United States Court of Appeals for the Fifth Circuit

No. 21-20195

STANCIU JON,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent—Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:20-CV-938

ON MOTION FOR RECONSIDERATION
AND REHEARING EN BANC

Before SOUTHWICK, GRAVES, and COSTA, *Circuit Judges*.

PER CURIAM:

The motion for reconsideration is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

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STANCIU JON,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent—Appellee.

Application for Certificate of Appealability from the
United States District Court for the Southern District of Texas
USDC No. 4:20-CV-938

ORDER:

IT IS ORDERED that the Appellant's motion for a certificate of appealability is DENIED.

/s/ Leslie H. Southwick
LESLIE H. SOUTHWICK
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

STANCIU JON, TDCJ NO. 2116104	§	
Petitioner,	§	
v.	§	CIVIL ACTION NO. H-20-938
BOBBY LUMPKIN, Director, Texas Department of Criminal Justice, Correctional Institutions Division	§	
Respondent.	§	

FINAL JUDGMENT

For the reasons set forth in the court's Memorandum and Order issued today, this case is dismissed with prejudice. No certificate of appealability is issued.

This is a final judgment.

SIGNED on March 24, 2021, at Houston, Texas.

Lee H. Rosenthal
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

STANCIU JON, TDCJ NO. 2116104	§	
Petitioner,	§	
v.	§	CIVIL ACTION NO. H-20-938
BOBBY LUMPKIN, Director, Texas Department of Criminal Justice, Correctional Institutions Division	§	
Respondent.	§	

MEMORANDUM AND OPINION GRANTING MOTION FOR SUMMARY JUDGMENT

Jon Stanciu, or Ion Stanciu, a Texas state inmate, challenges his state-court murder conviction under 28 U.S.C. § 2254. Stanciu alleges the following grounds for relief:

1. the State suppressed exculpatory evidence, and trial counsel failed to provide effective assistance by failing to present exculpatory evidence;

2. the State knowingly produced and used a false statement when the prosecutor stated during closing argument that the deceased's ribs were fractured in the back because applying pressure to her back would be a way to keep the deceased still so a zip-tie could be placed around her neck, and when the doctors testified that applying pressure could break the bones, but they did not know how the deceased's bones were broken;

3. the State used false evidence to get a conviction because the autopsy report listed the manner of death as a "homicide" when "nothing realistically proved" that it was a "homicide";

4. Stanciu was denied effective assistance when his trial counsel did not consult with the defense expert witness to challenge the medical findings of the doctor who did the autopsy;

5. the State improperly commented on Stanciu's invocation of his right not to testify, and trial counsel was ineffective in failing to object;

6. the State used Stanciu's illegally obtained statement, and trial counsel provided ineffective assistance in not moving to suppress it;

7. the State used perjured testimony when investigator Abe Alanis, Jr. testified that there had been an altercation because the "bedsheet was all over the place. There was a boot, a necklace and sweater on bed," and no other witnesses confirmed this statement;

8. the State used a misstatement of material fact when the prosecutor argued in closing that the deceased had told Stanciu that he was a "monster," when there is no proof that Stanciu was the male the deceased was arguing with;

9. Stanciu was denied effective assistance when trial counsel failed to investigate;

10. the evidence is insufficient to support the conviction; and

11. Stanciu was denied effective assistance because his appellate counsel failed to properly brief the issues on appeal and did not consult with Stanciu about his petition for discretionary review.

(Docket Entry No. 1).

The record is sufficient to decide Stanciu's motion without the discovery or evidentiary hearing he seeks. Based on the pleadings, motions, briefs, the record, and the applicable law, the court grants the respondent's motion for summary judgment and, by separate order, enters final judgment. Stanciu's remaining motions are denied as without merit. The reasons are set out below.

I. Background

A. Procedural History

Stanciu challenges the judgment and sentence of the 176th District Court of Harris County, Texas, in Cause Number 1454476, *The State of Texas v. Stanciu, Ion*. Stanciu was indicted for murder. In February 2017, a jury found Stanciu guilty as charged in the indictment and sentenced him to a 60-year prison term the next day. In February 2018, the Fourteenth Court of Appeals of Texas affirmed the judgment, and in June 2018, the Texas Court of Criminal Appeals refused

Stanciu's petition for discretionary review. Stanciu filed a state habeas application in March 2019. The Texas Court of Criminal Appeals denied the application, without written order, in February 2020. Stanciu timely filed this federal petition.

B. Facts and Background

The Fourteenth Court of Appeals of Texas summarized the facts presented at trial. In the opinion, the word "complainant" is used to refer to Stanciu's deceased wife.

> Around 10:00 or 11:00 a.m. on January 13, 2015, [Stanciu]'s next-door neighbor heard banging noises coming from the kitchen window facing [Stanciu]'s home. The neighbor went into the kitchen and saw [Stanciu] looking through the window. At first, the neighbor did not recognize [Stanciu] because he didn't look like himself; the neighbor thought [Stanciu] looked "very weary" and "like a crazy person."
>
> The neighbor ran outside and saw [Stanciu] gasping and throwing up. She asked [Stanciu] what was wrong, and he showed her that something was around his neck. The neighbor explained the situation to 9–1–1 operator on [Stanciu]'s cell phone and then briefly left [Stanciu] to look for help from another neighbor, but no one was around. The neighbor did not hear anyone in [Stanciu]'s house and did not see anyone leave the house after she went outside. Nor had she noticed anything out of the ordinary on her street when she returned home from an errand around 8:00 a.m. that day.
>
> Paramedics soon arrived at the scene. A paramedic initially saw [Stanciu], wearing nothing but underwear, lying face-down with his head in the doorway of his house. The paramedic and his partner rolled [Stanciu] over and saw that he had a zip tie around his neck. The paramedic cut the zip tie off [Stanciu]'s neck so he could breathe. [Stanciu] was taken by a Life Flight helicopter to a hospital.
>
> After learning from neighbors that [Stanciu] had a wife and child, the paramedics went into the house to see if anyone else was inside. In an upstairs bedroom, the paramedic found the complainant, [Stanciu]'s wife, dressed in business attire, lying face up on the floor. The complainant was not breathing, had no vital signs, and had a zip tie around her neck that was similar to the one found on [Stanciu]'s neck. Vomit and blood were coming from her mouth and nose. Paramedics performed cardiopulmonary resuscitation (CPR) and other medical interventions to help her breathe, but they were unsuccessful. The complainant was taken to a hospital where she was pronounced dead.
>
> Harris County Sheriff's Office deputies arrived and searched the house. They found blood and loose zip ties on the first floor and in the second-floor master

