No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DANIEL KILGORE, Petitioner

v.

CHANTAY GODERT, Respondent

On Petition for Writ of Certiorari
to the U.S. Court of Appeals, Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

After Mr. Kilgore entered a plea of guilty to two counts of child molestation, the court ordered (following a plea agreement) that Mr. Kilgore be sent to the Missouri Department of Corrections for a 120-day "program," the Missouri Sexual Offender Unit (SOAU). Under Mo Rev. Stat. § 559.115, persons who successfully complete this "program" may be released on probation.. However, the SOAU simply evaluates the prisoner and decides whether to recommend probation. No treatment or education is provided. Mr. Kilgore was unaware of this when he entered his plea.

The prison did not recommend probation, and Mr. Kilgore is now serving his prison sentence. After habeas corpus proceedings, Mr. Kilgore was denied relief and a certificate of appealability without explanation. The case thus presents the following questions:

1. Is Mr. Kilgore entitled to appeal the district court's decision that Missouri did not violate Mr. Kilgore's right to due process of law when he was ordered to participate in a program that did not exist as a condition to obtaining probation?

2. s Mr. Kilgore entitled to appeal the district court's decision that Mr. Kilgore's plea of guilty was voluntary and conformed to due process despite the fact that he was not informed of the true nature of the SOAU "program" before he entered his plea of guilty?

3. Did the court of appeals' unexplained denial of a COA as to any grounds improperly insulate its decision from review by this Court?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Daniel Kilgore is the Petitioner in this case and was represented in the Court below by Elizabeth Unger Carlyle.

Chantay Godert, Warden of Northeast Missouri Correctional Center where Mr. Kilgore is now housed, is the respondent in this case. Ronda Pash, Warden of Crossroads Correctional Center was the respondent in the court below. They were represented in the court below by Assistant Missouri Attorney General Stephen Hawke.

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

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Petitioner Daniel Kilgore prays that a writ of certiorari be granted to review the judgment of the Eighth Circuit Court of Appeals entered on August 20, 2018.

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OPINIONS BELOW

The order of the Eighth Circuit denying a Certificate of Appealability (COA) and dismissing Mr. Kilgore's appeal is printed at Appendix (hereinafter "App.") p. 1a. No opinion accompanied the decision or was reported. The memorandum and order of the district court is printed beginning at App. 2a.

JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was entered on January 8, 2019, denying a COA as to all grounds presented in Mr. Kilgore's petition for writ of habeas corpus as to which the district court denied relief, and dismissing Mr. Kilgore's appeal *See* App. p. 1a. No petition for rehearing was filed. On April 1, 2019, Justice Gorsuch granted Mr. Kilgore's motion for extension of time to file the petition for writ of certiorari and ordered that it be filed on or before May 8, 2019.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. XIV § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No

state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2253

(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).

STATEMENT OF THE CASE

Mr. Kilgore entered a plea of guilty to two counts of child molestation, with the agreement that the state would dismiss a third count, and would recommend a sentence of twelve years concurrent on each of the two remaining counts. The state also agreed to recommend that Mr. Kilgore be sent to the Missouri Department of Corrections for a 120-day "program," the Missouri Sexual Offender Unit (SOAU). Under Mo Rev. Stat. § 559.115, persons convicted of sex offenses who successfully complete this "program" shall be released on probation, with limited exceptions:

> When the court recommends and receives placement of an offender in a department of corrections one hundred twenty-day program, **the offender shall be released on probation if the department of corrections determines that the offender has successfully completed the program except as follows. . . . The court shall release the offender unless such release constitutes an abuse of discretion.**
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> (Emphasis added.)

The court rejected the state's recommendation for concurrent sentences, instead imposing consecutive twelve year sentences.[1] The court agreed with the

[1] Mr. Kilgore understood that, because of the plea bargaining policy of the sentencing judge, the state's recommendation was not binding on the court.

SOAU recommendation. Mr. Kilgore was then sent to the Missouri Department of Corrections for a period of 120 days. While there, he was treated as any other DOC prisoner except for an interview with a counselor in training and an institutional parole officer. There were no classes or therapy provided to Mr. Kilgore to assist him in rehabilitating himself. He had no conduct violations, and behaved as a model prisoner. However, the parole officer reported to the court that Mr. Kilgore was not a good candidate for probation. Despite the fact that the same test was given to Mr. Kilgore as was given before his plea, with the same results indicating low risk, the parole officer made the subjective judgment based on her single interview with him that Mr. Kilgore was deceitful and lacked remorse, and recommended against probation. Notably, the report did not indicate that Mr. Kilgore had failed to successfully complete a "program." After receiving the report, the court denied probation.

