No. 22-_____ (CAPITAL CASE) (22A586)

IN THE SUPREME COURT OF THE UNITED STATES

JAIME PIERO COLE,
Petitioner,

v.

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

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

During jury selection, the court told eleven of the twelve seated jurors that their decision to impose death would be automatically reviewed on appeal to "make sure everything was done according to the law." The court misled the jurors to "believe that the responsibility for determining the appropriateness of the defendant's death rest[ed] elsewhere," violating *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985). On Petitioner's application for a certificate of appealability ("COA"), the Fifth Circuit ruled that Petitioner could not overcome procedural default of a claim that counsel was ineffective for failing to object to the trial court's comments. That ruling was based on the Fifth Circuit's erroneous belief that the *Caldwell* claim was without merit and therefore that Petitioner could not establish cause for the default under *Martinez v. Ryan*, 566 U.S. 1 (2012). The merits of the claim were thus critical to the ruling below. The questions presented are:

1. Was the Fifth Circuit's ruling that a court's comments during voir dire cannot give rise to a *Caldwell* violation erroneous and in tension with rulings of other courts of appeals that have applied *Caldwell* in similar circumstances?

2. Did the Fifth Circuit exceed the bounds of review of a COA application in its analysis of the merits of the *Caldwell* claim?

STATEMENT OF RELATED PROCEEDINGS

Cole v. Lumpkin, No. 21-70011 (United States Court of Appeals for the Fifth Circuit) (order denying rehearing and rehearing en banc on October 5, 2022).

Cole v. Lumpkin, No. 21-70011 (United States Court of Appeals for the Fifth Circuit) (order denying certificate of appealability filed August 26, 2022).

Cole v. Lumpkin, No. 4:17-CV-940 (United States District Court for the Southern District of Texas) (judgment and order denying petition for writ of habeas corpus and certificate of appealability filed September 7, 2021).

Ex parte Cole, No. 84,332-02 (Texas Court of Criminal Appeals) (order dismissing subsequent postconviction application filed April 1, 2020).

Ex parte Cole, No. 84,332-01 (Texas Court of Criminal Appeals) (order denying habeas corpus relief filed February 8, 2017).

Ex parte Cole, No. 1250754-A (District Court of Harris County, Texas) (order adopting the state's proposed findings of fact and conclusions of law filed June 14, 2016).

Cole v. State, No. AP-76,703 (Texas Court of Criminal Appeals) (opinion affirming judgment and sentence of trial court on direct appeal filed June 18, 2014).

State v. Cole, No. 1250754 (District Court of Harris County, Texas) (judgment of guilt and sentence entered October 27, 2011).

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

State Cases

State Statutes

Other

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, *Cole v. Lumpkin*, No. 21-70011, 2022 WL 3710723 (5th Cir. Aug. 26, 2022) ("*Cole II*"), is unreported and appears in the appendix. Timely petitions for panel rehearing and rehearing en banc were denied by order on October 5, 2022. The court's denial is not reported and appears in the appendix.

The opinion of the United States District Court for the Southern District of Texas denying the petition for habeas corpus, *Cole v. Lumpkin*, No. 4:17-CV-940, 2021 WL 4067212 (S.D. Tex. Sept. 7, 2021) ("*Cole I*"), is unreported and appears in the appendix.

The order of the Texas Court of Criminal Appeals dismissing Petitioner's subsequent application for a writ of habeas corpus, *Ex parte Cole*, No. 84,322-02, 2020 WL 1542118 (Tex. Crim. App. Apr. 1, 2020), is unreported and appears in the appendix.

The order of the Texas Court of Criminal Appeals denying a writ of habeas corpus, *Ex parte Cole*, No. 84,322-01, 2020 WL 1542118 (Tex. Crim. App. Feb. 8, 2017), is unreported and appears in the appendix. The findings of fact and conclusions of law for the 230th District Court of Harris County, Texas, *Ex parte Cole*, No. 1250754-A (Tex. Dist. Ct. June 14, 2016), are unreported and appear in the appendix.

JURISDICTION

The Court of Appeals denied a Certificate of Appealability on August 26, 2022, and denied petitions for rehearing and rehearing en banc on October 5, 2022. This Court has jurisdiction under 28 U.S.C. § 1254.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

The Eighth Amendment to the United States Constitution provides in relevant part: "[N]or cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides in relevant part: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law[.]"