bedroom. The deputies looked for evidence of a home invasion or burglary, but found none. There were no signs of forced entry on the doors or windows, and nothing in the house appeared to be missing or out of place. Electronic items were in plain view and appeared undisturbed. Elsewhere in the house, deputies also saw a large floor safe, piano, computer, printer, and artwork that appeared undisturbed. Although deputies found nothing moved or out of place in the garage, they did find zip ties in the bottom drawer of a tool chest.[1]

A homicide detective arrived and interviewed several witnesses. He learned that a child lived in the home, and eventually he located the Stancius' eleven-year-old daughter at school. Because the detective could not find any family members, Child Protective Services took the child into custody. The detective returned to the Stancius' home and entered with a search warrant. The detective saw that an altercation appeared to have occurred on the bed in the master bedroom where the complainant was found, because the bedding was tossed around and a woman's black boot and necklace were found on the bed. Items in the master bathroom and closet appeared undisturbed, however, including the complainant's jewelry hanging in the closet. The detective saw two other bedrooms upstairs, one a child's bedroom, and another that appeared to have someone living in it, because it had a bed and male clothing in the closet.

The detective next went to examine the complainant's body at the hospital. After that, the detective went to a different hospital, where [Stanciu] was being treated, to get [Stanciu]'s statement. The detective was not immediately able to speak with [Stanciu], however, because [Stanciu] was intubated. The next day, [Stanciu]'s intubation tube was removed and the detective was able to talk to him.

[Stanciu] told the detective that all he remembered about the morning of the 13th was waking up in bed, lying on his back with his hands tied behind his back and something tied around his legs and neck. [Stanciu] said that he fell down the stairs, and then the tie around his hands came off. [Stanciu] went to the kitchen and used a knife to cut off the tie around his legs, but he was unable to remove the tie around his neck. He called 911, but the operator could not understand him, so he went next door to get help from his neighbor. He then vomited and passed out.

[Stanciu] also told the detective that he worked a night shift at a postal office and usually got home around 7:30 a.m., but he said that he could not remember what time he got home from work that morning. [Stanciu] said that the complainant was the only person home when he arrived. [Stanciu] thought he last saw the complainant in the kitchen, but he did not remember speaking to her. [Stanciu] eventually acknowledged that a few days earlier the complainant had told [Stanciu] that she wanted a divorce, [Stanciu] said he begged her not to leave him and tried to convince her to stay, but the complainant would not changer her mind. [Stanciu]

[1] At trial, a deputy explained that the zip ties found in the tool box were not the same as those recovered from [Stanciu] and the complainant because the markings on them were different and they were smaller.

did not remember having any conversation or altercation with the complainant on the morning of January 13.

The detective concluded that [Stanciu]'s story was inconsistent with the evidence. After finishing his investigation, the detective gave the information he had to the district attorney's office. [Stanciu] later was charged with the murder of the complainant by placing a zip tie around her neck.

At trial, the medical examiner testified that the cause of the complainant's death was ligature strangulation, and the manner of death was homicide. The medical examiner stated that the complainant also sustained rib fractures of a type that probably were not caused by CPR, but that possibly could have been caused by pressure being put on her back by a hand or knee, or by standing on her back. The complainant also had a fracture to her thyroid cartilage, which was a "very strong indication that there was significant force applied to the neck." A forensic anthropologist similarly concluded that the injury to the thyroid cartilage indicated that a "significant amount of force" was applied and that the injury occurred at or near the time of death, as there was no evidence of healing.

The daughter, now fourteen years old, testified that in the months preceding January 2015, the relationship between her parents had started to deteriorate. The daughter stated that [Stanciu] and the complainant argued almost every night, they did not spend much time with each other, and they did not sleep in the same room with each other. In July 2014, the complainant got a new job at National Oilwell Varco, and [Stanciu] became jealous of one of the complainant's male co-workers. [Stanciu] would tell the complainant that she only got the job or wanted it 'because of him" and "why not just go off with him instead." On the morning of January 13, 2015, the daughter recalled that when she awoke, her mother was downstairs making breakfast. When the daughter left to catch the bus around 7:00 a.m., her mother was upstairs and [Stanciu] had come home from work.

Zvetlana Solome, a friend of the complainant's, testified that she spoke with [Stanciu] two weeks before January 13, because "the situation start[ed] going too far." Solome then met with the complainant to give her the name and telephone number of a divorce attorney. The night before the complainant died, Solome was with the complainant when she called the divorce attorney around midnight.

About 7:42 a.m. the next day, the complainant called her supervisor, Juanita Kellstrom, to tell her that she was going to be twenty minutes late for work. The complainant had never before been late during the entire time she worked for National Oilwell Varco. A few minutes later, the complainant called Kellstrom again. During the call, the complainant did not respond to Kellstrom, but Kellstrom could hear the complainant in the background talking loudly and rapidly, and not in her usual tone of voice. Kellstrom also heard a male voice she did not recognize. The male was talking in a loud but calm voice. The complainant and the male were

> speaking Romanian, so Kellstrom could not understand most of what they were saying, but Kellstrom did hear the complainant say, "you've turned into a monster."
>
> Kellstrom hung up the phone, but then received a third call a few minutes later in which she could hear the complainant and the male continuing to talk in the same way. Kellstrom hung up after about a minute. A fourth call came in shortly after that, but Kellstrom had left her desk and missed it. Kellstrom tried several times to return the call, but she got only a busy signal. Kellstrom became concerned and contacted others to see if someone could go and check on the complainant. When Kellstrom got home from work, a police officer told her that the complainant had died.