Mr. Kilgore filed a timely motion under Mo. Sup. Ct. R. 24.035 for post-conviction relief. At the evidentiary hearing on that motion, Mr. Kilgore presented the depositions of a counselor who had observed the prison interview and the institutional parole officer who interviewed Mr. Kilgore and wrote the report recommending that he not be granted probation.

Gerald Hoeflein, a licensed professional counselor, signed the SOAU report. The company Mr. Hoeflein works for, Mental Health Management ("MHM"), contracts with the DOC "to assess the offender's risk of reoffending and amenability to treatment in the community or prison" as part of SOAU.

Mr. Hoeflein explained that SOAU is an opportunity for judges to send offenders to prison for 120 days. During that time, SOAU assesses the risk for sexually reoffending. Typically, the SOAU assessment lasts from an hour and a half to two hours. Mr. Hoeflein did not know what the individual does during the remaining 119 days of incarceration. SOAU provides neither treatment nor diagnosis to offenders. It is not a "program" as he understood the term.

Keshia Ritter, the institutional parole officer who completed the report to the court recommending against probation, explained that of her function in SOAU was to interview the individual to get background information and that individual's version of the present offense in order to make a recommendation to the court about either granting or denying probation. The inmate and his or her attorney are not provided a copy of the report by DOC.

Ms. Ritter agreed with Mr. Hoeflein that SOAU is not a program. No treatment is provided in SOAU. The SOAU process is virtually identical to that which the Department of Probation and Parole provides to the court in a pre-sentence report, with the addition of input from a counselor.

The post-conviction evidence also included the deposition testimony of Julie Motley, the director of the Missouri Sexual Offender Program (MOSOP), of which the SOAU is a part. Ms. Motley testified that her team had created an in-house brochure describing SOAU as follows:

> **The SOAU is not a treatment program. Its primary focus is to assist the court and Board of Probation and Parole regarding offender risk or the danger they pose to the community and their amenability to outpatient treatment within community settings.** The specialized

> assessment report provided to the court will include a general assessment of the mental and emotional health, determination of the probable risk to sexually reoffend, amenability for treatment and change, a recommendation that will focus on the risks to others and where that risk can be most effectively dealt with in the community or in a correctional setting. It is expected that any sex offender considered appropriate for release on probation will be required to participate in sex offender specific treatment while on probation.
>
> (Emphasis added.)

Ms. Motley explained that the only purpose of SOAU is to determine an individual's risk of sexually reoffending and whether or not the offender is amenable to community treatment and parole, or if he or she requires incarceration and more intensive sex offender treatment. SOAU does not inform the individual how to successfully complete a program, and participants are given no educational materials, workbooks or similar materials. There are no standardized criteria, written or oral, for determining when a person has successfully completed SOAU and SOAU does not determine whether an individual has successfully completed a program.

Trial counsel also testified at the evidentiary hearing. He believed that SOAU was a "program with a varied protocol, including group counseling, individual counseling and an assessment of the risk of re-offense, amongst many other things." Trial counsel told Mr. Kilgore that the program was difficult, but that Mr., Kilgore could successfully complete it by actively participating in the programs they offered and being amenable to suggestions from the staff or counselors, and by working on his habit of being "reflexively argumentative."

Mr. Kilgore testified at the post-conviction hearing that based on trial counsel's statements to him, he expected SOAU to consist of courses, classes, and testing over which he would have control to successfully complete or not. He did not understand that he would receive no education or treatment.

Mr. Kilgore testified that he would not have entered a plea of guilty had he known that successfully completing SOAU depended entirely on the report writer's opinion, after an interview early in his prison stay, of his likelihood of offending. Since he was unaware of this fact, when he entered his plea of guilty, he relied on his attorney's advice that while the program was "difficult," he would have no problem successfully completing it.

The post-conviction motion court denied relief, and Mr. Kilgore appealed. On appeal, the Missouri Court of Appeals found that SOAU is a "program," that the statute creating it does not create a liberty interest, and that Mr. Kilgore was not induced to plead guilty either by a misunderstanding of the nature of SOAU or by misinformation from his trial counsel. In the alternative, the court held that trial counsel was not required to advise Mr. Kilgore about the nature of SOAU because it was a "collateral consequence" of the plea.