Title 28 U.S.C. § 2253(c) provides in relevant part:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from --
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; . . . .
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

Title 28 U.S.C. § 2254 provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted

> with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT

A. Trial Proceedings

On March 25, 2010, a Texas grand jury indicted Mr. Cole for capital murder for the killings of his estranged wife, Melissa Cole, and Alecia "Desirae" Castillo. Trial commenced on October 17, 2011. ROA.7470.[1] During jury selection, the trial court told eleven of the twelve seated jurors that their decision to impose death would be automatically reviewed. *See* ROA.1008-09, 4430-31, 5299.

The court told one venire panel, which contained six of the accepted jurors: "If there is a death sentence there is automatic review whether the defendant wants it or not. It's automatically reviewed if there is a death sentence in a capital case. Okay?" ROA.5299.[2]

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[1] ROA refers to the electronic record on appeal filed in the Fifth Circuit.

[2] *See* ROA.5396, 5534 (acceptances of jurors Rodriguez and Murphy); ROA.5713 (acceptance of juror Edwards); ROA.6382, 6445, 6511 (acceptances of jurors Villareal, Gillespie, and Perez); ROA.6591 (start of third panel's group voir dire).

In the presence of another venire panel, which included five accepted jurors,[3] the following exchange occurred:

> THE COURT: Every death sentence is an automatic appeal. And you would want that. You are talking about someone's life. We want to make sure everything was done according to the law. So, in every death case, there is an automatic appeal.
>
> VENIREPERSON: It's an automatic appeal.
>
> THE COURT: Whether the defendant wants it or not, automatic appeal.
>
> . . .
>
> THE COURT: It's an automatic appeal after a conviction. How long a case is in the Court of Appeals, none of us can give an answer to that. That goes to a different court, different judges all of that.

ROA.4430-31.

At trial, the evidence showed that following his separation from Melissa, Mr. Cole was returning their sons to Melissa's apartment after they had spent a couple of days with him. Melissa was in the apartment with Desirae, her daughter from another relationship, and her niece. Mr. Cole and Melissa began arguing inside the apartment and continued their argument outside. Mr. Cole suddenly shot Melissa, then entered the apartment and shot Desirae. He left the apartment with his two-year-old son Lucas and was eventually apprehended without incident. The defense did not present any witnesses during the guilt-phase hearing. ROA.8257. The jury convicted Mr. Cole of capital murder. ROA.8292-93.

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[3] *See* ROA.4531, 4653, 4766 (acceptances of jurors Gilbeaux, Butler, and Tarrant); ROA.4969 (acceptance of juror Imola); ROA.5123 (acceptance of juror Marshall); ROA.5128 (start of second panel's group voir dire).

In addition to the circumstances of the offense, the State's case for death relied on its characterizations of who Mr. Cole was and who, it contended, he had always been. ROA.8318, 8323. The State presented multiple witnesses who testified that Mr. Cole had been possessive, controlling, and violent in two previous romantic relationships. The State also presented officers who had arrested Mr. Cole several years previously for public intoxication; and Mr. Cole's daughter, who testified regarding his drinking, violent behavior, and an incident involving alleged sexual impropriety. *See* ROA.8331-8505, 8581-8614.

The defense presented multiple witnesses at the penalty-phase hearing. Several lay witnesses testified about Mr. Cole's character and work history as a car wash manager. *See, e.g.*, ROA.8715-16, 8748, 8768-74, 8779-83, 8802-04, 8808-09, 9043-48. Mr. Cole's adoptive parents and natural mother and sister from Ecuador related information about their respective families and his traumatic separation from his birth family. *See* ROA.8949, 8981, 8986, 9020-39, 9139-41, 9143-44, 9147-48. A counselor testified that Mr. Cole visited her for anxiety and depression following his separation from his wife. ROA.8820, 8825, 8839. A psychiatrist testified about Mr. Cole's drinking, diagnosed him as alcohol dependent and suffering from an adjustment disorder with depressed mood, and discussed the effects of alcohol and repeated withdrawals from alcohol on cognitive and emotional functioning. ROA.8845-47, 8853-61. And a prison expert testified about the restrictions Mr. Cole would face were he to be sentenced to life without parole. ROA.9056-67, 9077-78.

The jury sentenced Mr. Cole to death. ROA.8292-93, 9274-76, 9278-79.

B. Direct Appeal and Initial State Habeas Proceedings

The Texas Court of Criminal Appeals (hereinafter "CCA") affirmed Mr. Cole's conviction and sentence on direct appeal. *Cole v. State*, No. AP-76,703, 2014 WL 2807710, at *1 (Tex. Crim. App. June 18, 2014). This Court denied certiorari review. *Cole v. Texas*, 135 S. Ct. 1154 (2015).

