

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

PROOF OF SERVICE

I hereby certify that on the 12th day of June, 2023, a copy of **Respondent's Brief in Opposition to Petition for a Writ of Certiorari** was sent by electronic mail to: Shawn Nolan, Federal Community Defender, Office for the EDPA, 601 Walnut Street, Suite 545 West – The Curtis, Philadelphia, PA 19106. All parties required to be served have been served. I am a member of the Bar of this Court.

s/ Cara Hanna

CARA HANNA
Assistant Attorney General
Criminal Appeals Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 936-1400

Counsel for Respondent

IN THE
Supreme Court of the United States

JAIME PIERO COLE,
Petitioner,

vs.

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

**BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI**

JOHN SCOTT
Provisional Attorney General

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

BRENT WEBSTER
First Assistant Attorney General

CARA HANNA
Assistant Attorney General
Criminal Appeals Division
Counsel of Record

JOSH RENO
Deputy Attorney General
for Criminal Justice

P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 936-1400
cara.hanna@oag.texas.gov

Counsel for Respondent

CAPITAL CASE
QUESTIONS PRESENTED

1. In his federal habeas petition, Cole asserted that trial counsel were ineffective when they did not object under *Caldwell v. Mississippi*, 472 U.S. 320 (1984),¹ to the trial court’s responses to venire members’ questions (“*Caldwell* IATC claim”). Cole conceded that his claim was procedurally barred by the Texas Court of Criminal Appeals (CCA), pursuant to Texas Code of Criminal Procedure Art. 11.071, § 5. Should this Court review the Fifth Circuit’s determination that reasonable jurists would not debate the correctness of the district court’s dismissal of Cole’s *Caldwell* IATC claim as procedurally defaulted, and that Cole failed to meet the standard set out in *Martinez v. Ryan*, 566 U.S. 1 (2012), to show he overcomes that default?
2. Given the foregoing facts, should this Court review the Fifth Circuit’s straightforward and correct application of 28 U.S.C. § 2253(c)(1) when the court denied Cole’s application for certificate of appealability (COA)?

¹ The *Caldwell* Court held it is “constitutionally impermissible to rest a death sentence on a determination 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.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
BRIEF IN OPPOSITION.....	6
STATEMENT OF JURISDICTION.....	7
STATEMENT OF THE CASE	7
I. Facts of the Crime.....	7
II. Voir Dire Proceedings.....	7
III. Facts Presented at Punishment.....	10
IV. Procedural History.....	13
REASONS TO DENY THE PETITION.....	14
I. Certiorari Review Should Be Denied Because Cole Presents No Compelling Reason for the Court to Review the Fifth Circuit’s Determination that Reasonable Jurists Could Not Debate the Correctness of the District Court’s Dismissal of Cole’s <i>Caldwell</i> IATC Claim as Procedurally Defaulted.....	14
A. State law does not support Cole’s belief that objectionable <i>Caldwell</i> error occurred.....	15
B. Federal law does not support Cole’s claim.	18
II. The Court Should Deny Certiorari Review of Cole’s Issue 2 Because the Fifth Circuit Correctly Applied the Standard of Review on Appeal for the District Court’s Dismissal of Cole’s IATC Claim on a Procedural Ground.	21
CONCLUSION.....	24

