

No. 22-6955 (CAPITAL CASE)

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

**REPLY BRIEF IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI**

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ARGUMENT IN REPLY

Does a trial court have free rein during voir dire to mislead a capital sentencing jury about the scope of appellate review as long as it does not repeat such remarks thereafter? The Fifth Circuit said yes. *Cole v. Lumpkin*, No. 21-70011, 2022 WL 3710723, *6 (5th Circuit Aug. 26, 2022) (unpublished), App. 14. Whether the Fifth Circuit's decision—which is in tension with decisions from other circuits—was correct is an important issue, worthy of this Court's certiorari review. The State does not directly contest the importance of the issue but offers several reasons why this Court should not address it. The State's proffered reasons do not withstand scrutiny.

First, the State asserts that the claim under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), is procedurally defaulted. Br. in Opp. 15 (citing App. 13-14). But there is no bar to this Court's review of the merits. The Fifth Circuit implicitly acknowledged that, as long as the *Caldwell* claim had merit, Mr. Cole would overcome the default by showing that trial counsel and state habeas counsel were both ineffective for failing to raise the issue. Thus, the Fifth Circuit's entire analysis was based on its rejection of the merits of the *Caldwell* claim. App. 13-14. The Fifth Circuit did not rule, and the State does not argue, that effective counsel would forego raising a meritorious *Caldwell* claim. Thus, the merits of the claim are properly before this Court.

Second, the State argues that no *state* law applies *Caldwell* to jury selection. Br. in Opp. 15-16 (citing *Sattiewhite v. State*, 786 S.W.2d 271 (Tex. Crim. App.

1989)). We dispute the accuracy of this contention, but even if it were accurate, it is nearly irrelevant.

This Court's decision in *Caldwell* and its application are matters of federal Eighth Amendment law, not matters of state law. To be sure, state courts are also charged with interpreting and applying the United States Constitution, and their decisions on matters of federal constitutional law are entitled to respect. But effective counsel would not forego a viable federal claim simply because there was potentially unfavorable state law regarding the claim. *See Tyson v. Sup't Houtzdale SCI*, 976 F.3d 382, 395-96 (3d Cir. 2020) (counsel ineffective for failing to raise due process objection to instruction, even though state courts narrowly applied related state law).

In any event, the State misconstrues the relevant state law. *Sattiewhite*—the sole decision relied on by the State in support of its argument—does not actually help the State. In *Sattiewhite*, during individual voir dire, the prosecutor told a single juror that even if the defendant were sentenced to death, he might never be executed. Defense counsel objected and the trial court instructed the juror that if the jury voted for death, the death penalty would be imposed. The defense then challenged the juror for cause based on the potential taint of the prosecutor's remarks. The trial court denied the cause challenge. *Sattiewhite*, 786 S.W.2d at 281-82. The narrow ruling of the state court was that it had to defer to the trial court's decision—after instructing the juror and observing the juror's response—that the juror's fitness had not been tainted by the prosecutor's remark. *Id.* at 282.

True, the *Sattiewhite* court said in dicta that *Caldwell* does not extend to “voir dire remarks.” *Id.*¹ But those dicta were not binding precedent, as shown by the fact that the Texas Court of Criminal Appeals subsequently decided the merits of a *Caldwell* claim based on remarks made by the trial court during voir dire, without overruling or even discussing *Sattiewhite*. See *Falk v. State*, No. AP-77,071, 2021 WL 2008967, *13-14 (Tex. Crim. App. 2021), *cert. denied*, 142 S. Ct. 1211 (2022). Even if state court precedent could preclude a *Caldwell* claim, there was no such state court precedent here. No reasonable attorney would fail to make an objection or raise and litigate a viable claim because of non-binding dicta.

The State nevertheless argues (1) that Petitioner’s claim is “contrary to the exact opposite holding in *Sattiewhite*”; (2) “trial counsel are not expected to anticipate potential changes in law”; and (3) “Cole asserts that *Falk* provides that the CCA has overturned its prior decision in *Sattiewhite*.” Br. in Opp. 16. These assertions are either wrong or inapplicable.

(1) As discussed above, there is no “exact opposite holding” in *Sattiewhite*, only dicta.

(2) Making a *Caldwell* objection at trial or raising the claim in state habeas would not have required counsel to “anticipate potential changes in law.” The trial took place in 2011. By that time, there was substantial precedent that at least opened the door to a claim that *Caldwell* was violated during voir dire proceedings.