Mr. Cole sought a writ of habeas corpus under state law. ROA.1569. The state court adopted the State's Proposed Findings of Fact and Conclusions of Law and affirmed Mr. Cole's conviction and sentence. ROA.2327-80.

The CCA affirmed the trial court's findings of fact and conclusions of law. *Ex parte Cole*, No. 84,332-01, 2017 WL 562725, at *2 (Tex. Crim. App. Feb. 8, 2017). A dissenting opinion was also issued. *Id.* at *2-3. This Court denied certiorari review. *Cole v. Texas*, 138 S. Ct. 90 (2017).

C. Federal Habeas Proceedings

Mr. Cole filed a timely habeas petition and an amended petition. Among other claims, Mr. Cole alleged that the trial court improperly informed eleven of the twelve seated jurors that their decision to impose death would be automatically reviewed, *see* ROA.1008-09, and that those instructions violated *Caldwell v. Mississippi*, 472 U.S. 320 (1985). He further alleged that trial counsel was ineffective for failing to object to the trial court's comments, and that postconviction counsel's ineffectiveness in failing to raise this trial counsel ineffectiveness claim

provided cause to overcome the claim's default. ROA. 808-14 (citing *Martinez v. Ryan*, 566 U.S. 1, 14 (2012)).[4]

Mr. Cole returned to state court in an unsuccessful attempt to litigate previously unexhausted issues, including the *Caldwell* issue. *See Ex parte Cole*, No. 84,332-02, 2020 WL 1542118, at *1 (Tex. Crim. App. April 1, 2020). Mr. Cole then filed a second amended habeas petition. The district court issued an opinion and order denying the petition. ROA.1440. It found that Mr. Cole failed to show his state postconviction counsel was ineffective where the Texas state court "has not extended *Caldwell* to remarks made during voir dire[,]" *Cole I*, 2021 WL 4067212, at *20 (citing *Sattiewhite v. State*, 786 S.W.2d 271, 282 (Tex. Crim. App. 1989)), the trial court correctly stated Texas law, and the trial court made no other incorrect statements throughout trial. The district court also declined to issue a COA. ROA.1511-12. The district court denied Mr. Cole's timely motion to alter and amend judgment. ROA.1542.

Mr. Cole filed a timely notice of appeal. ROA.1545. He then filed an application and supporting brief requesting COA on the *Caldwell* issue and two others. On August 26, 2022, the Fifth Circuit denied COA on all of the claims,

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[4] The claim presented here is primarily based on the trial record. With regard to such record-based claims, this Court has found cause for a procedural default based on postconviction counsel's ineffectiveness, without the need for an evidentiary hearing or extra-record evidence. *See, e.g.*, *Buck v. Davis*, 137 S. Ct. 759, 780 (2017). Accordingly, the failure-to-develop rule applied in *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022), does not apply here. Indeed, although the Fifth Circuit discussed *Ramirez* in denying other issues, *see Cole II*, 2022 WL 3710723, at *5, it did not apply *Ramirez* to this claim, but rather denied review based on its analysis of the merits of the underlying *Caldwell* claim. *Id.* at *6.

holding, *inter alia*, that reasonable jurists could not debate the district court's conclusion that Mr. Cole's postconviction counsel were not ineffective for failing to raise a claim of trial counsel's ineffectiveness related to the *Caldwell* issue. *Cole II*, 2022 WL 3710723, at *6. On October 5, 2022, the Court of Appeals denied rehearing and rehearing en banc. App. B. This petition is timely filed, Justice Alito having granted Petitioner two extensions of time to file this petition.

REASONS FOR GRANTING THE WRIT

A capital jury cannot be misled regarding its unique role in the sentencing process. *Caldwell*, 472 U.S. at 341-42 (O'Connor, J., concurring in part and concurring in judgment).[5] This type of error, during any part of the trial, including voir dire, violates the Eighth Amendment if the sentencing decision was "made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* at 328-29. Here, the Fifth Circuit denied Mr. Cole a COA on his claim that counsel was ineffective for failing to object to the violation of *Caldwell* that resulted from the trial court comments during voir dire, based on its assessment of the merits of the underlying *Caldwell* claim. This decision is contrary to *Caldwell* and in tension with decisions from other circuits.

[5] "[Justice O'Connor's] position is controlling" where she "supplied the fifth vote in *Caldwell*, and concurred on grounds narrower than those put forth by the plurality." *Romano v. Oklahoma*, 512 U.S. 1, 8 (1994) (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)).

A. This Court should grant certiorari to determine whether *Caldwell* applies to a trial court's comments during voir dire.