Stanciu, 2018 WL 894029, at *1–3.

II. The Standard for Summary Judgment

Section 2254(d) imposes a deferential standard that allows a federal court to grant habeas relief only if the state court adjudicated a constitutional claim contrary to, or unreasonably applied, clearly established federal law, as determined by the Supreme Court, *Harrington v. Richter*, 562 U.S. 86, 100–01 (2011) (citing *(Terry) Williams v. Taylor*, 529 U.S. 362, 412 (2002)), or if the state-court decision unreasonably determined the facts in light of the record. *Id.* The § 2254(d) standard is high.

A state-court decision can be contrary to established federal law if the state court applies a rule that contradicts Supreme Court precedent, or if the state court confronts facts that are "materially indistinguishable" from relevant Supreme Court precedent but reaches an opposite result. *(Terry) Williams*, 529 U.S. at 405–06. A state court unreasonably applies Supreme Court precedent only if the correct precedent is unreasonably applied to the facts of a particular case. *Id.* at 407–09.

A federal habeas court "must determine what arguments or theories supported or . . .could have supported, the state court's decision," and then ask whether "fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court."

Harrington 562 U.S. at 87. A state-court determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree'" on the correctness of the state court's decision. *Id* (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The federal habeas court is limited to the record that was before the state court. Section 2254(d)(2); *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

III. Exhaustion and Procedural Bar

Neither Stanciu's state habeas application nor his petition for discretionary review raised a claim that he was denied effective assistance of trial counsel because his attorney failed to investigate certain items of evidence. Before filing a federal writ petition, a state prisoner must exhaust claims and allegations in the Texas courts. 28 U.S.C. § 2254(b)(1)(A). The exhaustion requirement of § 2254(b) "ensures that the state courts have the opportunity fully to consider federal-law challenges to a state custodial judgment before the lower federal courts may entertain a collateral attack upon that judgment." *Duncan v. Walker*, 533 U.S. 167, 178–79 (2001) (citations omitted).

"A federal court claim must be the 'substantial equivalent' of one presented to the state courts if it is to satisfy the 'fairly presented' requirement." *Whitehead v. Johnson*, 157 F.3d 384, 387 (5th Cir. 1998). The exhaustion requirement "is not satisfied if a petitioner presents new legal theories or entirely new factual claims in his petition to the federal court." *Vela v. Estelle*, 708 F.2d 954, 958 (5th Cir. 1983) (footnote omitted); *Anderson v. Harless*, 459 U.S. 4, 6–7 (1982).

In his petition for discretionary review, Stanciu made no claims of ineffective assistance of counsel. In his petition for state habeas, Stanciu raised numerous ineffective-assistance-of-trial-counsel claims, but he did not include a claim that his trial counsel was ineffective for failing to investigate the items of evidence he raises here. Stanciu's state habeas files did not raise the same

facts and legal theories that he urges in this federal petition. *Duncan*, 513 U.S. at 365–366. Stanciu cannot combine the ineffective-assistance-of-counsel claims he did raise in the state courts with new facts and allegations to avoid the exhaustion requirement. *Nobles v. Johnson*, 127 F.3d 409, 419–20 (5th Cir. 1997).

Unexhausted claims may not be reviewed in federal court if the state court to which the claims would have to be filed would find them to be procedurally barred. *Coleman v. Johnson,* 501 U.S. 722, 735 n.1 (1991). The federal procedural default doctrine precludes federal habeas corpus review of unexhausted claims in this posture. *Id.*; *Gray v. Netherland*, 518 U.S. 152, 161–162 (1996); *Teague v. Lane*, 489 U.S. at 298–99 (an unexhausted claim was procedurally barred); *Nichols v. Scott*, 69 F.3d 1255, 1280 n. 48 (5th Cir. 1995) (because unexhausted claims would be barred by the Texas contemporaneous-objection rule, federal habeas corpus review was procedurally barred).

Stanciu would be unable to bring this unexhausted claim in another state habeas application, because the Texas Court of Criminal Appeals would find this allegation procedurally barred under the Texas abuse-of-the-writ doctrine. Tex. Code Crim. Proc. Ann. art. 1107 § 4; *Ex parte Whiteside*, 12 S.W. 3d 819, 821 (Tex. Crim. App. 2000). Stanciu would be barred from bringing his claims to a federal habeas court under the federal procedural default doctrine. *Fearance v. Scott*, 56 F.3d at 642 (the Texas abuse-of-the-writ doctrine to be an adequate procedural bar for purposes of federal habeas review). As a result, Stanciu cannot obtain relief on the claim that trial counsel was ineffective for failing to raise certain items of evidence.

IV. Sufficiency of the Evidence

In determining an insufficiency of the evidence claim, a federal habeas court must consider whether, viewing the evidence "in the light most favorable to the prosecution, any rational trier of

fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979); *Dupuy v. Cain*, 201 F.3d 582, 589 (5th Cir. 2000). This analysis is based on "substantive elements of the criminal offense as defined by state law," *Jackson*, 443 U.S. at 324 n. 16, and all credibility choices and conflicting inferences are resolved in favor of the verdict, *United States v. Cyprian*, 197 F.3d 736, 740 (5th Cir. 1999).

