No.

IN THE SUPREME COURT OF THE UNITED STATES

GORDON LAGERSTROM,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMETN OF CORRECTIONS, ATTORNEY GENERAL, STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari
to the Eleventh Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

Dane K. Chase, Esquire
Florida Bar Number: 0076448
Chase Law Florida, P.A.
111 2nd Ave NE
Suite 334
Saint Petersburg, Florida 33701
Direct: (727) 350-0361
Facsimile: (866) 284-1306
Email: dane@chaselawfloridapa.com

* Counsel of Record

QUESTION PRESENTED

Whether a single circuit court judge may deny a motion for certificate of appealability under Fed. R. App. P. 27(c)?

PARTIES TO THE PROCEEDING

Parties to the proceeding include Gordon Lagerstrom (Appellant/Petitioner), Dane K. Chase, Esquire (Appellant/Petitioner's Counsel), and Ashley Moody, Esquire (Attorney General, State of Florida).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Statutes

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The decision of the Eleventh Circuit Court of Appeal, *infra*, is attached as Appendix A.

JURISDICTION

The Judgment of the Eleventh Circuit Court of Appeal was entered on August 28, 2023. This Court's jurisdiction is invoked under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

§ 2253. Appeal

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.
>
> (c)(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; or
>
> (B) the final order in a proceeding under section 2255.

(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.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2)

28 U.S.C.A. § 2253.

Rule 22. Habeas Corpus and Section 2255 Proceedings

(a) Application for the Original Writ. An application for a writ of habeas corpus must be made to the appropriate district court. If made to a circuit judge, the application must be transferred to the appropriate district court. If a district court denies an application made or transferred to it, renewal of the application before a circuit judge is not permitted. The applicant may, under 28 U.S.C. § 2253, appeal to the court of appeals from the district court's order denying the application.

(b) Certificate of Appealability.

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district clerk must send to the court of appeals the certificate (if any) and the statement described in Rule 11(a) of the Rules Governing Proceedings Under 28 U.S.C. § 2254 or § 2255 (if any), along with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue it.

(2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.

> **(3)** A certificate of appealability is not required when a state or its representative or the United States or its representative appeals.

Fed. R. App. P. 22.

Rule 27. Motions.

…

> **(c) Power of a Single Judge to Entertain a Motion.** A circuit judge may act alone on any motion, but may not dismiss or otherwise determine an appeal or other proceeding. A court of appeals may provide by rule or by order in a particular case that only the court may act on any motion or class of motions. The court may review the action of a single judge.

Fed. R. App. P. 27(c).

STATEMENT OF FACTS

Mr. Lagerstrom was convicted of five counts of sexual battery of a child in the State of Florida, and sentenced to life imprisonment on December 2, 2015. The state appellate court affirmed his convictions and sentences. Mr. Lagerstrom thereafter filed a Motion for Post-Conviction Relief arguing that his trial counsel had performed ineffectively. The state post-conviction court denied Mr. Lagerstrom relief, and the state appellate court affirmed.

Mr. Lagerstrom then filed a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 in the United States District Court for the Middle District of Florida, which was denied. The district court declined to issue a certificate of appealability. Mr. Lagersrom subsequently filed a Notice of Appeal, and a Motion for Certificate of Appealability in the Eleventh Circuit Court of Appeal. A single judge from the

Eleventh Circuit denied Mr. Lagerstrom's Motion.

This Petition follows.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW TO ESTABLISH THAT FED. R. APP. P. 27(C) PROHIBITS A SINGLE CIRCUIT JUDGE FROM DENYING A MOTION FOR CERTIFICATE OF APPEALABILITY.

At issue in this Petition is whether a single circuit judge may deny a Motion for Certificate of Appealability. For the reasons that follow, this Court should grant review and establish that a Motion for Certificate of Appealability cannot be denied by a single circuit judge.

Fed. R. App. P. 22(b)(2) states that a request for a certificate of appealability "addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes." However, Fed. R. App. P. 27(c) states that "A circuit judge may act alone on any motion, but may not dismiss or otherwise determine an appeal or other proceeding." A plain and ordinary reading of Fed. R. App. P. 22(b)(2) and Fed. R. App. P. 27(c) makes clear that while a single judge may *consider* a motion for certificate of appealability, a single judge may not *deny* a motion for certificate of appealability, as by doing so the judge is dismissing or otherwise determining the appeal/proceeding in violation of Fed. R. App. P. 27(c). Read together, it is clear a single judge may consider a motion for certificate of appealability and grant the motion, but may not alone deny the motion. Given that a single judge may grant a certificate of appealibility under 28 U.S.C. § 2253, but the statute says nothing of a single judge's ability to deny such a motion, the rules likewise comport with the relevant statutory provisions.