The Fifth Circuit denied a COA on Mr. Cole's ineffective assistance claim related to the *Caldwell* error for three reasons: (1) the Texas CCA "has declined to apply *Caldwell* to 'voir dire remarks.'" *Cole II*, 2022 WL 3710723, at *6 (citing *Sattiewhite v. State*, 786 S.W.2d 271, 282 (Tex. Crim. App. 1989) (en banc)); (2) the trial court "accurately described Texas's postsentencing" procedures; and (3) Mr. Cole did not "challenge as violating *Caldwell* any remarks that the trial court made during either the guilt or penalty phases of the trial." *Id.* None of these reasons withstands scrutiny. At the very least, each of these rulings is debatable by reasonable jurists.

1. Texas courts had not foreclosed this *Caldwell* challenge.

The district court and Fifth Circuit relied on a single state court decision—which is distinguishable from Mr. Cole's case and has never been subsequently cited by the state court with respect to *Caldwell*—for the proposition that Texas courts do not recognize a *Caldwell* error in voir dire, and thus, prior counsel was not ineffective for not raising such an issue.

In *Sattiewhite*, during individual voir dire of a single juror, the prosecutor suggested that even if sentenced to death, the defendant might not be executed. 786 S.W.2d at 281-82. On appeal, the court considered whether "to apply the *Caldwell* rationale to a situation arising during *individual* voir dire." *Id.* at 282 (emphasis added). The CCA declined to apply *Caldwell* to such remarks. *Id.* The CCA has not extended that ruling beyond its facts, i.e., remarks made to a single juror during

individual voir dire. Here, the comments were made by the trial court to eleven of the twelve seated jurors during group voir dire. ROA.1008-09. *Sattiewhite* is distinguishable from Mr. Cole's case, and not dispositive of Mr. Cole's claim.

Moreover, a recent CCA decision illustrates that Texas state courts are, as they must be, willing to review the merits of claims that *Caldwell* was violated during voir dire. *See Falk v. State*, No. AP-77,071, 2021 WL 2008967, at *13-14 (Tex. Crim. App. May 19, 2021), *cert. denied*, 142 S. Ct. 1211 (2022). In *Falk*, the death sentenced appellant alleged that a trial judge's "inform[ing] each prospective juror" during voir dire that the defendant's decision to represent himself was reasonable and rational "effectively assured the jurors that they need not have any reservations about potentially condemning a mentally infirm person to death[,]" and therefore violated *Caldwell*. *Id.* at *12-14. The CCA mentioned neither *Sattiewhite* nor any prohibition on the application of *Caldwell* to comments made during voir dire when it considered the constitutionality of the trial court's comments to each juror during voir dire. *See id.* at 14 ("In this case, the trial judge's comments did not 'reduc[e] the jurors' sense of responsibility for their sentencing verdict,' in violation of *Caldwell*.").

To further support its position that the state courts have declined to apply *Caldwell* to remarks made during voir dire, the Fifth Circuit also referenced its prior observations that such remarks have a "'greatly reduc[ed]' chance of having 'any effect at all on sentencing.'" *Cole II*, 2022 WL 3710723, at *6 (quoting *Miniel v. Cockrell*, 339 F.3d 331, 343 (5th Cir. 2003)) (alteration in original). However, in

Miniel itself, the Circuit recognized that "[t]o evaluate a *Caldwell* claim, this Court looks to the total trial scene, *including jury selection*." 339 F.3d at 342 (citations and quotation marks omitted) (emphasis added).

Furthermore, *Miniel*, like *Sattiewhite*, is distinguishable. The prosecutor in *Miniel* had an extended discussion with a single "highly educated prospective juror who engaged in some philosophical debate" about the length of the appellate process. 339 F.3d at 343. Unlike this case, there is no indication that most of the seated jurors in *Miniel* witnessed this exchange. Moreover, in Miniel's state habeas proceedings, which followed the decision in *Sattiewhite*,[6] the Texas trial court considered Miniel's claim and found there was "no evidence in the record to support [Miniel's] assertions that the State misstated the law in voir dire or impermissibly minimized the jury's responsibility for the death sentence." *Id.* at 342 (internal quotations omitted). That finding, unlike here, was reviewed under § 2254(e)(1). *Id.* at 344. *Miniel* provides no support for the idea that the Texas state courts have declined to apply *Caldwell* to voir dire remarks. Given these distinctions, prior counsel's failure to raise this meritorious claim cannot be excused by the CCA's decision in *Sattiewhite*.