On direct appeal, the Texas intermediate court of appeals found the evidence sufficient to support Stanciu's conviction for murdering his wife. The court explained:

> [Stanciu] contends that the evidence is legally insufficient for the jury to have found that he committed murder because he was severely injured at the same time as the complainant, there was no DNA evidence linking [Stanciu] to a struggle with the complainant, and the complainant's injuries were consistent with a different type of strangulation. The gist of [Stanciu]'s argument is that the jury's conclusions are based on speculation and factually unsupported inferences rather than reasonable inferences supported by evidence.
>
> [Stanciu] was charged with committing murder by (1) intentionally or knowingly causing the death of the complainant by placing a zip tie around her neck, or (2) intending to cause serious bodily injury by intentionally or knowingly committing an act clearly dangerous to human life that caused the death of the complainant, by placing a zip tie around her neck. *See* Tex. Penal Code § 19.02(b)(1)–(2). The court's charge tracked this language. When, as here, the trial court's charge authorizes the jury to convict on more than one theory, the verdict of guilt will be upheld if the evidence is sufficient on any of the theories. *See Guevara,* 152 S.W. 3d at 49.
>
> . . . .
>
> We disagree that a rational jury could not have concluded beyond a reasonable doubt that [Stanciu] murdered the complainant based on the evidence admitted at trial. The evidence showed that [Stanciu] and the complainant were the only two people in their home immediately before the incident on the morning of January 13, 2015. The home showed no signs of burglary or forced entry, and a neighbor saw no suspicious people or vehicles in the area that morning. The lack of evidence of a burglary or robbery suggests the crime was not the result of a burglary or robbery gone wrong. *See id.* at 51.
>
> The jury also heard that in the months before the complainant's death. [Stanciu] had grown jealous of a male co-worker at the complainant's new job. The relationship between [Stanciu] and the complainant so deteriorated that the

complainant had contacted an attorney about a divorce. On the morning the complainant was killed, she and a male were overheard arguing in Romanian, the native language of both the complainant and [Stanciu]. The complainant told the male "you've turned into a monster," implying that the complainant knew her attacker well enough to recognize a disturbing change in his personality or behavior. Although [Stanciu] said he could not remember any argument with the complainant that morning, he acknowledged that earlier he had begged and pleaded with the complainant not to leave him, indicating that he was opposed to the complainant's decision to seek a divorce.

"Motive is a significant circumstance indicating guilt." *Id.* at 50. The jury reasonably could have concluded from the evidence that [Stanciu] was motivated by anger and jealousy to strangle his wife on the morning of January 13, 2015. The record contains no evidence showing anyone else who would have wanted the complainant dead.

[Stanciu] emphasizes that he was also severely injured, implying that an alternate perpetrator was responsible for his injuries and the complainant's murder. But the jury could have rejected an alternate-perpetrator theory based on reasonable inferences from the evidence. Among other things, the medical examiner testified that it would take less than one minute to lose consciousness from ligature strangulation. The jury reasonably could have concluded from the testimony that it was unlikely that an alternate perpetrator would have applied the zip tie to the complainant's neck with lethal force, but then applied the zip tie to [Stanciu]'s neck with less-than-lethal force. Likewise, the jury reasonably could have concluded that if an alternate perpetrator placed the zip tie on [Stanciu]'s neck with a lethal amount of force, [Stanciu] would not have had time to get down the stairs, cut off the tie around his legs, and go next door to a neighbor's house for help before collapsing.

Further, the jury reasonably could have found it implausible that [Stanciu] could have slept through an attack on his wife and had no memory of what happened before he awoke to find himself bound with zip ties on his hands, legs, and neck. Based on the medical evidence, the jury reasonably could have concluded that [Stanciu] held the complainant down by pressing his hand or foot on her back while placing the zip tie around her neck and strangling her with it. When the record supports conflicting inferences, we are to presume that the jury resolved the conflicts in favor of the verdict and defer to that determination. . . .

[Stanciu] next contends that the State presented no DNA evidence to prove that [Stanciu] had a struggle with the complainant. [Stanciu] argues that the medical examiner testified that he did not observe any injury to the complainant's hands and her nails were intact. And, although the complainant's hands were enclosed in paper bags to preserve evidence, the State did not present any scientific evidence linking [Stanciu] to a struggle with the complainant, and did not present any evidence of defensive wounds on either [Stanciu] or the complainant consistent

with a struggle. But, the State is not required to present any specific type of direct physical evidence, as circumstantial evidence alone can be sufficient to establish guilt. . . . Even if positive DNA results linking [Stanciu] to the complainant's body had been presented to the jury, the fact that [Stanciu] and the complainant were husband and wife and shared a home likely would have limited the probative value of such evidence.

Finally, [Stanciu] complains that "the jury verdict suggests that the jury filled in the gaps in the testimony to find that [Stanciu] applied the zip-ties to [the complainant's] neck" and that this conclusion is "inconsistent [with] the ligature strangulation being the only manner of [the] cause of death as the evidence suggest[s] that greater force than a zip-tie was applied to complainant's neck." In support of this assertion, [Stanciu] points to the medical examiner's testimony that the fractures to the thyroid cartilage caused by significant force applied to the complainant's neck could have been caused by ligature strangulation, but also could have been caused "a lot of other ways." Thus, [Stanciu] argues, only a modicum of probative evidence was presented that [Stanciu] caused the complainant's death.

We disagree that the jury reached a conclusion unsupported by the evidence. The medical examiner explained that "ligature strangulation," meant that the complainant's death was caused by "constriction of the neck" by something being tied around the neck." The paramedic who discovered the complainant's body testified that the complainant had no vital signs and had a zip tie "similar to the one on [Stanciu]'s neck" around her neck. The medical examiner confirmed that the fractures the complainant sustained were consistent with a strangulation by a zip tie. The medical examiner also testified that placing a zip tie around someone's neck and tightening it could cause serious bodily injury or death, and was an act that can be clearly dangerous to human life. The record contains no evidence to support any alternative theory as to the manner and means or cause of the complainant's death.

Viewing the evidence as a whole and in the light most favorable to the verdict, a rational jury reasonably could have concluded that [Stanciu] murdered the complainant by placing a zip tie around her neck. We therefore overrule [Stanciu]'s issue.

Stanciu, 2018 WL 894029, at *3–6.

