 witnesses, rather than state law, are applicable to habeas corpus petitions to determine whether
13 evidence is admissible to impeach a state court verdict. McDowell v. Calderon, 107 F.3d 1351,
14 1367-68 (9th Cir.), vacated in part on another ground, 120 F.3d 956 (9th Cir. 1997) (en banc)
15 (holding that, pursuant to Rule 606(b), juror testimony is inadmissible to impeach state court
16 verdict on federal habeas review).

17 Although Petitioner asserts that this rule is inapplicable where a Strickland claim is asserted
18 based on counsel’s failure to litigate a meritorious state law claim of juror bias, the Ninth Circuit
19 has held otherwise. See Martinez v. McGrath, 535 F. App’x 614, 615 (9th Cir. Aug. 1, 2013). In
20 Martinez, as here, the Petitioner, relying on a juror affidavit, alleged a claim of juror misconduct
21 and a corresponding claim of ineffective assistance of counsel based on counsel’s failure to
22 investigate the alleged misconduct. Id. The Ninth Circuit held that Rule 606(b) prohibited
23 consideration of the juror’s affidavit in analyzing the petitioner’s juror misconduct claim.¹
24 Consequently, according to the Ninth Circuit, the petitioner’s “underlying claim of ineffective
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26 ¹ The Ninth Circuit would have considered the affidavit to the extent that it showed that the
27 jurors considered extrinsic evidence in reaching their verdict. Martinez, 535 F. App’x at 615.
28 However, after reviewing the record, the Ninth Circuit concluded that “there was no extrinsic
evidence, and [the] [p]etitioner’s claim of juror misconduct concern[ed] only what was discussed
during deliberations.” Id.

1 assistance of trial counsel, therefore, ha[d] no substance.” Id. To be sure, in a concurring opinion,
2 one of the judges on the panel opined that the juror affidavit was admissible to resolve the
3 ineffective assistance of counsel claim because the affidavit would have been admissible under
4 state law.² Id. (Ripple, J., concurring). However, no other judge on the panel joined that
5 concurrence. Accordingly, Martinez’s holding shows that, as the magistrate judge concluded, Rule
6 606(b) prohibits consideration of the juror’s affidavit in resolving petitioner’s ineffective assistance
7 of counsel claim -- regardless of which theory petitioner advanced in support of that claim.

8 Second, as the Magistrate Judge also concluded in the Report and Recommendation, the
9 statement on which Petitioner relies does not show juror bias under California law. In support of
10 his claim of juror bias, Petitioner relies on Grobesson v. City of Los Angeles, 190 Cal. App. 4th 778,
11 118 Cal. Rptr. 3d 798 (2010). There, the appellant in a civil case argued that he was entitled to
12 a new trial based on juror misconduct where, two weeks into a five-week trial, one of the jurors
13 stated, “I made up my mind already. I’m not going to listen to the rest of the stupid argument.”
14 Id. at 784. When the plaintiff’s counsel later contacted the juror, the juror confirmed that she had
15 made up her mind to vote against the plaintiff during the second week of trial. Id.

16 On appeal, the California Court of Appeal held that the juror’s statement warranted a new
17 trial. In so holding, the Court of Appeal explained that the juror’s statement that she had made up
18 her mind about the case during the second week of trial “requires neither interpretation nor the
19 drawing of inferences. It is a flat, unadorned statement that this juror prejudged the case long
20 before deliberations began and while a great deal more evidence had yet to be admitted.” Id. at
21 794.

22 Grobesson is distinguishable from this case for many reasons. First, unlike the juror in
23 Grobesson, who evidently had determined which way she was going to vote two weeks into a five-
24 week trial, the unnamed juror in Petitioner’s case indicated that he had made up his mind as to

26 ² The concurring judge in Martinez explained that the juror affidavit was insufficient to show
27 that the petitioner was prejudiced by counsel’s purported failure to investigate the alleged juror
28 misconduct. Id. (Ripple, J., concurring) (“Despite my respectful disagreement about reliance on
Rule 606(b), I believe that the evidence of record does not establish that the defendant was
prejudiced by any shortcoming of counsel.”).

1 which way he was voting after the close of the prosecution's evidence. Second, and more
2 importantly, the unnamed juror in Petitioner's case never indicated that he would not fairly consider
3 the evidence. Indeed, unlike the juror in Grobesson, who flatly stated that she was unwilling to
4 listen to any more evidence, the unnamed juror in Petitioner's case expressed curiosity about
5 whether Petitioner would present a defense. Given that fact, the unnamed juror's statement is
6 insufficient to show that he was not "open to a fair consideration of the evidence, instructions, and
7 shared opinions expressed during deliberations." People v. Allen, 53 Cal. 4th 60, 73, 133 Cal.
8 Rptr. 3d 548, 264 P.3d 336 (2011). Finally, unlike the juror in Grobesson, who told the plaintiff's
9 counsel that she had decided to vote against the plaintiff two weeks into the five-week trial, the
10 unnamed juror in Petitioner's case did not indicate which way he planned to vote. To be sure, he
11 ultimately voted in favor of convicting Petitioner, but his pre-deliberation statement, on its own, falls
12 far short of the "flat, unadorned statement" that was present in Grobesson.

13 14 CONCLUSION

15 Based on the foregoing and pursuant to 28 U.S.C. § 636, the Court has reviewed the
16 Petition, the other records on file herein, the Magistrate Judge's Report and Recommendation, and
17 Petitioner's objections to the Report and Recommendation. The Court has engaged in a de novo
18 review of those portions of the Report and Recommendation to which objections have been made.
19 The Court concurs with and accepts the findings and conclusions of the Magistrate Judge.

20 ACCORDINGLY, IT IS ORDERED:

- 21 1. The Report and Recommendation is accepted.
22 2. Judgment shall be entered consistent with this Order.
23 3. The clerk shall serve this Order and the Judgment on all counsel or parties of record.

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25 DATED: September 18, 2017

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27 DOLLY M. GEE
28 UNITED STATES DISTRICT JUDGE