Mr. Kilgore appealed these findings. The court of appeals affirmed the decision of the motion court in an unpublished opinion. App. p. 15a.

In his subsequent habeas corpus petition, Mr. Kilgore contended, in Ground 1, that his right to due process of law was violated because he was sentenced to complete a treatment program that could not be successfully completed, and his

agreement to plead guilty was premised on his understanding that he would have the opportunity to demonstrate success in a treatment program before the judge decided whether to place him on probation.

The district court failed to address this issue, finding instead that the question of whether SOAU was a "program" within the meaning of Mo Rev. Stat. § 559.115 was a matter of state law. Mr. Kilgore did not contend before the district that he was not sentenced to a "program." Rather, he contended that the actions of the Missouri Department of Corrections, after he was sentenced under Mo. Rev. Stat. § 559.115.3 to the SOAU "program," did not satisfy the statutory mandate that he be placed in a program which he can "successfully complete," and therefore violated his right to due process of law.

In Ground 2, Mr. Kilgore contended he was denied effective assistance of counsel and his plea was involuntary because his trial counsel failed to understand, and therefore to communicate to him, the real nature of the SOAU. The district court found that the nature of the advice given by counsel was in dispute, that *Padilla v. Kentucky*, 559 U.S. 356 (2010), does not clearly extend to all collateral consequences of a plea, and that there was no prejudice.

The district court denied relief, and, denying Mr. Kilgore's post-judgment motion, also denied a COA as to all grounds in the petition.[2] With respect to the COA, the district court cited the relevant authorities from this Court, then said

[2] The issues raised in Grounds 3 and 4 of Mr. Kilgore's petition are not before this Court.

only, "The Court holds no reasonable jurist could disagree with its decision and declines to issue a certificate of appealability." App. p. 13a. Mr. Kilgore then sought a COA in the court of appeals. Without revealing its analysis, the court of appeals denied a COA. App. p. 1a.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO DIRECT THE COURT OF APPEALS TO ISSUE A COA AND REVIEW MR. KILGORE'S GROUNDS FOR RELIEF.

The court of appeals denied Mr. Kilgore a COA as to all grounds rejected by the district court. At least two of them merit appellate review.

In *Buck v. Davis*, 137 S.Ct. 759, 773-774 (2017), this Court rejected the reasoning of the Fifth Circuit in denying a COA, holding that the court had improperly reviewed the merits of the claim:

> The court below phrased its determination in proper terms—that jurists of reason would not debate that Buck should be denied relief, 623 Fed. Appx., at 674—but it reached that conclusion only after essentially deciding the case on the merits. . . . We reiterate what we have said before: A "court of appeals should limit its examination [at the COA stage] to a threshold inquiry into the underlying merit of [the] claims," and ask "only if the District Court's decision was debatable."

Of course, in Mr. Kilgore's case, this Court cannot determine the reasoning employed by either the district court or the Eighth Circuit when they denied a COA as to any issue. However, the standard of 28 U.S.C. § 2253, as interpreted in *Buck* and this Court's other cases, notably *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003),

requires a COA in Mr. Kilgore's case. The individual grounds as to which review is required are discussed below.

A. DENIAL OF DUE PROCESS OF LAW UNDER U.S. CONST. AMEND. XIV WHEN MR. KILGORE, AS A CONDITION OF AMENDMENT OF HIS SENTENCE OF IMPRISONMENT TO PROBATION, WAS DIRECTED TO PARTICIPATE IN A "PROGRAM" WHICH DOES NOT EXIST.

The district court held that whether SOAU was "program" within the meaning of the Missouri statute, *and* whether the statute created an enforceable liberty interest to which a right to due process attached, were matters of state law. But whether there is a liberty interest is a question of federal constitutional law, not state law. *See Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979); *Williams v. Missouri Bd. of Probation & Parole*, 661 F.2d 697, 698-699 (8th Cir. 1981); *Maggard v. Wyrick,* 800 F.2d 195, 198 (8th Cir.1986). All of these cases analyze state parole statutes and find that they create a federally protected liberty interest. This was Mr. Kilgore's claim in state and federal court. Thus, if the decision of the state court unreasonably applies that law, relief is required. 28 U.S.C. § 2254(d)(2).