¹ The *Sattiewhite* court’s remarks are dicta because they “were not necessary to the decision.” *United States v. Dashiell*, 70 U.S. 688, 693 (1865).

In *Rodden v. Delo*, 143 F.3d 441, 445 (8th Cir. 1998), the Eighth Circuit rejected an argument that applying *Caldwell* to remarks made during voir dire would violate the non-retroactivity principle of *Teague v. Lane*, 489 U.S. 288 (1989). The court noted that when addressing *Caldwell* claims courts “consider the entire trial scene, including jury selection, the guilt phase, the penalty phase, and the sentencing hearing, examining both the court's instructions and the attorneys’ remarks.” *Id.* (citing cases); accord *Miniel v. Cockrell*, 339 F.3d 331, 342 (5th Cir. 2003). While *Miniel* suggested that *Caldwell* claims based on remarks made during jury selection might have a reduced chance of success, *id.* at 343, *Rodden* indicates 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. Given these precedents (including those cited in *Rodden*), effective counsel who were aware of the existing law would have objected to the court’s comments at trial and raised the issue in state habeas proceedings.

(3) Mr. Cole does not and has not asserted that *Falk* overruled *Sattiewhite*. Rather, as discussed above, *Falk* indicates that the decision in *Sattiewhite* is and always was limited to a narrow question, and that Sattiewhite’s dicta suggesting that *Caldwell* does not apply to remarks made during jury selection are and always were non-binding.

Third, the State argues that there could not be a *Caldwell* violation here because the trial court “accurately” described Texas appellate procedures. Br. in Opp. 18-19. In context, however, this argument is directly contrary to *Caldwell*.

Here, the trial court told the jurors that a decision by them to impose the death penalty would be “automatically reviewed,” ROA.5299, or subject to an “automatic appeal.” ROA.4430-31. This was misleading and at best incomplete because it did not inform the jury of the limited nature of that automatic appeal. *See* Pet. for Writ of Cert. 14 (automatic appeal of death sentence under Texas law limited to determining whether, when viewed in the light most favorable to the verdict, any rational trier of fact could have imposed the death penalty). This is on all fours with *Caldwell*, where the prosecutor told the jury that their decision was “automatically reviewable by the [state] Supreme Court.” *Caldwell*, 472 U.S. at 325-26. Again, that was at best incomplete and misleading, as Justice O’Connor explained:

Should a State conclude that the reliability of its sentencing procedure is enhanced by *accurately* instructing the jurors on the sentencing procedure, including the *existence and limited nature of appellate review*, I see nothing . . . to foreclose a policy choice in favor of jury education.

As the Court notes, however, the Mississippi prosecutor’s argument accomplished the opposite result. In telling the jurors, “your decision is not the final decision . . . [y]our job is reviewable,” the prosecutor sought to minimize the sentencing jury’s role, by creating the mistaken impression that automatic appellate review of the jury’s sentence would provide the authoritative determination of whether death was appropriate. In fact, under Mississippi law the reviewing court applies a “presumption of correctness” to the sentencing jury’s verdict. . . .

Laypersons cannot be expected to appreciate without explanation the *limited nature of appellate review*, especially in light of the reassuring picture of “automatic” review evoked by the sentencing court and the prosecutor in this case.

Caldwell, 472 U.S. at 342-43 (O'Connor, J., concurring) (citations omitted) (emphasis supplied).

The State says that “*Caldwell* and Cole’s case are not the same.” Br. in Opp. 18. It is a truism that no two cases are exactly the same, but *Caldwell* and this case are the same in the most important respect: both juries were told there would be automatic review and neither jury was accurately (or at all) informed about the “limited nature” of that review.

Finally, the State argues that it is fine for the trial court to mislead the jury about the limited nature of appellate review during jury selection, as long as the court does not repeat those comments during the guilt and penalty phases of trial. Br. in Opp. 19-21. Significantly, the State does not argue that any later remarks by the court or counsel actually explained the “limited nature of appellate review” or in any other way cured the error. Rather, the State argues simply that what the court tells the jury during voir dire does not matter. To state the proposition reveals its incorrectness. The State does not challenge Mr. Cole’s showing that constitutional errors frequently occur during the voir dire process. Pet. for Writ of Cert. 16-17. There is no reasoned basis for the implicit argument that other errors can take place during voir dire, but not *Caldwell* error.

