

1 court of appeal rejected all of those claims in reasoned  
2 decisions issued on May 19, 2011 (Lodgments 4, 8), except that it  
3 did not address Petitioner's Confrontation Clause argument in  
4 claim one (Lodgment 1 at 19; Lodgment 5 at 15). Subsequently,  
5 the California Supreme Court summarily denied his Petition for  
6 Review and habeas petition. (Lodgments 5, 6, 9, 10.) Thus, the  
7 Court "looks through" the state supreme court's silent denials to  
8 the last reasoned decisions as the bases for the state court's  
9 judgment. See Ylst v. Nunnemaker, 501 U.S. 797, 803-04, 111 S.  
10 Ct. 2590, 2595, 115 L. Ed. 2d 706 (1991) (holding that California  
11 Supreme Court, by its silent denial of petition for review,  
12 presumably did not intend to change court of appeal's analysis);  
13 Bonner v. Carey, 425 F.3d 1145, 1148 n.13 (9th Cir. 2005)  
14 (applying look-through doctrine to state habeas petitions). The  
15 Court reviews Petitioner's claims that were adjudicated by the  
16 state courts under the deferential AEDPA standard of review. See  
17 Richter, 131 S. Ct. at 784. The Court reviews the Confrontation  
18 Clause subclaim in claim one de novo because it was not addressed  
19 by the state courts even though Petitioner presented it to them  
20 (see Lodgment 1 at 19; Lodgment 5 at 15). See Cone v. Bell, 556  
21 U.S. 449, 472, 129 S. Ct. 1769, 1784, 173 L. Ed. 2d 701 (2009).

## 22 DISCUSSION

### 23 I. Habeas relief is not warranted on Petitioner's evidentiary 24 claim

25 Petitioner contends that the trial court violated his  
26 constitutional rights to due process and to confront witnesses by  
27 admitting a purportedly fake invoice given by defense counsel to  
28 the prosecutor before trial. (Pet. at 5.)

1           A.    Background

2           The Court has independently verified and accordingly adopts  
3 the court of appeal's factual summary regarding Petitioner's  
4 evidentiary claim:

5           After the preliminary hearing in this matter,  
6 defense counsel handed a document marked "invoice" to the  
7 prosecutor, Rachel Bowers. [FN2] Bowers did not recall  
8 the exact words spoken by defense counsel; however, she  
9 testified at trial that the invoice was presented to her  
10 as "a receipt that was given to the defendant for  
11 services rendered." The invoice contains Robertson's  
12 handwritten name at the top; indicates that four bedrooms  
13 were painted at an address on East Lancaster Blvd.; and  
14 the service was "sold by" [Petitioner]. Upon  
15 investigation, the address proved to be a home  
16 theatre/auto audio business known as California Sound  
17 Works, which does not have bedrooms and has not painted  
18 its premises in the last six years. Robertson's does not  
19 operate in Lancaster, and its business is concrete  
20 production, not house painting.

21           [FN2]       A different prosecutor handled the trial.

22           At trial, [Petitioner] sought to have the invoice  
23 excluded from evidence, ostensibly because any testimony  
24 from Bowers about the provenance of the invoice was  
25 hearsay. The prosecution contended that the invoice was  
26 relevant to prove [Petitioner]'s guilty state of mind  
27 because the invoice was - like the check [Petitioner]  
28 tried to negotiate - fake. [Petitioner]'s counsel

1           conceded that she gave Bowers the invoice, saying that it  
2           was a receipt for work performed by [Petitioner].

3 (Lodgment 4 at 4.) The trial court denied Petitioner's motion to  
4 exclude the invoice, finding that if the prosecutor could  
5 properly "lay the foundation" while questioning Bowers, the  
6 invoice would be admissible as an admission by a party opponent.  
7 (Lodgment 11, 2 Rep.'s Tr. at 606-07.)