TABLE OF AUTHORITIES

CASES

<i>Caldwell v. Mississippi</i> , 472 U.S. 320 (1984)	<i>passim</i>
<i>Canales v. Stephens</i> , 765 F.3d 551 (5th Cir. 2014)	23
<i>Clark v. Collins</i> , 19 F.3d 959 (5th Cir. 1994)	17
<i>Cole v. Lumpkin</i> , No. 4:17-CV-940, 2021 WL 4067212 (S.D. Tex. Sept. 7, 2021)	<i>passim</i>
<i>Cole v. Lumpkin</i> , No. 21-70011, 2022 WL 3710723 (5th Cir. Aug. 26, 2022)	<i>passim</i>
<i>Cole v. State</i> , No. AP-76,703, 2014 WL 2807710 (Tex. Crim. App. June 18, 2014)	12, 13
<i>Cole v. Texas</i> , 574 U.S. 1123 (2015)	13
<i>Cole v. Texas</i> , 138 S. Ct. 90 (2017)	12
<i>Coleman v. Thompson</i> , 501 U.S. 722 (1991)	22-23
<i>Darden v. Wainwright</i> , 477 U.S. 168 (1986)	19, 20
<i>Dugger v. Adams</i> , 489 U.S. 401 (1989)	18
<i>Ex parte Cole</i> , No. WR-84,322-01, 2017 WL 562725 (Tex. Crim. App. Feb. 8, 2017)	7, 12, 13
<i>Ex parte Cole</i> , No. WR-84,322-02, 2020 WL 1542118 (Tex. Crim. App. Apr. 1, 2020)	12
<i>Falk v. State</i> , No. AP-77,071, 2021 WL 2008967 (Tex. Crim. App. May 19, 2021)	15-17
<i>Garza v. Stephens</i> , 738 F.3d 669 (5th Cir. 2013)	22
<i>Henderson v. United States</i> , 568 U.S. 266 (2013)	17
<i>Koch v. Puckett</i> , 907 F.2d 524 (5th Cir. 1990)	17
<i>Martinez v. Ryan</i> , 566 U.S. 1 (2012)	<i>passim</i>
<i>Montoya v. Scott</i> , 65 F.3d 405 (5th Cir. 1995)	19
<i>Patrick v. State</i> , 906 S.W.2d 481 (Tex. Crim. App. 1995)	17
<i>Rodden v. Delo</i> , 143 F.3d 441 (8th Cir. 1998)	20-21
<i>Sattiewhite v. State</i> , 786 S.W.2d 271 (Tex. Crim. App. 1989)	16
<i>Shinn v. Martinez Ramirez</i> , 142 S. Ct. 1718 (2022)	19
<i>Slack v. McDaniel</i> , 529 U.S. 473 (2000)	22, 23
<i>Trevino v. Thaler</i> , 569 U.S. 413 (2013)	14
<i>United States v. Frady</i> , 456 U.S. 152 (1982)	23

TABLE OF AUTHORITIES (CONT.)

STATUTES

28 U.S.C. § 1254(1)	7
28 U.S.C. § 2253(c)(1)	ii
28 U.S.C. § 2254(e)(2)	19
Tex. Crim. Code of Proc. Art. 11.071 § 5.....	ii, 13
Tex. Code Crim. Proc. Art. 37.071 § 2.....	8, 18-20
Tex. Penal Code § 19.03(a)(7)(A)	7

BRIEF IN OPPOSITION

Petitioner Jaime Piero Cole was convicted of capital murder and sentenced to death for murdering his wife and teenage stepdaughter during the course of the same criminal transaction.

Cole now petitions this Court for certiorari review of the Fifth Circuit's denial of a COA on the district court's procedural dismissal of Cole's allegation that trial counsel were constitutionally ineffective. Namely, Cole alleges trial counsel failed to object to statements by the trial court during voir dire that were purportedly improper under *Caldwell v. Mississippi*. But there is no compelling reason for this Court to exercise its discretion to review the lower court's COA denial of Cole's *Caldwell* IATC claim, nor the Fifth Circuit's straightforward and correct application of the law governing the procedural dismissal of Cole's claim. The petition should be denied.

STATEMENT OF JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Facts of the Crime

The CCA briefly summarized the events of the offense as follows:

[Cole] was convicted of murdering his estranged wife, Melissa Cole, and his fifteen-year-old stepdaughter, Alecia “Desirae” Castillo, during the same criminal transaction. *See* Tex. Penal Code § 19.03(a)(7)(A). On February 4, 2010, [Cole] went out to eat with the couple’s two sons, ten-year-old Piero and two-year-old Lucas. During the meal, [Cole] told Piero where he should live if [Cole] or Melissa died. When [Cole] returned the boys to Melissa’s apartment that evening, he argued with Melissa, then he shot and killed both Melissa and Desirae with a gun he had purchased the previous afternoon. He also pointed his gun at Melissa’s nine-year-old niece during the incident. [Cole] left the scene with Lucas, traveling at a high rate of speed and ramming his truck through the apartment’s automatic gate. He then took \$1,400 from a safe at his workplace and purchased 100 rounds of ammunition at a Walmart store in Wharton County. At approximately 11:00 p.m., police apprehended [Cole] as he was leaving the Walmart with Lucas. Police searched [Cole]’s truck and found the gun he used to kill Melissa and Desirae, the cash he took from his employer, a large hunting knife, and a loaded shotgun.