Reasonable jurists could debate whether the Missouri statute conveys a liberty interest. Mo. Rev. Stat. § 559.115.3 promises that a person sentenced to a department of corrections program "shall" be released on probation (with narrow exceptions) upon "successful completion" of the program. This Court has regularly held that use of the word "shall" in a statute pertaining to early release or prison programs ordinarily creates a liberty interest. *Greenholtz v. Inmates of Nebraska*

Penal and Correctional Complex, 442 U.S. 1 (1979);. While Missouri statute provides that the trial court does retain some discretion to reject the DOC's recommendation for release of a defendant sentenced under § 559.115.3, that discretion is not unfettered. In *Greenholtz* and its progeny, this Court recognized a liberty interest despite the fact that "parole-release decisions are inherently subjective. . . ." *Board of Pardons v. Allen*, 482 U.S. 369, 374 (1987). Thus, reasonable jurists could find that a liberty interest was established, and the decision of court below is in conflict with this Court's decisions. A COA is required as to Ground 1, and this Court should grant certiorari to correct the conflict.

B. INVOLUNTARY GUILTY PLEA

A COA is likewise required to correct the decision of the district court regarding Mr. Kilgore's claim that he was denied due process of law when he entered his plea of guilty under the mistaken belief that the state would recommend that he be sentenced to a "program" that both he and his counsel agreed included classes and counseling. The reviewing courts essentially dismissed this contention, holding that the SOAU recommendation was a collateral consequence of the conviction. This holding clearly conflicts with this Court's analysis.

The courts below disputed whether *Padilla v. Kentucky*, 559 U.S. 356 (2010), would require Mr. Kilgore to be informed about the nature of the SOAU before he entered his plea of guilty. But that is the wrong question. The evidence is undisputed that Mr. Kilgore (unlike Mr. Padilla) WAS informed about the SOAU

before he entered his plea of guilty. The evidence is likewise undisputed that the advice he received was incorrect.

Mr. Kilgore's counsel testified that he told Mr. Kilgore that SOAU included counseling, individual counseling and an assessment of the risk of re-offense, amongst many other things" and that he could successfully complete the program, "By participating actively in the programs that they offered, by being amenable to suggestions from the staff or counselors. . . ." Mr. Kilgore testified that he believed that at SOAU, he would participate in classes and testing, and could control over whether he successfully completed the program or not. Instead, as the administrators of the program testified, and their brochure provided, "The SOAU is not a treatment program."

Thus, the question before the courts below was not whether trial counsel was *required* to tell Mr. Kilgore about the SOAU. It was whether he did so accurately, and if he did not, whether those inaccuracies affected Mr. Kilgore's decision to plead guilty. *Libretti v. United States*, 516 U.S. 29, 50–51 (1995), *Hill v. Lockhart*,474 U.S. 52, 58 (1985); *Henderson v. Morgan,* 426 U.S. 637 (1976); *Boykin v. Alabama*, 395 U.S. 238 (1969). *See also Lafler v. Cooper*, 566 U.S. 156 (2012) (trial counsel's incorrect advice causing defendant to reject plea offer was ineffective assistance of counsel.) Under these cases, incorrect advice as to the nature and terms of plea agreements is ineffective assistance of counsel. A COA was required as to this issue, and certiorari should be granted to correct the erroneous disregard of the *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003), standard.

II. THIS COURT SHOULD GRANT CERTIORARI TO REQUIRE COURTS OF APPEALS TO EXPLAIN DENIALS OF CERTIFICATES OF APPEALABILITY.

When a habeas petitioner appeals to the Eighth Circuit without a COA, the Eighth Circuit routinely issues unexplained orders like that in this case, stating only "The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied." App. p. 1a. Mr. Kilgore filed an extensive motion in the court of appeals detailing the basis for a COA. The state did not respond. The court of appeals panel did not provide any basis for its decision to deny a COA.

This Court has previously been informed of the disparity between circuits in the granting of certificates of appealability in capital cases. *See Buck v. Davis*, brief of petitioner, Appendix A, showing that, between 2011 and 2016, "[A] COA was denied on all claims in 58.9% (76 out of 129) of the cases arising out of the Fifth Circuit, while a COA was only denied in 6.3% (7 out of 111) and 0% of the cases arising out of the Eleventh and Fourth Circuits respectively." The data for the Eighth Circuit, where Mr. Kilgore's case arose, have been compiled for this court through 2016 in the case of *Greene v. Kelley*, No. 16-7425, 137 S.Ct. 2973 (2017). This data indicated that in the Eighth Circuit since 2011, 47.6% of capital cases as to which COA was sought in the Eighth Circuit had their COAs denied. Since that time, that court has denied at least one COA in a capital case with an unexplained order. *Barton v. Griffith,* No. 18-2241 (petition for rehearing pending).