On federal habeas review, "[a] federal court may not substitute its own judgment regarding the credibility of witnesses for that of the state courts." *Marler v. Blackburn*, 777 F.2d 1007, 1012 (5th Cir. 1985); *accord Maggio v. Fulford*, 462 U.S. 111, 113 (1983); *Scott v. Louisiana*, 934 F.2d 631, 634 (5th Cir. 1991); *Dunn v. Maggio*, 712 F.2d 998, 1001 (5th Cir. 1983).

The state court reasonably found that the trial evidence was enough to support Stanciu's conviction for murder. *Jackson*, 443 U.S. at 319. The conclusion that the evidence was sufficient is entitled to deference. *Parker v. Procunier*, 763 F.2d 665 (5th Cir. 1985). The record shows that this conclusion was neither contrary to, nor an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. Stanciu has not shown that "that the state court's ruling on the claim being presented in federal court [is] so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 131 S. Ct. at 786–87. Stanciu is not entitled to relief on this claim.

V. Prosecutorial Error

A. The Standard of Review

In habeas corpus proceedings, a claim of prosecutorial error or misconduct is reviewed to determine whether it "'so infected the [trial] with unfairness as to make the resulting [conviction a denial of due process.'" *Barrientes v. Johnson*, 221 F.3d 741, 753 (5th Cir. 2000) (quoting *Ables v. Scott*, 73 F.3d 591, 592 n.2 (5th Cir. 1996)); *accord Greer v. Miller*, 483 U.S. 756, 765 (1987). "To constitute a due process violation, the prosecutorial misconduct must be of 'sufficient significance to result in the denial of the defendant's right to a fair trial.'" *Greer*, 483 U.S. at 765 (citation and internal citation omitted). A trial is fundamentally unfair only when "there is a reasonable probability that the verdict might have been different had the trial been properly conducted." *Barrientes*, 221 F.3d a 753 (quoting *Foy*, 959 F.2d a 1317).

B. The Claim That the State Suppressed Evidence

Stanciu alleges that the State violated its obligations under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), by suppressing the following evidence: (1) DNA test and fingerprints report; (2)

his daughter's suicide note; (3) the deceased's reasons for wanting a divorce; (4) Stanciu's and the deceased's cellphone and home phone records; (5) the deceased's cellphone; (6) his bank account records; (7) evidence about how the deceased was dressed; (8) the zip-tie positions around his and the deceased's neck; and (9) photographs of the deceased's back.

A habeas petitioner's claim of wrongful suppression of evidence must show that: (1) the prosecution suppressed evidence; (2) the evidence was favorable; (3) the evidence was material either to guilt or punishment; and (4) the alleged favorable evidence was not discoverable through due diligence. *Brady*, 373 U.S. at 87; *Rector v. Johnson*, 120 F.3d 551, 558 (5th Cir. 1997). Evidence is material if there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 677, 682 (1985); *Rector*, 120 F.3d at 562. The petitioner must show that the disputed evidence would reasonably cast the entire case in a different light, so as to undermine confidence in the verdict. *Kyles v. Whitley,* 514 U.S. 419, 434–35; *Rector*, 120 F.3d at 562.

Evidence must be "significant new evidence" to show a *Brady* violation on habeas. *Westley v. Johnson*, 83 F.3d 714, 725 (5th Cir. 1996). "Under *Brady*, the prosecution has no obligation to produce evidence or information already known to the defendant, or that could be obtained through the defendant's exercise of reasonable diligence." *Castillo v. Johnson*, 141 F.3d 218, 223 (5th Cir. 1998). Stanciu fails to show a basis for the relief he seeks.

Stanciu's own expert witness referred to the DNA report at trial. 4 RR 115. A photograph submitted in evidence at the trial showed Stanciu's daughter's purported suicide note. 7 RR 31. The record shows that Stanciu knew, or at least should have known, why his wife wanted a divorce. Stanciu had access to his own cellphone and bank records, and he does not show that the State had obtained and then suppressed these records. The record shows that the trial evidence included how

the deceased was dressed, and photographs admitted into evidence showed the items on the bed. 4 RR 25; 7 RR 36–39.

Stanciu's arguments about the zip ties around his neck and the deceased's neck do not show a *Brady* violation. The record shows that the zip-tie positions were not recorded and witnesses did not recall these facts; the record does not show that the State had this evidence and withheld it.

Stanciu argues that photographs of the deceased's back would prove that her ribs were cracked post-mortem by mechanical attempts to resuscitate her. The trial testimony was that no one attempted to mechanically resuscitate the deceased. And again, there is no basis to infer that the State had photographs of the deceased's back and suppressed them.

Stanciu does not show that the state courts unreasonably applied clearly established Supreme Court precedent or unreasonably determined the facts in resolving this claim. He fails to show a basis for relief.

C. The Claim of Improper Closing Argument

Stanciu challenges two parts of the prosecution's closing argument. The first is the statement that the deceased's ribs were fractured by pressure on her back to keep her still so the zip tie could be put around her neck. The second is the statement that the deceased told Stanciu that he was a "monster" during a phone call to her employer because she "wanted all of us to know that. Because she soon found out just how much of a monster Ion Stanciu really was." 5 RR 24. Stanciu argues that this evidence was improper because it assumed that he was the male the deceased had been arguing with.

The prosecution made the following argument as to the broken ribs:

> And what did the doctors tell us about the fractures in the ribs? They're in the back. . . . we know she was not a small woman. We know that she would not take things lying down. So, it had to have come from behind. And the only way to keep her still would be to put pressure on her back, whether a foot, a knee, or putting your

entire body weight down there forcing her down so that you can tie the zip-tie around her neck.

(5 RR 32).