8           The court of appeal rejected Petitioner's claim:

9           [Petitioner] now argues that no foundation was laid  
10          for admission of the invoice, reasoning that "it is  
11          unknown when the invoice was created, who authored the  
12          document, the intent of the author at the time the  
13          document was drafted, or whether the document was for  
14          services rendered in this case or some other job on some  
15          other date." [Petitioner]'s argument is misplaced. The  
16          invoice was not admitted as true documentation of an  
17          actual transaction to paint four bedrooms. Rather, it  
18          was admitted to show [Petitioner]'s consciousness of  
19          guilt: the invoice was fabricated to exonerate  
20          [Petitioner] of the criminal charges, to convince the  
21          prosecutor that [Petitioner] painted a house and  
22          legitimately received the check from Robertson's as  
23          remuneration for his services. (See People v. Alexander  
24          (2010) 49 Cal. 4th 846, 921 [fabrication of exculpatory  
25          evidence shows consciousness of guilt].) Because the  
26          prosecution was not trying to prove that this was a  
27          genuine invoice, no authentication was required.

28           A reasonable inference can be drawn that

1 [Petitioner] supplied the invoice to his attorney, who  
2 passed it on to Prosecutor Bowers. Defense counsel  
3 admitted as much to the trial court. Presumably,  
4 [Petitioner] knew who created the document, when it was  
5 created, his intent, and whether it reflected services  
6 rendered. Bowers could relate how she came into  
7 possession of the invoice, which the jury was free to  
8 believe or disbelieve. Bowers's recollection was  
9 bolstered by a letter [Petitioner] sent to the court,  
10 indicating that "a bad check [] was issued to me for my  
11 labor," which goes hand in hand with the invoice he  
12 supplied. No testimony from a work supervisor or  
13 employer vouched that [Petitioner] earned the check with  
14 his labor. There was no error in admitting the invoice  
15 to show [Petitioner]'s consciousness of guilt.

16 Even if the invoice was improperly admitted, the  
17 error was harmless. There was abundant evidence of  
18 guilt. [Petitioner] presented a check that appeared to  
19 be made on a home computer, with none of the security  
20 features used by commercial enterprises. The check  
21 proved to be fraudulent. During the bank's  
22 investigation, [Petitioner] was fidgety and looking  
23 around nervously. He slipped out without warning,  
24 leaving his identification and a check. When  
25 [Petitioner] reappeared two hours later, he was still  
26 nervous, but did not seem surprised or shocked that the  
27 bank manager refused to cash the check. An innocent  
28 person would be stunned to learn that a payroll check was

1 fraudulent and would be eager to explain the  
2 circumstances, rectify the error, and ensure payment.  
3 Instead, [Petitioner] turned on his heel, and abandoned  
4 his identification, his wallet, and the check at the  
5 bank, without explanation. [Petitioner] would have been  
6 convicted even without the invoice.

7 (Lodgment 4 at 5-6.)

8 B. Due Process<sup>2</sup>

9 A federal habeas court does not review "questions of state  
10 evidence law." Spivey v. Rocha, 194 F.3d 971, 977 (9th Cir.  
11 1999). Only if a petitioner asserts that the admission of  
12 evidence by the state court violated his due process rights is  
13 the claim cognizable on federal habeas review, and then only if  
14 the evidence rendered the trial "fundamentally unfair." Holley  
15 v. Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2009). The  
16 admission of inculpatory evidence violated due process only if no  
17 permissible inferences existed for the jury to draw from the  
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20 <sup>2</sup> Even though the court of appeal did not explicitly refer  
21 to the Due Process Clause in denying Petitioner's evidentiary  
22 claim, its analysis tracked the standard applicable under federal  
23 law by concluding that the invoice was admissible to show his  
24 consciousness of guilt. See Ortiz-Sandoval v. Gomez, 81 F.3d 891,  
25 897 (9th Cir. 1996) (holding that admission of prior-bad-acts  
26 evidence to show consciousness of guilt did not violate Due Process  
27 Clause). The court of appeal therefore necessarily adjudicated  
28 that federal claim. See Ramirez v. McDonald, No. CV 11-02068-JST  
(SS), 2011 WL 7111902, at \*7 (C.D. Cal. Dec. 22, 2011) (concluding  
that state court necessarily adjudicated federal nature of  
instructional-error claim even though court cited only state law  
because "applicable state-law standard imposed the same limit on  
trial court discretion as the applicable legal standard under the  
federal Constitution"), accepted by 2012 WL 263032 (C.D. Cal. Jan.  
26, 2012).