Counsel's failure to object to the trial court's comments to the jury was unreasonable. The comments were facially violative of the rule in *Caldwell* itself. And at the time of trial extant authority supported both the view that comments

[6] *Miniel*, 339 F.3d at 335 (noting petitioner filed petition for writ of habeas corpus in state court in 1993).

during voir dire could violate *Caldwell*, *see Miniel*, 339 F.3d at 342; *Rodden v. Delo,* 143 F.3d 441, 445 (8th Cir. 1998) ("comments about sentencing during voir dire could mislead the jury into believing the responsibility for imposing a death sentence rested elsewhere"), and that counsel in a capital case have a duty to raise objections and claims based on the United States Constitution. *See, e.g.*, *Everett v. Beard*, 290 F.3d 500, 513 (3d Cir. 2002) (counsel ineffective for failing to raise due process objection to jury instruction); *Starr v. Lockhart*, 23 F.3d 1280, 1285-86 (8th Cir. 1994) (counsel ineffective for failing to raise Eighth Amendment objection to jury instruction on aggravating circumstances). At a minimum, the question of whether counsel's failure to object was ineffective was worthy of a COA.

2. While technically correct, the trial court's comments had the impermissible effect of misleading the jury.

In *Caldwell*, the prosecutor said to a capital jury at sentencing that "your decision is not the final decision . . . the decision you render is automatically reviewable by the [state] Supreme Court." 472 U.S. at 325-26. While technically correct,[7] the prosecutor's comments were constitutionally impermissible because they misled the jury as to the scope of appellate review. *Compare id.* at 342-43 (O'Connor, J. concurring in part and concurring in judgment) (prosecutor's remarks about appellate review sought to minimize the jury's role), *with id.* at 342 (would be appropriate to accurately instruct "jurors on the sentencing procedure, *including the existence and limited nature of appellate review*") (emphasis added). The comments

[7] Under Mississippi law, death sentences are automatically reviewed by the Supreme Court of Mississippi under Mississippi Code § 99-19-105.

at issue in *Caldwell* suggested that "the appellate court would be free to reverse the death sentence if it disagreed with the jury's conclusion that death was appropriate," even though appellate review was actually restricted to whether the jury's verdict was "so arbitrary that it 'was against the overwhelming weight of the evidence.'" *Id.* at 343 (quoting *Williams v. State*, 445 So.2d 798, 811 (Miss. 1984)). Telling jurors that a death sentence is subject to automatic appeal—without also informing them of the limits on such appellate review—has the impermissible effect of misleading the jury and therefore constituted an Eighth Amendment violation. *Id.* at 342-43.

Likewise, in Mr. Cole's case, the trial court's statements misled the jurors to believe that their decision was provisional because Mr. Cole's fate ultimately rested with the appellate courts. During voir dire, the trial court told members of the jury that their votes for death would be automatically reviewed by the appellate court. ROA.4430-31, 5299. The court told one venire panel, which contained six of the accepted jurors: "If there is a death sentence there is automatic review whether the defendant wants it or not. It's automatically reviewed if there is a death sentence in a capital case. Okay?" ROA.5299.

In another venire panel, which included five accepted jurors, the trial court again misled the jurors about their role:

> THE COURT: Every death sentence is an automatic appeal. And you would want that. You are talking about someone's life. We want to make sure everything was done according to the law. *So, in every death case, there is an automatic appeal.*
>
> VENIREPERSON: It's an automatic appeal.

> THE COURT: Whether the defendant wants it or not, automatic appeal.
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> . . .
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> THE COURT: It's an automatic appeal after a conviction. How long a case is in the Court of Appeals, none of us can give an answer to that. That goes to a different court, different judges all of that.

ROA.4430-31 (emphasis added).

These are exactly the same kind of statements that this Court condemned in *Caldwell*. The automatic appeal in Texas, like in Mississippi, is extremely limited. Under Texas law, review of the jury's capital sentencing verdict is limited to whether it was arbitrarily or capriciously imposed. When reviewing the sufficiency of the evidence to sustain the death penalty, the CCA determines only whether the evidence, when viewed in the light most favorable to the verdict, would support any rational trier of fact in answering the punishment issues so as to impose the death penalty. *Williams v. State*, 273 S.W.3d 200, 213 (Tex. Crim. App. 2008); *see also State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006) (explaining that when reviewing the record in the light most favorable to the verdict, it will "reverse the judgment only if it is outside the zone of reasonable disagreement").

The trial court, in contrast, told jurors that the automatic appeal would "make sure everything was done according to the law," ROA.4430, suggesting a much broader review of any death sentence. As in *Caldwell*, telling the jurors only that there was an automatic appeal, but not telling them about the limitations on such appeals, misled the jurors and diminished their sense of responsibility for imposing a sentence of death. *See Wheat v. Thigpen*, 793 F.2d 621, 627-28 (5th Cir.

