(Lodgment 4 at 7-8 (footnote and some alterations omitted).)

The court then rejected this claim on the merits after finding that Petitioner had waived it:

> . . . . The prosecutor did not address [Petitioner]'s failure to testify. In context, the closing argument highlighted [Petitioner]'s failure to "tell the truth" before trial to the police and prosecution, i.e., that he knew the check was fraudulent. Telling the police the truth about the check would get him "immediately convicted." Instead, [Petitioner] – fearing the truth – concocted a flimsy story about the provenance of the check. If [Petitioner] were innocent, he would not have made up "the lie and the fake evidence."
>
> The prosecutor alluded to the phony exculpatory evidence because it showed [Petitioner]'s consciousness of guilt. (See People v. Cunningham (2001) 25 Cal. 4th 926, 1001 [prosecutor may comment on evidence showing the defendant's consciousness of guilt].) The argument was a "comment on the state of the evidence." (People v. _____ evidence.
>
> . . . .
>
> And I want to sort of contrast that for a second with what an innocent person would do. Because think about it. Think about if someone who really thought this check was good, had really painted some bedrooms and had been given this check for payment, and went to [the bank] to cash it, what would they do? . . .

(Lodgment 11, 2 Rep.'s Tr. at 1247-48.)

Cornwell, supra, 37 Cal. 4th at p. 90[.]) It does not refer, in any way, to [Petitioner]'s silence at trial, and the jury could not reasonably have construed it as a reference to [Petitioner]'s failure to testify.

(Id. at 8 (some internal quotation marks omitted).)

B. Applicable Law

Prosecutorial misconduct warrants habeas relief only if it "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181, 106 S. Ct. 2464, 2471, 91 L. Ed. 2d 144 (1986); Renderos v. Ryan, 469 F.3d 788, 799 (9th Cir. 2006) (same). The Ninth Circuit has interpreted Darden as requiring a two-step inquiry: whether the prosecutor's actions were improper and, if so, whether they "infected" the trial and rendered it "fundamentally unfair." Drayden v. White, 232 F.3d 704, 713 (9th Cir. 2000). "[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." Smith v. Phillips, 455 U.S. 209, 219, 102 S. Ct. 940, 947, 71 L. Ed. 2d 78 (1982). Relief is limited to cases in which the petitioner can establish that the prosecutorial misconduct resulted in actual prejudice under Brecht, 507 U.S. at 637-38, requiring the alleged error to have had a substantial and injurious effect or influence on the verdict. Shaw v. Terhune, 380 F.3d 473, 478 (9th Cir. 2004).

The Fifth Amendment precludes the prosecutor from commenting on a defendant's failure to testify. Griffin, 380 U.S. at 615. A comment is impermissible "if it is manifestly intended to call attention to the defendant's failure to testify, or is of such a

character that the jury would naturally and necessarily take it to be a comment on the failure to testify." Rhoades v. Henry, 598 F.3d 495, 510 (9th Cir. 2010), cert. denied, 132 S. Ct. 401 (2011).

C. Analysis

As a preliminary matter, Respondent asserts that Petitioner's prosecutorial-misconduct claim is procedurally defaulted because the court of appeal rejected it in part based on Petitioner's failure to comply with California's contemporaneous-objection rule. (Answer at 1, 22-25.) Petitioner has failed to dispute Respondent's contentions because he did not file a reply to the Answer. Because it is easier to adjudicate this claim on the merits, however, the Court has done so in the interest of judicial economy. See Lambrix v. Singletary, 520 U.S. 518, 524-25, 117 S. Ct. 1517, 1523, 137 L. Ed. 2d 771 (1997); Franklin v. Johnson, 290 F.3d 1223, 1232 (9th Cir. 2002) (noting that federal courts "are empowered to, and in some cases should, reach the merits of habeas petitions if they are, on their face and without regard to any facts that could be developed below, clearly not meritorious despite an asserted procedural bar"). The Court applies the deferential AEDPA standard in reviewing this claim because the court of appeal reached its merits in the alternative. (Lodgment 4 at 8); see James v. Ryan, 679 F.3d 780, 802-03 (9th Cir. 2012) (holding that when state court primarily rejects habeas claim on procedural ground but alternatively reaches and resolves merits of claim, denial of it is entitled to AEDPA deference).

The court of appeal was not objectively unreasonable in

denying this claim. Taken in context, instead of expressly targeting Petitioner's failure to testify, the prosecutor's remarks focused on Petitioner's pretrial attempt to falsify evidence, in which he created and then gave a fake invoice to his attorney; the remarks therefore were permissible to show Petitioner's consciousness of guilt and were properly grounded in the evidence. Likewise, the prosecutor's statement that Petitioner would have been "immediately convicted" if he had "told the truth" referred to his decision to lie before trial, not his failure to testify during it. Therefore, because the statements were not of "such a character that the jury would naturally and necessarily take [them] to be [comments] on the failure" of Petitioner to testify, there was no Griffin error. See Rhoades, 598 F.3d at 510; Winn v. Lamarque, No. 2:03-cv-2347 JAM KJN P, 2010 WL 2303304, at *19-20 (E.D. Cal. June 7, 2010) (denying Griffin challenge because prosecutor's statement referred to petitioner's lie to police, which prosecutor claimed had not been subjected to cross-examination, and not his failure to testify at trial).