During trial, the prosecutor and Dr. Michael Condron, II, who performed the autopsy had the following exchange about the rib fractures:

> A. Okay. Rib fractures are – they can be caused by resuscitation. And this lady, Ms. Stanciu, did undergo some cardiopulmonary resuscitation, chest compressions. Typically, when that's done just with your hands, if the ribs fracture, they're going to fracture in the front right around in this area here (indicating). Okay? These are in the back. Some mechanical resuscitation devices can cause that. I don't think – there's no documentation she underwent that kind of resuscitation with a mechanical device. So, this to me is probably not caused by CPR, but rather caused by something else.
>
> Q. And can these fractures be consistent with pressure being put on someone's back, either a hand or a knee or even standing on a person's back?
>
> A. That's one way, yeah. Yes.

(4 RR at 41–42). Contrary to Stanciu's claim, the prosecution's argument that the deceased's broken ribs were likely caused by pressure applied to her back to forcibly put the zip tie around her neck was proper. The argument was within the record evidence.

The prosecutor's argument about the deceased's last known statement about her husband, overheard while the deceased was talking by telephone to her supervisor, Juanita Kellstrom, calling him a "monster," is also within the evidence. The prosecutor argued:

> "You're turning into a monster." These are possibly the last words that anyone ever heard from Ancuta Stanciu, overheard by Ms. Juanita Kellstrom as she was called not once, but four separate times. One time, maybe a butt-dial, but four distinct phone calls. Anca wanted her to hear that. Anca wanted all of us to know that. Because she soon found out just how much of a monster Ion Stanciu really was.

(5 RR 24).

During the trial, Juanita Kellstrom, the person on the other end of the telephone, testified that,

> [A]t 7:42 a.m. the [deceased] called [Ms. Kellstrom] to tell her that she was going to be twenty minutes late for work. The [deceased] had never before been late during the entire time she worked for National Oilwell Varco. A few minutes later, the [deceased] called Kellstrom again. During the call, the [deceased] did not respond to Kellstrom, but Kellstrom could hear the [deceased] in the background talking loudly and rapidly, and not in her usual tone of voice. Kellstrom also heard a male voice she did not recognize. The male was talking in a loud but calm voice. The [deceased] and the male were speaking Romanian, so Kellstrom could not understand most of what they were saying, but Kellstrom did hear the [deceased] say, "You've turned into a monster."

Stanciu, 2018 WL 894029, at *3; 3 RR 75–92. Stanciu argues, but points to no evidence showing, that the deceased was arguing with a different Romanian man. The argument was proper.

Neither of the challenged closing arguments, considered separately or together, made Stanciu's trial unfair. Stanciu is not entitled to relief on this basis.

D. The Claim That the State Introduced Perjured Testimony

Stanciu alleges that the listing of the manner of death as a "homicide" on the autopsy report was false evidence, because "nothing realistically proved" that the death was a homicide. He also alleges that the testimony of investigator Abe Alanis, Jr.—that there appeared to have been an altercation because the "bedsheet was all over the place. There was a boot, a necklace and sweater on bed"—was perjured, because no other witness confirmed this statement. (Docket Entry No. 1 at 7, 14–15, 18, 33–34, 41–43).

The record fails to show that the testimony given was actually false, that the prosecutor was actually aware of the alleged perjury, or that the challenged testimony was material. *Faulder v. Johnson*, 81 F.3d 515, 519 (5th Cir. 1996). Perjured testimony is material only when "there is any reasonable likelihood that [the false testimony] could have affected the judgment of the jury." *Barrientes*, 221 F.3d at 756; *see United States v. Washington*, 44 F.3d 1271, 1282 (5th Cir. 1995)

(the materiality prong was not met when the allegedly perjurious statements "have nothing to do with [the defendant's] guilt or innocence" and evidence of guilt is "overwhelming"). At most, the kinds of inconsistent statements Stanciu alleges are insufficient to show statements that were perjured or material. *See Koch*, 907 F2d 524, 531 (5th Cir. 1990) (contradictory testimony from witnesses or inconsistencies in a witness' testimony at trial are to be resolved by the trier of fact and are not suffice enough to show certain testimony was perjured).

The state courts considered and rejected this claim. Stanciu has failed to show that the state habeas courts unreasonably determined the facts or reached a result contrary to, or an unreasonable application of, Supreme Court precedent. There is no basis for relief on this claim.

E. The Claim of Prosecutorial Comments on Stanciu's Choice Not to Testify

Stanciu alleges that the prosecutor improperly commented on his choice not to testify. (Docket Entry No. 1 at 15–16, 36–37).

The following exchanges, the first two during the voir dire examination and the remaining during closing argument, are at issue:

1. MR. O'DONNELL: So, the Judge mentioned a lot of these defendant's rights. I just want to focus on just one of them because we touched on it briefly, that Fifth Amendment right. I know a lot of you–and all of you actually said: You know what, I'm okay with the defendant not testifying. I know the Judge gave the hypothetical where he's not going to ask you, and I'm not going to do the same–of course, people would want to hear from someone, but the defendant has an absolute right not to testify. Can anyone think of some reasons maybe why a person may not testify?

   VENIREPERSON: Makes them look guilty.

. . . .

   MR. O'DONNELL: Okay. It may make them look guilty, How many persons here like speaking in front of strangers?

   VENIREPERSONS: No (in unison).

MR. O'DONNELL: No hands, right? It can be nerve-racking, right?

VENIREPERSON: Right.

MR. O'DONNELL: So that may be another reason why you may not hear from a particular defendant in a case. They may not speak well in front of other people, but really the focus of me asking this question again is just to make sure that there's no one out there that says: I can't make a determination in this cause unless I hear the defendant testify.

(2 RR 53–54).

2. . . . .

MR. O'DONNELL: Okay. What circumstantial evidence is – first of all, it is evidence. Okay? It's just anything that's not eyewitness testimony. So, you may hear from witnesses in any case who can give information but didn't actually see it happen. Okay? And you can use that information as evidence to judge the credibility and the weight of it. So, let's take a look at this hypothetical here. Okay? You've got a new house. You decide that you're going to paint the bedroom. You own a dog and you leave the dog in the house while you run out to get more paint from the store. When you come back, there are white paw prints all over the room that you were just painting. No one saw the dog and the dog isn't talking. He's not telling you, yeah, I did it. He's just kind of sitting there waiting to see are you going to speak with a nice tone or voice or are you going to get the angry tone. How do we know what happened? Juror No. 4, what do you think?