The State seeks to support its argument by citing *Darden v. Wainwright*, 477 U.S. 168, 183 n.15 (1986), Br. for Appellees 19-20, but this is unavailing. In *Darden*, this Court reviewed a claim of prosecutorial misconduct addressed to a highly emotional argument for the death sentence that the Court found “deserve[d] . . .

condemnation,” *id.* at 179, but which, the Court found, had not rendered the trial “fundamentally unfair.” *Id.* at 183 (citation and quotation marks omitted).

In a footnote, the Court addressed an argument that the prosecutor’s remarks also violated *Caldwell*. The Court rejected that argument for the following reasons:

There are several factual reasons for distinguishing *Caldwell* from the present case. The comments in *Caldwell* were made at the sentencing phase of trial and were approved by the trial judge. In this case, the comments were made at the guilt-innocence stage of trial, greatly reducing the chance that they had any effect at all on sentencing. The trial judge did not approve of the comments, and several times instructed the jurors that the arguments were not evidence and that their decision was to be based only on the evidence. But petitioner’s reliance on *Caldwell* is even more fundamentally mistaken than these factual differences indicate. *Caldwell* is relevant only to certain types of comment—those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision. In this case, none of the comments could have had the effect of misleading the jury into thinking that it had a reduced role in the sentencing process. If anything, the prosecutors’ comments would have had the tendency to *increase* the jury’s perception of its role. We therefore find petitioner’s Eighth Amendment argument unconvincing.

Id. at 183 n.15.

As is clear from the full passage quoted above, this case is nothing like *Darden*. Most importantly—and the factor that was most stressed in *Darden*—the court’s remarks here, unlike the prosecutor’s remarks in *Darden*, likely misled the jury into “thinking it had a reduced role in the sentencing process,” because, as shown above, this case is on all fours with *Caldwell*. Nor do the factual distinctions discussed in *Darden* change the picture. Here, unlike *Darden*, the remarks were not just “approved by the trial judge” but made by the trial judge, rendering the claim

here even stronger than that in *Caldwell*. Here, unlike *Darden*, there was nothing in the instructions or arguments of counsel to counteract the effect of the trial court's remarks.² The State is reduced to relying on a single one of the factual distinctions that this Court noted in *Darden*: that there, unlike in *Caldwell*, the "comments were made at the guilt-innocence stage of trial." *Id.* The fact that the remarks were made during voir dire, the State says, makes this case unlike *Caldwell*. Br. for Appellees 19-20.

Does the fact that the comments here were made at voir dire rather than at penalty phase defeat the *Caldwell* claim? In *Rodden*, the Eighth Circuit said no:

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.

The Fifth Circuit, however, has repeatedly ruled, based on a strained analogy to *Darden*, that the trial court can mislead the jury during voir dire without violating *Caldwell*. See App. 14 (citing *Miniel*, 339 F.3d at 343); *Miniel*, 339 F.3d at 343 (quoting *Byrne v. Butler*, 845 F.2d 501, 508 (5th Cir. 1988)); *Byrne*, 845 F.2d at

² The Fifth Circuit said that the court and counsel later told the jury that whether Mr. Cole received a death sentence would depend on the jury's answers to the special issues. App. 14. But nobody ever told the jury about the limited nature of appellate review, which is the essence of the *Caldwell* violation. The remarks pointed to by the Fifth Circuit "failed to correct the impression that the appellate court would be free to reverse the death sentence if it disagreed with the jury's conclusion that death was appropriate." *Caldwell*, 472 U.S. at 343 (O'Connor, J., concurring). Thus, they failed to cure the error. *Id.*

509 (quoting *Darden* in support of the proposition that any potential harm was greatly reduced because “the objections and rulings were made during voir dire”). The Fifth Circuit’s repeated assertions that *Caldwell* error at voir dire does not matter are at a minimum in tension with *Rodden*. And the question whether *Caldwell* error can occur at voir dire is important in itself, particularly given the Fifth Circuit’s repeated assertions that misleading the jury about the limited nature of appellate review is permissible as long as the remarks are confined to voir dire.

The State’s arguments only serve to highlight the importance of the issue presented here. The trial court’s remarks here are exactly the same as those that this Court found violated the Eighth Amendment in *Caldwell*. The Fifth Circuit erred in ruling that remarks that clearly violate *Caldwell* do not matter if they are made only during voir dire. This Court should grant certiorari to review that decision.

CONCLUSION

For all of the reasons set forth here and in Petitioner's prior submissions, 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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