In non-capital cases, an April, 2012 study finds similar disparities in the granting of COAs in non-capital cases:

> Rulings on COAs varied greatly between circuits. Consider the two circuits with the largest volume of habeas cases, for example. In the Ninth Circuit, district judges granted more than 14 percent and the court of appeals granted more than 13 percent of COAs sought, while in the Fifth Circuit, every COA sought from a district judge was denied, and only 7 percent were granted by the court of appeals.

Nancy J. King, *Non-Capital Habeas Cases After Appellate Review: An Empirical Analysis*, 24 FED. SENT. RPTR 308 (2012). The study reflects that at that time, the Eighth Circuit granted COA in 4.1% of cases where a COA was requested. Only three circuits had a lower rate. *Id.* at 310, Table 3.

The Eighth Circuit's COA practice is outside the norm for courts of appeals in another respect. Unlike most other circuits, the Eighth Circuit does not even attempt to explain to litigants (or to this Court) why their claims are not debatable. When denying a COA motion, the Eighth Circuit always issues a uniform three-line summary order like that issued in Mr. Kilgore's case. The Eighth Circuit does not appear to have explained its reasons for denying a COA since 1997. The Sixth Circuit, which issues reasoned decisions denying COA, explained the importance of reasoned opinions in *Murphy v. Ohio*, 263 F.3d 466 (6th Cir. 2001). There, the court reversed a blanket denial of a COA, remanding to the district court for analysis of the individual issues presented in the petition. (The exact text of the district court's order is not available on PACER.) Citing its earlier decision in *Porterfield v. Bell*, 258 F.3d 484 (6th Cir. 2001), the court held that remand was required because "The

district court here failed to consider each issue raised by Murphy under the standards set forth by the Supreme Court. . . ." *Murphy*, 263 F.3d at 467.

Like Mr. Murphy, Mr. Kilgore has never had the benefit of a reasoned analysis of whether his claims meet the standard for COA. The practice of issuing unreasoned blanket denials of COA departs from that of every other court of appeals, with the possible exception of the Seventh Circuit.[3] Under *Hohn v. United States*, 524 U.S. 236 (1998), this Court has jurisdiction to review the denial of a COA by a lower court. But when there is an unexplained denial, this Court is left with the responsibility of reviewing the lower court decisions on the COA issue *de novo.*

The great disparity between the rates at which COAs are granted in the various circuits makes the need for clarification by the courts of appeals even more important. The COA standard should be clear enough that any court reviewing a habeas case will be able to apply it uniformly. That is obviously not happening. And permitting the Eighth Circuit to completely insulate its reasoning from Supreme Court review contributes heavily to that inequity. If this Court does not direct the

[3] The certiorari petition in *Greene v. Kelley* identified the following reasoned orders denying COA. Capital cases:*Swisher v. True*, 325 F.3d 225 4th Cir. 2003); *Chanthakoummane v. Stephens*, 816 F.3d 62 (5th Cir. 2016); *Treesh v. Robinson*,No. 12-4539, 2013 U.S. App. Lexis 3878 (6th Cir. Feb. 13, 2013); *Woods v. Buss*, 234 F.Appx 409 (7th Cir. 2007); *Dickens v. .Ryan*, 552 F.Appx 770 (9th Ctr. 2014); *Griffin v. Sec'y*,787 F.3d 1086 (11th Cir. 2015). Non-capital cases: *McGonagle v. United States,* 137 F. Appx 373 (1st Cir. 2005); *Middleton v. Attorneys General*, 396 F.3d 207 (2nd Cir. 2005); *Webster v. Adm'r N.J. State Prison*, No. 13-338I, 2013 U.S. App. Lexis 25719 (3d Cir. Oct.25, 2013); *Pickens v. Workman*,373 F. App'x 847 (10th Cir. 2010)..

court of appeals to grant Mr. Kilgore a certificate of appealability, at a minimum it should grant review and direct the Eighth Circuit to demonstrate to this Court that it is following the requirements of § 2253.

CONCLUSION

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

Respectfully submitted,

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