Ex parte Cole, No. WR-84,322-01, 2017 WL 562725, at *1 (Tex. Crim. App. Feb. 8, 2017); Pet. Appx. A92.

II. Voir Dire Proceedings

Toward the end of the first day of Cole’s voir dire proceedings, the entire panel was surveyed on whether anyone would automatically answer Special

Issues 1 and 2² in such a way that sentencing would result in either a life sentence or the death penalty. *See* ROA.4420–30.³ A venire member spoke up and the following exchange occurred:

VENIREPERSON: . . . I just want to make absolutely sure that when it is life in prison, that many years later they can – they won’t be allowed to come back and appeal or – you know, like if somebody’s got life in prison, but I’m saying 20, 30 years, I hear these cases where it’s 99 years, but then they get out in 20 years and they have to fight, the family, or –

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.

VENIREPERSON: And we’ll be told if that’s the judgment, all of this –

THE COURT: Say that again.

VENIREPERSON: Like, how many years down the line that would be.

² Under Tex. Code Crim. Proc. Art. 37.071, § 2, a Texas jury asked to assess the death penalty must answer two special issues during punishment deliberations. The first is “whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.” *Id.* at § 2(b)(1). The second is “[w]hether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant’s character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.” *Id.* at § 2(e)(1).

³ “ROA” refers to the record on appeal filed in the court below.

THE COURT: How many years what?

VENIREPERSON: Right –

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.

VENIREPERSON: Okay. Thank you.

VENIREPERSON: But the life without parole is not appealable?

THE COURT: A defendant can always appeal a sentence. If someone gets life without parole, they may decide not to appeal that. That's their choice.

VENIREPERSON: What would be the minimum? If there were just two types of punishment, what would be the point of appealing?

THE COURT: You could always appeal because if something was not properly [sic] in the course of the trial, you can always appeal. Every defendant has the right to appeal.

VENIREPERSON: Appeal as to the guilty, not guilty part?

THE COURT: Wherever the error is. . . .

ROA.4430–32.

On a subsequent day of voir dire, the trial court surveyed a smaller venire panel on whether anyone would, after having found someone guilty of capital murder, automatically answer Special Issue 1 with “Yes,” that “this individual would probably be a continuing threat to society.” ROA.5282; *see*

generally, ROA.5282–5300. After that, two venire members asked a question; the first inquiry was whether an inmate sentenced to life without parole could be released early, which was followed by, “Is there a possibility the case would be reviewed?” ROA.5299 *Id.* The trial court responded to the latter by answering, “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?” *Id.*

III. Facts Presented at Punishment

The facts presented at punishment as found by the trial court and adopted by the CCA in Cole’s initial state habeas proceedings are as follows:

STATE’S PUNISHMENT EVIDENCE

On June 24, 2001, Chris Taylor, Harris County Jail, searched [Cole]’s cell and found fifty-six Seroquel pills and fifty-seven Clonazepam pills concealed in a jar of peanut butter; [Cole] was subsequently charged with a third-degree felony offense [(ROA.8521, ROA.8529, ROA.8551, ROA.8531, ROA.8555–67)].

[Cole] was arrested in 1990 with childhood friend Carl Freeman for public intoxication, as well as in 1996 for public intoxication and disorderly conduct in Brazoria County [(ROA.8358–65, ROA.8366–73, ROA.9721–24)].

[Cole] was placed on probation for driving while intoxicated in 1991 [(ROA.8836, ROA.8876)].

Leticia Leal, a former high school girlfriend, testified that [Cole] gradually became more possessive during the course of their relationship; that [Cole] pushed her against a wall and placed her in a chokehold at the K-mart where she worked after noticing a hickey on her neck; that [Cole] showed up at her home with a handgun and grabbed Leal’s pregnant sister; that Leal’s father and

brother-in-law were forced to intervene; and, that Leal made a police report but later dropped charges [(ROA.8334–41)].