1 evidence, which was so inflammatory that it necessarily prevented  
2 a fair trial. Windham v. Merkle, 163 F.3d 1092, 1103 (9th Cir.  
3 1998); Hovey v. Ayers, 458 F.3d 892, 923 (9th Cir. 2006). The  
4 Supreme Court has made "very few rulings regarding the admission  
5 of evidence as a violation of due process"; specifically, it has  
6 never "made a clear ruling that admission of irrelevant or  
7 overtly prejudicial evidence constitutes a due process violation  
8 sufficient to warrant issuance of the writ." Holley, 568 F.3d at  
9 1101.

10 The court of appeal's denial of this subclaim was not  
11 objectively unreasonable. Even though Petitioner did not fully  
12 limn the alleged due process violation in the Petition, to the  
13 extent he claims that the invoice was irrelevant, prejudicial, or  
14 lacked foundation, absent clearly established federal law  
15 recognizing that the admission of such evidence violates due  
16 process, the court of appeal could not have been unreasonable  
17 under AEDPA. See Wright v. Van Patten, 552 U.S. 120, 125-26, 128  
18 S. Ct. 743, 746-47, 169 L. Ed. 2d 583 (2008) (holding that state  
19 court could not have unreasonably applied federal law if no clear  
20 Supreme Court precedent existed); Holley, 568 F.3d at 1101; Baker  
21 v. Evans, No. 2:07-cv-00188 JCW, 2010 WL 4722034, at \*25 (E.D.  
22 Cal. Nov. 12, 2010) (rejecting evidentiary claim challenging lack  
23 of foundation in part because state court denial did not  
24 contradict controlling Supreme Court precedent). In any event,  
25 the admission of the invoice did not render Petitioner's trial  
26 fundamentally unfair because it was relevant to show his  
27 consciousness of guilt, in that other evidence suggested he had  
28 created and then given the fake invoice to his attorney,

1 presumably to exonerate himself and corroborate his explanation  
2 that he had received the check for his labor.<sup>3</sup> Further, the  
3 prosecutor laid a foundation for the invoice because Bowers  
4 testified that defense counsel had given it to her in the hallway  
5 after the preliminary hearing, and other evidence demonstrated  
6 that defense counsel had gotten it from Petitioner. (Lodgment  
7 11, 2 Rep.'s Tr. at 904-08, 912.)

8 Finally, even if erroneous, the admission of the invoice did  
9 not have a substantial and injurious effect in determining the  
10 verdicts. See Brecht v. Abrahamson, 507 U.S. 619, 638, 113 S.  
11 Ct. 1710, 1722, 123 L. Ed. 2d 353 (1993); Merolillo v. Yates, 663  
12 F.3d 444, 455 (9th Cir. 2011) (applying Brecht to review state  
13 court's harmlessness analysis). As the court of appeal found,  
14 the evidence of Petitioner's guilt was "abundant." (Lodgment 4  
15 at 5.) Petitioner (1) attempted to cash a fake check printed  
16 from a home computer (Lodgment 11, 2 Rep.'s Tr. at 673-76, 684-  
17 89, 918-19); (2) appeared "fidgety" and "nervous" at the bank  
18 (id. at 690); (3) left abruptly the first time, without the check  
19 and his California identification card, when bank personnel  
20 decided to verify the check (id. at 679, 691-92; and (4) left the  
21 second time without protest, and without his wallet, when he was  
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24 <sup>3</sup> Even though the court of appeal merely presumed that  
25 Petitioner had given the fake invoice to his attorney (Lodgment 4  
26 at 5 ("A reasonable inference can be drawn that [Petitioner]  
27 supplied the invoice to his attorney, who passed it on to  
28 Prosecutor Bowers.")), Petitioner conceded that fact in his state  
habeas petition, to which he attached defense counsel's declaration  
stating that Petitioner said he prepared the invoice himself and  
insisted that she deliver it to the prosecutor to "clear up the  
whole misunderstanding" (Lodgment 9, Ex. A).