VENIREPERSON: You can infer from the situation what happened.

(2 RR 63–64).

3. So, from 7:40 until 9:30, that leaves us a wide amount of time that, unfortunately, we will never know what exactly happened, how that argument progressed, but what we do know is how it ended. And it ended with Ancuta Stanciu dead on the floor with a zip-tie closed tightly around her neck.

(5 RR 25).

4. We have in this case–like we talked about in jury selection, we have to put the pieces of the puzzle together. And you have enough evidence to do that. There were only two people in that house that day, that morning. One of them is dead. So, we'll never know from some other eyewitness what actually happened to a "T." But if you follow the evidence, you can find beyond a reasonable doubt Ion Stanciu murdered his wife.

(5 RR 26).

> 5. So, what really happened that day? Unfortunately, we'll never know the exact "how" everything happened or the "why" everything happened. That's why we have to piece the puzzle together, to use the evidence that we have to come to a reasonable and rational conclusion. The evidence points to no one but Ion Stanciu as committing this crime.

(5 RR 31).

The first two comments were made during voir dire, and were presented as referring to the judge's explanation to the venire persons of the law. The remaining comments were during the trial and reflected the fact that there were no eyewitnesses and Stanciu claimed to not remember.

The record does not support the claim of prosecutorial misconduct for commenting on Stanciu's choice not to testify. Stanciu is not entitled to relief on this claim.

F. The Claim That Stanciu's Statement to Police Was Involuntary

Stanciu alleges that when he made the statement at issue to a police detective, he did not first receive a *Miranda* warning, making the statement involuntary and inadmissible. *Miranda v. Arizona*, 384 U.S. at 444. A police detective testified that he went to see Stanciu in the hospital the day after the murder to find out what Stanciu knew about his wife's death. Stanciu was not considered a suspect at that time. He was in the hospital, not in custody, and free to end the interview at any point. *Id.* 73–74. Because Stanciu was not in custody, there was no Fifth Amendment violation due to the lack of *Miranda* warnings. A noncustodial interview or interrogation does not implicate *Miranda*. *United States v. Harrell*, 894 F.2d 120 (5th Cir. 1990). The state-court denial of relief was a reasonable determination of the facts and a reasonable application of federal law. Stanciu is not entitled to relief on this claim.

VI. The Claims of Ineffective Assistance of Trial Counsel

A. The Standard of Review

A petitioner alleging ineffective assistance must show that counsel's performance fell below prevailing, objective, professional standards. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Loyd v. Whitley*, 977 F.2d 149, 156 (5th Cir. 1992). Merely alleging that counsel's performance was deficient is not enough. "[I]n the absence of a specific showing of how these alleged errors and omissions were constitutionally deficient, and how they prejudiced his right to a fair trial," claims of ineffective assistance must fail. *Miller v. Johnson*, 200 F.3d 274, 282 (5th Cir. 2000). A federal habeas court applies a highly deferential review, using a strong presumption that "trial counsel rendered adequate assistance and that the challenged conduct was the product of reasoned trial strategy." *Wilkerson v. Collins*, 950 F.2d 1054, 1065 (5th Cir. 1992); *Strickland*, 460 U.S. at 690; *Amos v. Scott*, 61 F.3d 333, 347–48 (5th Cir. 1995). The court reviews the record as a whole to eliminate the "distorting effects of hindsight." *Strickland*, 466 U.S. at 689.

To satisfy the prejudice prong of *Srickland*, a petitioner must show that counsel's errors were so serious as to make the trial unfair and the outcome unreliable. The petitioner must show that without trial counsel's unprofessional errors, there is a reasonable probability that the outcome would have been different. *Id.* at 694; *see Carter v. Johnson*, 131 F.3d 452, 463 (5th Cir. 1997) ("In evaluating claims of ineffective assistance during the guilt stage of the trial, the petitioner must show a 'reasonable probability' that the jury would have otherwise harbored a reasonable doubt concerning guilt." A failure to show either deficient performance or prejudice makes it unnecessary to examine the other prong. *Strickland* at 69.

B. The Claims of Failure to Present Exculpatory Evidence

Stanciu alleges that his trial counsel failed to present the following pieces of evidence: (1) DNA; (2) his daughter's purported suicide note; (3) the deceased's reasons for wanting a divorce; (4) Stanciu and the deceased's cellphone and home phone records; (5) the zip-tie positions around his and the deceased's necks; and (6) photographs of the deceased's back. (Docket Entry No. 1 at 6, 11–13; 24–31).

Trial counsel addressed this claim in her affidavit to the state habeas court, as follows:

> 8. I do not believe it would have been beneficial or necessary to present the listed additional evidence for the following reasons: There was no DNA evidence to present, which I believe benefitted Mr. Stanciu. In my closing argument in the guilt stage of trial, I argued that the State failed to present. DNA, emphasizing the State's opportunity to test the DNA under the decedent's fingernails to support my position that the State failed to reach its burden of proof. I do not think it would have been beneficial or necessary to my client's defense to present Mr. Stanciu's young daughter's undated note and label it a "suicide" note or my client's viewpoint of his wife's reasons for divorce because in my opinion to do so would have been speculation, I also do not think that, in light of the evidence at trial, highlighting the position of the neck zip ties or presenting a photo of the decedent's back would have been beneficial. Finally, I did not have any reason to believe that obtaining home phone records would have been beneficial to my investigation of the case or Mr. Stanciu's defense.

(SHCR at 181).