Coletta Rives, another former girlfriend, testified that she and [Cole] had two children together; that she and [Cole] initially had a good relationship, but it became more volatile as time progressed; that when she became pregnant with their first child, [Cole] said that he would provide for the child but would not claim the child; that, when Rives became pregnant again, [Cole] told her to get rid of the baby and bring him the receipt for the abortion; that, [Cole] punched Rives in the stomach while she was pregnant with their second child; that, during Rives's second pregnancy, while they were on a brief hiatus from their relationship, [Cole] found Rives visiting at his friend's house, and he forcefully grabbed her by the arm, took her to his car, and held her down with a shotgun to her head; that [Cole] repeatedly kicked Rives in the stomach while she was on the ground; that [Cole] put a shotgun to his friend's head when he tried to intervene and discharged his weapon while his friend was walking back to his house; that [Cole] was subsequently arrested for two counts of aggravated assault and ultimately pled guilty to terroristic threat after Rives and [Cole] reunited and Rives tried to drop charges; and, that [Cole] got drunk and punched Rives in the stomach throughout their relationship [(ROA.8376–86, ROA.8388–99, ROA.8407–14)].

Brittnie Reeves[, Cole's daughter from a previous relationship,] testified that the murders affected her and her brothers' lives forever; that Little Piero was fearful, guarded, and cautious; that even though Lucas was only two years old at the time of the murders, he remembered the event and suffered from nightmares; that Reeves missed Melissa and Desirae and was sad that they could not be present for the birth of her daughter; and, that Reeves had not seen [Cole] since the murders and had no desire to visit him in jail [(ROA.8611–12)].

Brooke Phillips, Melissa's sister, testified that [Cole] reacted violently to a comment Desirae made during a family card game in 2008; that Melissa cried frequently and acted nervous and scared while deciding whether to leave [Cole]; that Melissa pawned several guns that [Cole] kept in their home; that Melissa seemed more at ease when she moved to an apartment with her children;

that Melissa was a wonderful mother; that Melissa’s death was very hard on the family; and, that Desirae was a wonderful big sister to Little Piero and often took care of Lucas [(ROA.8667–75)].

DEFENSE EVIDENCE AT PUNISHMENT

Trial counsel presented the following witnesses at punishment: Mark Bartlett, a family friend of [Cole]’s adoptive parents; Michael Hogan, a vice president at Mister Car Wash; Donald Hill, the general manager of the Sugar Land Mister Car Wash lube center where [Cole] worked; Alexia Scipio and Sandra Barnett, Sugar Land Car Wash cashiers; Ed Fernandez, [Cole]’s friend and the general manager at the Sugar Land Mister Car Wash; psychotherapist Sharon Boyd; expert witness Terry Rustin; Jim Cole, [Cole]’s adoptive father; Hazel Cole, [Cole]’s adoptive mother; Leslie Carina [Moran], [Cole]’s biological sister; Sonya Araujo, [Cole]’s biological mother; and Frank Aubuchon, a former Texas Department of Criminal Justice (“TDCJ”) employee. [Citation omitted].

STATE’S REBUTTAL EVIDENCE

Gazelle Rodriguez, Desirae’s 15-year-old-step-sister, testified that she had known Desirae since Rodriguez was four years old and Desirae was six years old, and that Desirae was a wonderful sister [(ROA.9160–61)].

Joe Castillo, Desirae’s father, testified that Melissa and Desirae were very close; that Desirae was a wonderful older sister to Gazelle, her younger sister Jasmine, Little Piero, and Lucas; that, after Desirae’s death, Castillo retrieved all of her belongings, including her journal, from which Castillo came to hate [Cole] and the things that [Cole] did to Desirae; and, that Melissa and Desirae were buried next to each other [ROA.9167–75)].

ROA.2332–37 (trial court findings); Pet. Appx. A95 (adopting findings); *see also* *Cole v. State*, No. AP-76,703, 2014 WL 2807710, at *5–11 (Tex. Crim. App. June 18, 2014) (additional punishment phase evidence) (ROA.2528–39).