The circuit courts are split on whether a single circuit judge may deny a motion for certificate of appealability. The Third, Fourth, and Eighth Circuits require three judge panels to hear such motions by rule. *See*, 3rd Cir. R. 22.3; 4th Cir. R. 22(a); 8th Cir. R. 27A(a)-(c). In practice, the First, Second, Seventh, Tenth, and D.C. Circuits likewise decide such motions in three judge panels, while the Ninth Circuit decides them in panels of two. *See*, *e.g.*, *Rasberry v. United States*, No. 19-1966, 2019 WL 8329732 (1st Cir. Nov. 4, 2019); *Moore v. New York State Off. of Att'y Gen.*, No. 19-2618, 2020 WL 768668 (2d Cir. Jan. 15, 2020); *Foster v. Smith*, No. 17-1908, 2017 WL 5197490 (7th Cir. Sept. 29, 2017); *United States v. Cash*, 822 F. App'x 824, 831 (10th Cir. 2020); *Miles v. Paul*, No. 21-5078, 2021 WL 3719346 (D.C. Cir. Aug. 9, 2021); *Due v. Bd. of Parole Hearings*, No. 17-56559, 2018 WL 5018513 (9th Cir. May 31, 2018). The Fifth, Sixth, and Eleventh Circuits permit a single circuit judge to decide such motions. *See*, 5th Cir. R. 27.2; *Figura v. United States*, No. 21-1352, 2021 WL 8082964 (6th Cir. Oct. 15, 2021); 11th Cir. R. 22-1(c). As explained *supra*, the approaches taken by the Fifth, Sixth, and Eleventh Circuits are in direct contravention of Fed. R. App. P. 27(c). Accordingly, this Court should grant review and establish that under Fed. R. App. P. 27(c) a single circuit judge may not deny a motion for certificate of appealability, so that all habeas petitioners may enjoy the same right to panel review afforded by Rule 27, regardless of the circuit their petition originates from.

Additionally, Mr. Lagerstrom's case is the ideal vehicle for addressing this issue, as the record is fully developed and presents a clean opportunity to address

this important question. This Court is not tasked with sifting through the record and determining whether Mr. Lagerstrom should be granted a certificate of appealability – that task will be for a panel of the Eleventh Circuit to decide on remand. Instead, the question to be resolved is straightforward – is a single circuit judge permitted to deny a motion for certificate of appealability? Under a plain and ordinary reading of the Federal Rules of Appellate Procedure the answer is no. *See*, Fed. R. App. P. 27(c).

Consequently, for the reasons set forth above, this Court should grant Mr. Lagerstrom's Petition, and establish that a single circuit court judge may not deny a motion for certificate of appealability under Fed. R. App. P. 27(c), and grant relief accordingly.

CONCLUSION

For the reasons stated above, this Court should grant Mr. Lagerstrom's Petition for Writ of Certiorari, establish that a single circuit court judge may not deny a motion for certificate of appealability under Fed. R. App. P. 27(c), reverse the order denying his Motion for Certificate of Appealability, and order review of his motion by a panel of judges of the Eleventh Circuit.

Respectfully Submitted,

Dane K. Chase, Esq.
Florida Bar No. 0076448
Chase Law Florida, P.A.
111 2nd Ave Ne
Suite 334
Direct: (727) 350-0361
Email: dane@chaselawfloridapa.com
Counsel for Petitioner

APPENDIX A

In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-10886

GORDON LAGERSTROM,

Petitioner-Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 9:20-cv-80531-AHS

ORDER:

Gordon Lagerstrom moves for a certificate of appealability in order to appeal the denial of his 28 U.S.C. § 2254 petition for habeas corpus. Lagerstrom's motion for a certificate of appealability is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

/s/ Andrew L. Brasher

UNITED STATES CIRCUIT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 20-80531-CIV-SINGHAL/McCABE

GORDON LAGERSTROM,

Petitioner,

vs.

SECRETARY, DEPARTMENT OF CORRECTIONS, STATE OF FLORIDA,

Respondent.
_____/

ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

THIS CAUSE has come before the Court on the Report and Recommendation of Magistrate Judge Ryon M. McCabe (DE [15]) recommending that the Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (DE [1]) be denied. Petitioner Gordon Lagerstrom ("Petitioner") filed timely objections ("Objections"). (DE [16]).