It was reasonable for Stanciu's counsel to decide not to present the DNA report, because there was no evidence and no basis to believe that any such evidence would have been exculpatory. It was reasonable for counsel to decide not to attack Stanciu's teenage daughter as mentally unstable, without stronger evidence, for fear of angering the jury. It was reasonable for counsel to decide not to introduce the reasons Stanciu's wife wanted to divorce him, reasons unlikely to present him in a favorable light. Similarly, it was reasonable for counsel to decide not to introduce cellphone records that were consistent with the prosecution's theory that the deceased called Ms.

Kellstrom, her supervisor, numerous times because the deceased was afraid of Stanciu. As noted above, the evidence showed that there was no mechanical resuscitation effort, so it was reasonable for counsel to decide not to put a photograph of the deceased's back before the jury. Finally, it was reasonable for counsel to decide not to emphasize the position of the zip ties, which was likely to be upsetting to a jury.

There is no basis to find that trial counsel was deficient in the decisions on what evidence to present. Nor is there any basis to find that, given the evidence, adding any of these items of evidence would have changed the trial result. Stanciu is not entitled to relief on this claim.

C. The Claim That Trial Counsel Failed to Examine Medical Experts

Stanciu alleges that he was denied effective assistance because his trial counsel did not further cross-examine the doctors who did the autopsy on the deceased or consult with the defense expert to do so. (Docket Entry No. 1 at 7, 15, 34, 36). Trial counsel addressed this claim in her affidavit to the state habeas court, stating as follows:

> 6. I do not believe it would have been beneficial or necessary to cross-examine Dr. Pinto because I did not think any additional testimony would help Mr. Stanciu's defense and, instead, would have reinforced the expert's testimony.
>
> 7. I do not believe it would have been beneficial or necessary to further question Dr. Laughlin. I intentionally limited my questioning of defense expert Dr. Laughlin because, based on my investigation and extensive conversations with Dr. Laughlin I already knew that he was not going to be helpful to Mr. Stanciu's defense on any other topic, including challenging the testimonies of Dr. Pinto and Dr. Condron.

(SHCR at 180–81).

The presentation of testimonial evidence is a matter of trial strategy; allegations of what an uncalled witness would have testified to are largely speculative. *Boyd v. Estelle*, 661 F.2d 388, 390 (5th Cir. 1981). The record does not show that consulting with or presenting a defense expert

would have provided admissible and favorable evidence for Stanciu. The record shows neither deficient performance by counsel nor prejudice. Stanciu is not entitled to relief on this claim.

D. The Claim That Trial Counsel Was Ineffective In Failing To Move To Suppress Evidence

Stanciu alleges that he was denied effective assistance because trial counsel did not object to the prosecutor's statements that Stanciu alleges were comments on his choice not to testify, and failed to file a motion to suppress the statement Stanciu made to a police detective the day after the murder. *Id.* at 17, 38–41.

Stanciu challenges two exchanges between the prosecutor and members of the venire, and statements during closing argument that he also challenged as prosecutorial misconduct. Those exchanges are addressed earlier in this Memorandum and Opinion.

Trial counsel addressed this claim in her affidavit to the state habeas court, as follows:

> 5. I do not believe it would have been beneficial or necessary to object to the prosecutor's statements listed in Mr. Stanciu's writ application: the prosecutor asked during voir dire for reasons someone might not testify, the prosecutor's dog example, the prosecutor argued we will never know what happened, and the prosecutor argued that there is no other eyewitness. I do not see how the statements were objectionable or improper comments on Mr. Stanciu's failure to testify.

(SHCR at 180).

These comments were not connected to Stanciu's decision not to testify. The first two comments were made during voir dire and referred to what the judge had already told the venire. The other comments summarized the trial evidence, noting that there were no eyewitnesses and that Stanciu claimed to not remember. Failing to object was neither deficient nor prejudicial.

Trial counsel also addressed the claim directed to her decision not to file a motion to suppress the statement Stanciu gave to police. Her affidavit to the state habeas court stated:

4. I do not believe it would have been beneficial or necessary to move to suppress Mr. Stanciu's statement as he was not in custody and he was not a suspect at the time of his interview. Since he had been airlifted to the hospital for life-saving measures, it was the first opportunity for the officers to talk to him about what happened. I recall that Mr. Stanciu and I discussed that he was on medication at the time of his statement, but I did not think this was a meritorious ground to suppress his statement. I argued to the jury during the guilt stage of trial that he had just woken up from being "extubated" when the police spoke with him and that he did not know his own medical status or that of his wife before answering the officer's questions and they should take that into consideration as they deliberated.

(SCHR at 180).

As noted above, the record showed that Stanciu was in the hospital, not in police custody when he made the challenged statements to a police detective the day after Stanciu's wife died. (4 RR 73). Stanciu was not considered a suspect at that time. He was free to end the interview at any point. Trial counsel was not ineffective for not filing a motion to suppress the statement, and no prejudice resulted. Stanciu is not entitled to relief on this claim.

VII. The Claim of Ineffective Assistance of Appellate Counsel

Stanciu alleges that appellate counsel was ineffective for failing to properly present a claim for insufficiency of the evidence on direct appeal and for failing to file an appeal that conformed to Texas Rule of Court 48.4. (Docket Entry No. 1 at 20, 51–53).

The *Strickland* standard applies to appellate counsel. *Smith v. Robbins*, 528 U.S. 259, 285 (2000). Counsel's strategic and informed decision not to pursue a claim on appeal presumptively falls within the "wide range of professionally competent assistance." *Smith v. Murray*, 477 U.S. 527, 536 (1986); *United States v. Williamson*, 183 F.3d 458, 462–63, n.7 (5th Cir. 1999). "(Solid, meritorious arguments based on directly controlling precedent should be discovered and brought to the court's attention," but "it is not necessarily providing ineffective assistance of counsel to fail to construct an argument that may or may not succeed."). To show prejudice, a petitioner must

VIII. Conclusion

Stanciu's petition for writ of habeas corpus is denied. Because he has not met the requirements, a certificate of appealability will not issue.

SIGNED on March 24, 2021, at Houston, Texas.

Lee H. Rosenthal
Chief United States District Judge