IV. Procedural History

Cole's conviction and sentence were entered on October 27, 2011; the CCA affirmed his conviction on direct appeal. ROA.10978, ROA.2585; *Cole*, 2014 WL 2807710, at *1–37. The Court denied certiorari review. *Cole v. Texas*, 574 U.S. 1123 (2015).

Cole filed his first state application for writ of habeas corpus, which the CCA denied as procedurally defaulted, in part, and on the merits. ROA.1569–1699; Pet. Appx. A94–95. The Court denied Cole's petition for writ of certiorari. *Cole v. Texas*, 138 S. Ct. 90 (2017).

Cole filed a federal petition for writ of habeas corpus, ROA.37–158, then moved for a stay to exhaust three IATC claims, including the issue Cole raises in his petition before the Court, ROA.477–93. After the district court granted Cole's motion to stay, ROA.602–11, Cole filed a second state habeas application in the CCA; the CCA dismissed that application for abuse of the writ, pursuant to Tex. Crim. Code of Proc. Art. 11.071 § 5(a). ROA.11077–126; *Ex parte Cole*, No. WR-84,322-02, 2020 WL 1542118, at *1 (Tex. Crim. App. Apr. 1, 2020); Pet. Appx. A91.

After the CCA's dismissal, Cole and Respondent Bobby Lumpkin ("the Director") filed a joint motion to lift the stay in the federal district court. ROA.669–71. The motion was granted, ROA.674–75, and Cole filed an amended federal habeas petition and supporting memorandum. ROA.681–876,

ROA.880–1075 (identical). The Director filed a Motion for Summary Judgment. ROA.1124–1250. The district court dismissed, with prejudice, Cole’s federal habeas petition. *Cole v. Lumpkin*, No. 4:17-CV-940, 2021 WL 4067212 (S.D. Tex. Sept. 7, 2021); Pet. Appx A89. In its opinion, the court found, under *Martinez*,⁴ that Cole failed to demonstrate that he overcame the procedural default of the underlying issue here—Cole’s *Caldwell* IATC claim. Pet. Appx. A56–59. The district court also denied Cole a COA. *Id.* at A88–89. The court later denied Cole’s Motion to Alter or Amend Judgment. ROA.1514–23; ROA.1542–44.

Cole filed an application for COA on three grounds in the Fifth Circuit Court of Appeals, including whether Cole overcomes the procedural default of his *Caldwell* IATC claim. The Fifth Circuit denied COA. *Cole v. Lumpkin*, No. 21-70011, 2022 WL 3710723, *1 (5th Cir. Aug. 26, 2022); Pet. Appx. A2.

REASONS TO DENY THE PETITION

I. Certiorari Review Should Be Denied Because Cole Presents No Compelling Reason for the Court to Review the Fifth Circuit’s Determination that Reasonable Jurists Could Not Debate the Correctness of the District Court’s Dismissal of Cole’s *Caldwell* IATC Claim as Procedurally Defaulted.

Cole presents no compelling reason for the Court to expend its limited resources to determine whether *Caldwell* may apply to voir dire in Texas. First,

⁴ *Cf. Trevino v. Thaler*, 569 U.S. 413, 429 (2013) (*Martinez* applies to Texas capital cases).

Cole conceded in the court below that his *Caldwell* IATC claim is procedurally defaulted. Pet. Appx. A13. And the lower court properly rejected Cole’s argument that his state habeas counsel was ineffective for not raising it. *Id.* at A13–14. Cole now suggests that both state and federal law are so unsettled that the Fifth Circuit erred when it found that state habeas counsel was not ineffective, and that this Court’s intervention is necessary to a “resolve the tension.” Pet. 21. But reasonable jurists would not debate Cole’s *Caldwell* IATC claim. As the lower courts correctly held, no state law exists applying *Caldwell* to remarks during voir dire. Pet. Appx. A13–14, A57. Moreover, a trial judge’s accurate summation of state law is not objectionable, much less constitutional error. Pet. Appx. A14, A57–58. Finally, Cole identified no *Caldwell* error at any phase of the trial. Pet. Appx. A14, A58. There is no debate on whether *Caldwell* applies to the facts at hand and, thus, no debate about whether trial counsel should have objected or state habeas counsel should have complained.