This Court has conducted a *de novo* review of the portions of the Report to which Petitioner has objected, in accordance with 28 U.S.C. § 636(b)(1)(C), and the remainder of the Report for clear error, and finds that the Objections are without merit and are therefore overruled. *Schwartz v. Jones,* 2020 WL 905234, at *1 (S.D. Fla. Feb. 25, 2020), *aff'd sub nom. Schwartz v. Sec'y, Fla. Dep't of Corr.,* 842 Fed. Appx. 442 (11th Cir. 2021).

Petitioner first argues that the Court should not adopt the Magistrate Judge's finding that the Petition under 28 U.S.C. § 2254 was untimely filed. Citing *Martinez v. Ryan,* 566 U.S. 1 (2012), Petitioner argues that "because the state failed to provide counsel to assist him with respect to this proceeding, the state was precluded from

disputing his entitlement to relief on procedural grounds and was limited to responding to his claim on the merits." (DE [16], p. 2). The Magistrate Judge made two findings that are pertinent here. First, the Magistrate Judge correctly concluded that the state post-conviction court did not deny his motion on procedural grounds, but "instead addressed the 'merits' by finding that the Sixth Amendment does not recognize a theory of ineffective assistance based on trial counsel's failure to affirmatively recommend a plea offer." (DE [15] p. 11). Second, the Magistrate Judge correctly found that Eleventh Circuit precedent precluded Petitioner's *Martinez* argument:

> [T]he *Martinez* rule explicitly relates to excusing a procedural default of ineffective-trial-counsel claims and does not apply to AEDPA's statute of limitations or the tolling of that period. The § 2254 ineffective-trial-counsel claims in *Martinez* and *Trevino* were not barred by AEDPA's one-year limitations period. Instead, those § 2254 claims were dismissed under the doctrine of procedural default *because the petitioners never timely or properly raised them in the state courts under the states' procedural rules.* At no point in *Martinez* or *Trevino* did the Supreme Court mention the "statute of limitations," AEDPA's limitations period, or tolling in any way.

Arthur v. Thomas, 739 F.3d 611, 630 (11th Cir. 2014) (emphasis added). The state was, therefore, not precluded from arguing the timeliness issue. The issues of the timeliness of Petitioner's § 2254 petition and equitable tolling were fully briefed by the parties and correctly addressed by the Magistrate Judge. Petitioner's objection on the issue of timeliness is overruled.

Although the Magistrate Judge concluded that the petition was untimely filed, he nevertheless addressed the merits of Petitioner's claim that he was offered ineffective assistance of counsel "because trial counsel failed to advise him to accept the State's twenty-five (25) year plea offer, as doing so would have been in Petitioner's best interest

in light of the gain time implications and because of overwhelming evidence of guilt." (DE [1] at 5; DE [15]). The Magistrate Judge fully considered the parties' arguments and concluded that Petitioner failed to establish that the state court's decision denying Petitioner's Rule 3.850 motion contradicted or resulted in an unreasonable application of 'clearly established law.' *See* 28 U.S.C. § 2254(d)(1-2)." (DE [15], p. 16). First, the Magistrate Judge found no clearly established rule that would require trial counsel to make an affirmative recommendation on whether to accept a plea offer. *Id.* Second, he found that failure to advise Petitioner of the gain time consequences of his plea is not ineffective assistance of counsel. *Id.*

In his objections, Petitioner "submits the magistrate recommendations should be rejected for the reasons set forth in his" initial memorandum of law and reply brief. (DE [16], pp. 3-4). The Magistrate Judge fully considered those claims and after careful consideration, the Court wholly agrees with the conclusion that Petitioner's trial counsel did not render a degree of performance that fell outside the "wide range of competent assistance" as defined by *Strickland v. Washington,* 466 U.S. 668, 690 (1984). Accordingly, it is hereby

ORDERED AND ADJUDGED that the Report and Recommendation (DE [15]) is **AFFIRMED AND ADOPTED** as the Court's opinion in this case and Petitioner's 28 U.S.C. § 2254 Petition is **DISMISSED.** Petitioner is not entitled to a Certificate of Appealability.

The Clerk of Court is directed to **CLOSE** this case and **DENY AS MOOT** any pending motions.

DONE AND ORDERED in Chambers, Fort Lauderdale, Florida, this 17th day of February 2023.

RAAG SINGHAL
UNITED STATES DISTRICT JUDGE

Copies furnished counsel via CM/ECF