IV. Habeas relief is not warranted on Petitioner's ineffective-assistance-of-counsel claim

Petitioner argues that his trial counsel was constitutionally ineffective for failing to object to the alleged Griffin error or authenticate the fake invoice given to her by Petitioner, which was subsequently used at trial to inculpate

him.[8] (Pet. at 6.)

Under Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984), a petitioner claiming ineffective assistance of counsel must show that counsel's performance was deficient and that the deficient performance prejudiced his defense. "Deficient performance" means unreasonable representation falling below professional norms prevailing at the time of trial. Id. at 688-89. To show deficient performance, the petitioner must overcome a "strong presumption" that his lawyer "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690. Further, the petitioner "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Id. The initial court considering the claim must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Id.

The Supreme Court has recognized that "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id. at 689. Accordingly, to overturn the strong presumption of adequate assistance, the petitioner must demonstrate that the challenged action could not reasonably be considered sound trial strategy under the circumstances of the

---

[8] Petitioner adopts his ineffective-assistance-of-counsel arguments from his state-court briefs. (Pet. at 6.)

case. Id.

To meet his burden of showing the distinctive kind of "prejudice" required by Strickland, the petitioner must affirmatively

> show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Id. at 694; see also Richter, 131 S. Ct. at 791 ("In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently."). A court deciding an ineffective-assistance-of-counsel claim need not address both components of the inquiry if the petitioner makes an insufficient showing on one. Strickland, 466 U.S. at 697.

In Richter, the Supreme Court reiterated that AEDPA requires an additional level of deference to a state-court decision rejecting an ineffective-assistance-of-counsel claim:

> The pivotal question is whether the state court's application of the Strickland standard was unreasonable. This is different from asking whether defense counsel's performance fell below Strickland's standard.

131 S. Ct. at 785. The Supreme Court further explained,

> Establishing that a state court's application of Strickland was unreasonable under § 2254(d) is all the

more difficult. The standards created by Strickland and § 2254(d) are both "highly deferential," . . . and when the two apply in tandem, review is "doubly" so. The Strickland standard is a general one, so the range of reasonable applications is substantial. Federal habeas courts must guard against the danger of equating unreasonableness under Strickland with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard.

Id. at 788 (citations omitted).

A. *Griffin* Error

The court of appeal rejected this subclaim on direct appeal:

> [Petitioner] asserts that he received ineffective assistance of counsel, who failed to preserve claims by asserting timely objections in the trial court. It is true that defense counsel failed to object to the prosecutor's argument. (See People v. Turner (2004) 34 Cal. 4th 406, 420 [counsel's failure to preserve a claim by objecting in the trial court may give rise to a claim for ineffective assistance of counsel].) However, the explanation for this may be tactical: counsel may have decided not to object because it would highlight the issue. (People v. Stewart (2004) 33 Cal. 4th 425, 509.) In any event, the challenged argument did not refer to [Petitioner]'s decision not to testify at trial and did not constitute prosecutorial misconduct, as discussed in

section 3 of this opinion. . . .

(Lodgment 4 at 8.)

The court of appeal's denial of this subclaim was not objectively unreasonable because as discussed in Section III, the prosecutor did not violate Griffin in his closing argument, and defense counsel therefore had no reason to object. See Juan H. v. Allen, 408 F.3d 1262, 1273 (9th Cir. 2005) (finding counsel not deficient for failing to raise meritless objection). Further, as the court of appeal noted, counsel could have intentionally chosen not to object to avoid highlighting an incriminating fact, which the invoice certainly was. See Werts v. Vaughn, 228 F.3d 178, 204-05 (3d Cir. 2000) (holding state court's denial of ineffective-assistance-of-counsel claim not unreasonable because counsel's failure to object to prosecutor's opening and closing remarks was based on decision not to "highlight" or "draw attention" to certain issues). Counsel's informed tactical decision in this regard would be "virtually unchallengeable." See Strickland, 466 U.S. at 690. Accordingly, Petitioner is not entitled to relief on this subclaim.

B. Failure to Authenticate

The court of appeal rejected this subclaim on habeas review, finding that "Petitioner has failed to meet his burden of showing that but for counsel's alleged errors, the outcome of his trial would have been different." (Lodgment 8.) The court of appeal's denial of this subclaim was not objectively unreasonable. Petitioner has failed to show prejudice because as explained in Section I, even without admission of the invoice, abundant evidence demonstrated his guilt. Accordingly, this subclaim does

not warrant habeas relief.

ORDER

IT THEREFORE IS ORDERED that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: August 28, 2012

JEAN ROSENBLUTH
U.S. MAGISTRATE JUDGE