In sum, certiorari review is not warranted.

A. State law does not support Cole’s belief that objectionable *Caldwell* error occurred.

Cole essentially argues that, based on a recent state case, *Falk v. State*, No. AP-77,071, 2021 WL 2008967 (Tex. Crim. App. May 19, 2021) (unpublished), reasonable jurists could debate the district court’s holding that he failed to demonstrate cause under *Martinez*. Namely, Cole asserts that *Falk*

provides that *Caldwell* now applies to voir dire in Texas, contrary to the exact opposite holding in *Sattiewhite v. State*, 786 S.W.2d 271 (Tex. Crim. App. 1989), which was cited by both the district and Fifth Circuit court in their opinions. Pet. at 9–10; Pet. Appx. A13–14, A57. But not only does Cole fail to demonstrate that *Sattiewhite* is distinguishable from his case or to provide any caselaw that supports his argument, Cole’s underlying *Caldwell* IATC claim is insubstantial because trial counsel are not expected to object where settled law does not support an objection. Lastly, trial counsel are not expected to anticipate potential changes in law. For these reasons, certiorari is unwarranted.

First, Cole’s attempts to distinguish *Sattiewhite* are weak, at best, since he largely points to the only factual distinction between the two cases: the stage of voir dire when the trial court’s comments occurred. Pet. at 9–10. Additionally, Cole asserts that *Falk* provides that the CCA has overturned its prior decision in *Sattiewhite*. Pet. at 9–10; S.W.2d at 281–82. But *Falk* does not even mention *Sattiewhite*. 2021 WL 2008967, *13–14. And Cole fails to point to any cases within the last two years that support his position—particularly where the CCA in *Falk* had only applied the *Caldwell* analysis in its unpublished opinion after “assum[ing] without deciding” an appellant could raise an issue for the first time on appeal. 2021 WL 2008967, at * 13.

Further, Cole fails to point to any case law—and cannot—that trial counsel is ineffective for failing to object based on a novel and unsupported interpretation of *Caldwell*. Indeed, any such objection would have been overruled as frivolous, even after *Falk*, and counsel is not ineffective for failing to make futile objections. *See* Pet. Appx. A57 (“Cole has not shown that a reasonable attorney would raise a claim that is not favored under state law.”); *Koch v. Puckett*, 907 F.2d 524, 527 (5th Cir. 1990) (“This Court has made clear that counsel is not required to make futile motions or objections.”); *Clark v. Collins*, 19 F.3d 959, 966 (5th Cir. 1994) (“Failure to raise meritless objections is not ineffective lawyering, it is the very opposite.”); *Patrick v. State*, 906 S.W.2d 481, 496 (Tex. Crim. App. 1995) (“Counsel could have reasonably perceived that an objection before the jury would have been frivolous. He was within bounds of professional competence in not making such an objection.”); *Henderson v. United States*, 568 U.S. 266, 284 (2013) (Scalia, J., dissenting) (“When the law is settled against a defendant at trial[,] he is not remiss for failing to bring his claim of error to the court’s attention. It would be futile.”).

For these reasons, state law does not support Cole’s claim, and the Court should deny certiorari.

B. Federal law does not support Cole’s claim.

Certiorari review is not warranted here because Cole cannot demonstrate a compelling reason warranting this Court’s review where no *Caldwell* violation occurred and no circuit split exists.

Cole fails to establish that any error under *Caldwell* occurred to which counsel should have objected, and thus Cole cannot demonstrate any reasonable probability that, but for trial counsel’s failure to object, his proceeding would have been different. And again—like in Part I(A)—Cole cannot show that his IATC claim is substantial, and therefore he fails to prove cause under *Martinez* that would allow him to circumvent the procedural default against his *Caldwell* IATC claim.

First, *Caldwell* and Cole’s case are not the same. As recognized by the court below, “[t]o establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law.” *Dugger v. Adams*, 489 U.S. 401, 407 (1989); Pet. Appx. A57–58. The Fifth Circuit properly found that the trial court’s comments “accurately described Texas’s postsentencing [sic] procedures”—i.e., local law—“which provide that ‘[t]he judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals.’” Pet.