1986) (vacating death sentence because prosecutor told jury its sentencing decision would be reviewed on appeal); *accord Driscoll v. Delo*, 71 F.3d 701, 713 (8th Cir. 1995) ("Despite their technical accuracy under Missouri law, the prosecutor's statements were impermissible because they misled the jury as to its role in the sentencing process in a way that allowed the jury to feel less responsibility than it should for its sentencing decision.").

Moreover, the statements to this jury were even more prejudicial because of the source. Here, the judge, not the prosecutor, informed the jury that the appellate court could overrule their sentencing decision. *See Darden v. Wainwright*, 477 U.S. 168, 183 n.15 (1986) (noting that the trial judge's approval of the comments was an important factor in *Caldwell*). In *Sawyer v. Butler*, before ruling that the petitioner's claim was barred under *Teague v. Lane*, 489 U.S. 288 (1989), the Fifth Circuit noted that misleading remarks by the trial court make finding a *Caldwell* violation more likely: "[T]he trial judge is an extraordinarily puissant figure. A direct and uncorrected misleading misstatement to the jury that misleads the jury regarding its role will be difficult to salvage." *Sawyer v. Butler*, 881 F.2d 1273, 1287 (5th Cir. 1989), *aff'd sub nom. Sawyer v. Smith*, 497 U.S. 227 (1990); *see Mann v. Dugger*, 844 F.2d 1446, 1458 (11th Cir. 1988) (en banc) (finding *Caldwell* violation where "the trial judge expressly put the court's imprimatur on the prosecutor's previous misleading statements"). In this case, the trial judge—the final and definitive authority on the law of the case—left the jurors with a material

misconception about their responsibility as decision-makers and Mr. Cole's chances for appellate relief.

As in *Caldwell*, the jury here was misled about the scope of the automatic review. The Fifth Circuit's characterization of the court's comments as "accurately describ[ing] Texas's postconviction procedures" is contrary to *Caldwell*. At a minimum it is debatable among jurists of reason. *See Wheat*, 793 F.2d at 627-28; *see also Riley v. Taylor*, 277 F.3d 261, 295 (3d Cir. 2001) (similar argument violated *Caldwell*); *Fleener v. Anderson*, 171 F.3d 1096, 1099-1100 (7th Cir. 1999) (explaining that there was a constitutional violation in *Caldwell* because the jury's decision was subject "only to limited judicial review" but the jury may have inferred that their sentencing determination was subject to "plenary review").

3. A *Caldwell* violation occurred where misleading comments were made during voir dire and never corrected.

The final reason the Fifth Circuit provided for denying COA on this claim was that Mr. Cole had not challenged "any remarks that the trial court made during either the guilt or penalty phase of the trial," noting, "[i]nstead, '[t]hroughout voir dire and during closing arguments the court and counsel repeatedly informed the jury that whether [Cole] received a death sentence would be based on the jury's answers to the special issues.'" *Cole II*, 2022 WL 3710723, at *6 (first alteration added) (quoting *Cotton v. Cockrell*, 343 F.3d 746, 755 (5th Cir. 2003)).

The assumption that errors committed during voir dire are unimportant or irrelevant unless repeated during later stages of the trial is unwarranted. Courts have long recognized the independent importance of voir dire as "an essential

instrument to the delivery of a defendant's constitutionally secured right to a jury trial rooted in the commands of due process[.]" *United States v. Ford*, 824 F.2d 1430, 1435 (5th Cir. 1987). "Far from an administrative empanelment process, voir dire represents jurors' first introduction to the substantive factual and legal issues in a case." *Gomez v. United States*, 490 U.S. 858, 874 (1989). As such, courts have repeatedly reversed convictions based on errors made by trial courts during voir dire. *See, e.g.*, *Mach v. Stewart*, 137 F.3d 630, 633 (9th Cir. 1997) ("[T]he jury's exposure during voir dire to an intrinsically prejudicial statement made four times by a children's social worker [that in her experience children reporting abuse were always telling the truth], occurred before the trial had begun, resulted in the swearing in of a tainted jury, and severely infected the process from the very beginning.").

Moreover, the Fifth Circuit's reliance on *Cotton v. Cockrell* is misplaced. The trial court in *Cotton* did not discuss or mislead the jurors about appellate review; instead, it offered a general history of capital punishment in Texas and death penalty procedure. 343 F.3d at 755. There is no indication that any of these remarks misled the jurors about their roles. *Id.* at 754-55.