Appx. A14 (quoting Tex. Code Crim. Proc. Art. 37.071 § 2(h)).⁵

Also, the lower court noted that Cole “does not challenge as violating *Caldwell* any remarks that the trial court made during either the guilt or penalty phases of the trial.” Pet. Appx. A14; *see id.* at A58. The district court below noted that “[a] habeas court evaluates a *Caldwell* claim by looking to the ‘total trial scene,’ including jury selection, the guilt phase of trial, and the sentencing hearing, examining both the court’s instructions and counsel’s argument to the jury.” Pet. Appx. A58 (quoting *Montoya v. Scott*, 65 F.3d 405, 420 (5th Cir. 1995)). Further, these opinions align with *Darden v. Wainwright*, in which the Court noted that “[t]he principles of *Caldwell* are not applicable” when there were “several factual reasons for distinguishing *Caldwell*,” such as the prosecutor’s comments in *Caldwell* were made at the sentencing phase of trial, while the *Darden* Court reviewed statements at the guilt-innocence phase of trial. 477 U.S. 168, 183 fn.15 (1986). The *Darden* Court noted the statements occurred at the guilt-innocence stage, which “greatly reduc[ed] the

⁵ In support of contesting the impact of the trial court’s statements upon the venire members and ultimately the jury, Cole cites to supplemental affidavits that he had not presented in his first state writ. Pet. at 18–19 (citing ROA.11336–11337, ROA.11339). While Cole does not raise before the Court the issue of whether state court records presented in a subsequent state habeas application can be considered on federal habeas review, pursuant to 28 U.S.C. § 2254(e)(2), Cole waived consideration of that issue before the Fifth Circuit. *See* Pet. Appx. A13 fn.2 (referring to “Cole’s assurances that ‘there is no need for extra-record evidence to decide the *Caldwell* issue.’”) (citing *Shinn v. Martinez Ramirez*, 142 S. Ct. 1718 (2022)). Accordingly, certiorari review of this issue is unwarranted.

chance that [the comments] had any effect at all on sentencing.” *Id.* Even more so here, then, where the purportedly harmful comments were made at the distant stage of voir dire.

Cole attempts to distinguish his case from *Darden*, Pet. at 20, but he relies only upon a single Eighth Circuit case, *Rodden v. Delo*, 143 F.3d 441 (8th Cir. 1998). This is hardly sufficient to undermine the Court’s authority, even where the Court’s commentary lies in a footnote. Further, the *Rodden* court merely recognized the possibility that a prosecutor’s comments “about sentencing during voir dire *could* mislead the jury into believing the responsibility for imposing a death sentence rested elsewhere.” *Id.* at 445 (emphasis added). Not only is that commentary merely speculative, the Eighth Circuit ultimately rejected the *Caldwell* argument altogether. *Id.* at 446. This is because “the prosecutor’s comments did not misstate Missouri law.” *Id.* Similarly, the trial court’s comments here “accurately described Texas’s postsentencing [sic] procedures”: automatic appellate review of both conviction and sentence is conducted by the Court of Criminal Appeals where the defendant has been assessed the death penalty. Pet. Appx. A14 (quoting Tex. Code Crim. Proc. Art. 37.071 § 2(h)).

This decision hardly establishes a circuit split. While the Eighth Circuit in *Rodden* contemplated the occurrence of a *Caldwell* violation at voir dire, the court ultimately held that the prosecutor’s remarks *about the jury’s*

recommendation of sentencing at both voir dire *and* closing argument did not violate *Caldwell*, given that defense counsel and the court accurately provided instructions to the jury members about the duty they “alone [bore] to decide upon the punishment,” and the finality of the decision rested with them. *Rodden*, 143 F.3d at 445–46. Likewise, as pointed out above, the trial court in Cole’s case accurately stated Texas law when discussing *appellate review*.

Altogether, the impact of the trial court’s instructions and accurate conveyance of Texas law was minimal. More importantly, Cole fails to point to a case which states that *accurate* comments about *appellate review*—made only during voir dire—amount to error. Accordingly, Cole fails to demonstrate a circuit conflict.

For these reasons, certiorari review is not warranted.

II. The Court Should Deny Certiorari Review of Cole’s Issue 2 Because the Fifth Circuit Correctly Applied the Standard of Review on Appeal for the District Court’s Dismissal of Cole’s IATC Claim on a Procedural Ground.

Cole argues that the Fifth Circuit failed to apply the proper standard when it reviewed the debatability of the district court’s dismissal of his procedurally barred *Caldwell*-IATC claim. Pet. at 21–23. Cole argues that the Fifth Circuit regularly does this. Pet. at 22–23. This issue is not deserving of review because the court applied the proper standard of review under AEDPA.

Cole's complaint is a textbook example of a purported "misapplication of a properly stated rule of law." Sup. Ct. R. 10. Alone, it is thus not compelling.

Furthermore, Cole is mistaken. First, for the Fifth Circuit to have granted a COA on the denial of Cole's *Caldwell* IATC claim on procedural grounds, Cole was required to show "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." See *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The *Slack* Court further broke down that review:

Determining whether a COA should issue where the petition was dismissed on procedural grounds has two components, one directed at the underlying constitutional claims and one directed at the district court's procedural holding. Section 2253 [of Title 28 of the United States Code] mandates that *both* showings be made before the court of appeals may entertain the appeal. Each component of the § 2253(c) showing is part of a threshold inquiry, and a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments.

529 U.S. at 484–85 (emphasis added).

In denying a COA on the district court's procedural ruling on the first of two defaulted IATC claims that Cole raised in his COA application, the Fifth Circuit cited the analysis underlying the second component of *Slack*:

[To] prevail on a COA request that relies upon a procedural default, Cole "must show (1) that his claim of ineffective assistance of counsel at trial is substantial—i.e., has some merit—and (2) that habeas counsel was ineffective in failing to present those claims in his first state habeas proceeding." *Garza v. Stephens*, 738 F.3d 669, 676 (5th Cir. 2013) [(referring to *Coleman v. Thompson*, 501 U.S.

722, 729–32 (1991)). “Once cause has been established, [Cole] must then show ‘actual prejudice.’” *Canales v. Stephens*, 765 F.3d 551, 562 (5th Cir. 2014) (quoting *United States v. Frady*, 456 U.S. 152, 167 (1982)).

Cole, 2022 WL 3710723, at *4.

And when addressing the procedural default of Cole’s *Caldwell* IATC claim—the second defaulted IATC claim raised by Cole in his COA application—the Fifth Circuit summarized:

Cole concedes that this claim is also procedurally defaulted because he did not raise it in the state habeas court. He argues, however, that cause for the default exists under *Martinez* because state habeas counsel was ineffective for not pursuing this claim. The district court concluded that Cole failed to establish that state habeas counsel performed deficiently by not alleging a *Caldwell* violation and that *Martinez* was therefore inapplicable.

...

Jurists of reason could not debate the district court’s conclusion that Cole lacks cause for the procedural default of this claim.

Pet. Appx. A13 (footnote omitted). Repeating the *Slack* standard was an unnecessary step for the Fifth Circuit, given its prior reference to that standard.

Further comports with *Slack*’s second component of review, 529 U.S. at 484–85, the Fifth Circuit analyzed “the underlying constitutional claim[]” of Cole’s *Caldwell* IATC claim. That is, the court reviewed one of two requirements under the *Martinez* exception that allows a federal court on habeas review to reach the merits of a petitioner’s defaulted IATC claim. Pet. Appx. A12–14.

Ultimately, because the Fifth Circuit applied the proper standard of review for the district court's dismissal of Cole's *Caldwell* IATC claim on procedural grounds, Cole's request for a writ of certiorari on this point should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

John Scott
Provisional Assistant Attorney
General

Brent Webster
First Assistant Attorney General

Josh Reno
Deputy Attorney General
for Criminal Justice

Edward L. Marshall
Chief, Criminal Appeals Division

s/ Cara Hanna
CARA HANNA
Assistant Attorney General
Criminal Appeals Division

P.O. Box 12548, Capitol Station
Austin, Texas 78711
Tel: (512) 936-1800
Fax: (512) 320-8132
cara.hanna@oag.texas.gov
Counsel for Respondent