Here, during voir dire, the trial court made direct and uncontradicted misstatements of the jury's role with respect to automatic appellate review. These statements "d[id] not have to be lengthy to be effective in suggesting to the jury that ultimate responsibility for sentencing lies elsewhere." *Riley*, 277 F.3d at 298. And nothing that came later in the trial contradicted the trial court's misleading

statements indicating that any error made by the jurors at sentencing could be rectified on appeal. Likewise, the fact that the error was not repeated during the guilt- or penalty-phase of trial does not cure the error. *See Francis v. Franklin*, 471 U.S. 307, 319-22 (1985) (even subsequent contradictory instructions do not cure error if not clear to jury which instruction to follow).

As explained above, the trial court here made the improper statements in the presence of eleven of the twelve jurors who were seated. The jurors remembered those statements; during individual voir dire, juror Butler referred to the court's prior statement regarding an automatic appeal when asked whether the death penalty should be a punishment and discussing his concern about wrongful convictions: "Like the Judge said on Friday, it's an automatic appeal. Wait a minute. We missed something here. We might have made a mistake." ROA.4595. The taint of the trial court's statements during voir dire impacted the jury's understanding of its role as arbiters and nothing that happened subsequently cured the error.

As the *Caldwell* Court warned: "[O]ne can easily imagine that in a case in which the jury is divided on the proper sentence, the presence of appellate review could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in." 472 U.S. at 333. No imagination is required here: jurors discussed the fact that Mr. Cole would receive an automatic appeal during deliberations. ROA.11337. In fact, juror Gilbeaux has stated that the knowledge that Mr. Cole "would receive an automatic appeal . . .

change[d] [her] vote from life to death." ROA.11339; *see* ROA.11336-37 (stating she initially voted for a life sentence because she believed that Mr. Cole would not commit future acts of violence and that sufficient mitigating circumstances warranted a lesser sentence). Juror Gilbeaux's comments prove the accuracy of the Court's prediction in *Caldwell* that because "the sentence will be subject to appellate review only if the jury returns a sentence of death, the chance that an invitation to rely on that review will generate a bias toward returning a death sentence is simply too great." 472 U.S. at 333.

The jurors did not understand that they had the ultimate decision regarding Mr. Cole's fate. But for the court's suggestion that any sentencing error could be cured on appeal, it is reasonably likely that at least one juror would have voted for life. Mr. Cole should at least be granted full appellate review of his ineffective-assistance-of-counsel claim.

B. The Fifth Circuit's decision in Mr. Cole's case (and prior cases) demonstrates a departure from other circuits' decisions and improperly limits the scope of *Caldwell*.

Here, the Fifth Circuit suggested that *Caldwell* rarely, if ever, applies to improper comments made by a trial court during voir dire. *See Cole II*, 2022 WL 3710723, at *6 ("[R]emarks allegedly violative of *Caldwell* that 'were made during voir dire' have a 'greatly reduc[ed] chance' of having 'any effect at all on sentencing.'") (quoting *Miniel*, 339 F.3d at 343 (quoting *Byrne v. Butler*, 845 F.2d 501 (5th Cir. 1988))). That idea, however, draws scant support from the decisions of this Court and departs from the decisions of other circuits.

In *Byrne*, the appellant had argued that a prosecutor's remarks during voir dire conveyed an "inference of future release" within the meaning of "life imprisonment," creating "an unacceptable risk that the sentencing determination was improperly based on inaccurate or erroneous information." 845 F.2d at 507-08. The *Byrne* court borrowed language from this Court's opinion in *Darden v. Wainwright*, where the Court was distinguishing *Darden* from *Caldwell*: "[Here], the comments were made at the guilt-innocence stage of trial, greatly reducing the chance that they had any effect at all on sentencing." *Darden*, 477 U.S. at 183 n.15. In *Byrne*, the Fifth Circuit extended this argument from the guilt-stage to voir dire: "In the instant case, the objections and rulings were made during voir dire, 'greatly reducing the chance that they had any effect at all on sentencing.'" 845 F.2d at 509 (quoting *Darden*, 477 U.S. at 183 n.15).

However, this Court did not suggest in *Darden* and has not suggested elsewhere that remarks during voir dire and the guilt-phase are equals when determining whether *Caldwell* has been violated. As the Eighth Circuit explained post-*Darden*:

> Although remarks during the guilt phase of the trial are less likely to have an effect on sentencing than remarks during the penalty phase, it is possible that comments about sentencing during voir dire could mislead the jury into believing the responsibility for imposing a death sentence rested elsewhere.

Rodden, 143 F.3d at 445 (internal citation omitted).

The sentencing decision is necessarily within the purview of voir dire during jury selection for a capital trial, due to death-qualification questions, among others.

See generally Witherspoon v. Illinois, 391 U.S. 510 (1968); *Wainwright v. Witt*, 469 U.S. 412 (1985). In contrast, it is much less likely that comments made during the guilt-stage would violate *Caldwell*, because a *Caldwell* violation occurs when the jury "has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere," *Caldwell*, 472 U.S. at 329. Like the Eighth Circuit, the Eleventh Circuit has recognized that "comments made prior to the sentencing phase can establish a *Caldwell* violation," particularly those "made before . . . prospective jurors collectively, at a time when the prosecutor was purportedly outlining the role of the jury." *Mann*, 844 F.2d at 1457 n.12 (citing *Adams v. Wainwright*, 804 F.2d 1526, 1531 n.7 (11th Cir. 1986)). In *Mann*, the Eleventh Circuit held a prosecutor's comments made during voir dire and guilt-phase closing (and approved of by the court) misled the jury as to the nature of its sentencing responsibility, resulting in an unreliable and unconstitutional death sentence. *Id.* at 1457-58.

This Court should grant certiorari to resolve the tension arising from the circuit courts' disparate treatment of comments made during voir dire as they relate to *Caldwell*. The differing interpretations of appellate courts demonstrate, at least, that this is an issue upon which reasonable jurists could disagree.

C. The Fifth Circuit once again misapplied the COA standard in Mr. Cole's case.

The Fifth Circuit's decision denying COA is inconsistent with the standards this Court has set forth for granting COA. The habeas statute provides that a court should grant leave to appeal where a petitioner makes a "substantial showing of the

denial of a federal constitutional right." 28 U.S.C. § 2253(c)(2). "At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Buck,* 137 S. Ct. at 773 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)).

A petitioner meets the substantial showing standard when he presents a claim that "is a substantial one, which is to say [he] must demonstrate that the claim has some merit." *Martinez* , 566 U.S. at 14. A claim is only insubstantial if "it does not have any merit or . . . it is wholly without factual support." *Id.* at 16. That is not the case here.

Here, the Fifth Circuit did not even pay lip service to the COA statute. As it has done repeatedly since *Miller-El*, the Fifth Circuit did not undertake the COA analysis required by this Court's decisions. It "phrased its determination in proper terms—that jurists of reason would not debate that Buck should be denied relief—but it reached that conclusion only after essentially deciding the case on the merits." *Buck*, 137 S. Ct. at 773 (internal citation omitted). All the while, the court put a "dismissive and strained interpretation," *Miller-El*, 537 U.S. at 344, on Mr. Cole's debatable facts and arguments. *See* Parts A & B above.

When an inferior court repeatedly fails to apply the law as AEDPA demands, this Court has forcefully corrected that court's errors. As Justice Scalia has remarked, "The only way this Court can ensure observance of [AEDPA] is to

perform the unaccustomed task of reviewing utterly fact-bound decisions that present no disputed issues of law." *Cash v. Maxwell*, 132 S. Ct. 611, 616 (2012) (Scalia, J., dissenting from denial of certiorari) (citing eight reversals of Ninth Circuit grants of habeas relief in contravention of 28 U.S.C. § 2254(d)(1)). The same holds true here. The Fifth Circuit "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10. To be sure, Mr. Cole's petition presents another important question, even without regard to the Fifth Circuit's failure to carry out the analysis required by the COA statute. This Court certainly has the power to resolve the merits of those questions, including by taking certiorari from the improper denial of a COA. *See, e.g.*, *Buck*, 137 S. Ct. at 774-75. But in the alternative, this Court may simply review the Fifth Circuit's patent misapplication of the COA requirement and instruct the Fifth Circuit to issue a COA. *Miller-El*, 537 U.S. at 327; *see also Tharpe v. Sellers*, 138 S. Ct. 545, 546-47 (2018) (granting certiorari, vacating and remanding Eleventh Circuit's denial of COA "for further consideration of the question whether Tharpe is entitled to a COA"). Mr. Cole at a minimum seeks the vindication of his right to full appellate review of his claim, given that he has shown the lower court's resolution of the claim is at best debatable and that he deserves encouragement to proceed further.

CONCLUSION

For all of these reasons, this Court should grant this petition for a writ of certiorari. In the alternative, this Court should grant certiorari, vacate the decision below, and remand this case to the Fifth Circuit with instructions to grant a Certificate of Appealability.

Respectfully submitted,

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