UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-3130

Daniel H. Kilgore

Petitioner - Appellant

v.

Warden Ronda Pash, Crossroads Correctional Center; Chris Koster, Missouri Attorney General

Respondents - Appellees

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:15-cv-00794-DGK)

JUDGMENT

Before LOKEN, BENTON and ERICKSON, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

January 08, 2019

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

DANIEL H. KILGORE, Petitioner, v. RONDA J. PASH, Warden, Crossroads Correctional Center, and CHRIS KOSTER, Missouri Attorney General, Respondents.	)	No. 4:15-CV-00794-DGK

ORDER DENYING HABEAS PETITION

This case arises from Petitioner Daniel Kilgore's guilty plea to two counts of first-degree child molestation in Missouri state court. The court sentenced Petitioner to twenty-four years' imprisonment with the possibility of release on probation after 120 days. The court later determined Petitioner should not be released on probation.

Now before the Court is Petitioner's Amended Petition for a Writ of Habeas Corpus (Doc. 2) brought under 28 U.S.C. § 2254. Petitioner raises four claims of ineffective assistance of counsel and violations of due process. For the following reasons, his Petition is DENIED.

BACKGROUND

On a petition for a writ of habeas corpus brought by a person in state custody, a federal court views the facts and evidence in the light most favorable to the state court's verdict. *Hendricks v. Lock*, 238 F.3d 985, 986 (8th Cir. 2001); *see also* 28 U.S.C. § 2254(e)(1) (2009). The evidence and procedural history of Petitioner's case is summarized as follows:

On April 14, 2011, Petitioner was charged in the Circuit Court of Clay County, Missouri, with three counts of first-degree child molestation for allegedly molesting three relatives who were less than fourteen years-old. On August 26, 2011, Petitioner entered into a plea agreement,

negotiated through retained counsel, in which he pled guilty to two counts in return for the State dismissing the third count. As part of the agreement, the parties jointly recommended to the court that Petitioner be sentenced to concurrent twelve-year sentences under Missouri Revised Statute § 559.115 (which would allow him to be released on probation after 120 days), with placement in Missouri's Sex Offender Assessment Unit ("SOAU"). The court, however, retained the option of imposing a different sentence, and if it did, Petitioner could not withdraw his guilty plea.

During the plea colloquy, Petitioner repeatedly acknowledged that under the agreement, the court could sentence him to any amount of time up to the statutory maximum of 30 years (if the sentences were run consecutively), and that the court might not place him on probation after 120 days.

On October 14, 2011, the court sentenced Petitioner to placement in the SOAU under §559.115, but imposed consecutive, not concurrent, twelve-year sentences.

On October 26, 2011, Petitioner entered prison. On or about January 25, 2012, the SOAU issued a report recommending the court not place Petitioner on probation. The report gave numerous reasons for its recommendation, including the fact that during the evaluation, Petitioner reportedly

> did not display guilt, empathy or remorse and felt justified in training the victims sexually. Mr. Kilgore teared up only when he realized he could be found out, thereby focusing on his own suffering. He realized he had a problem when VP [a victim] demanded oral sex and threatened to tell his wife if he refused. Mr. Kilgore placed VP in the role of an adult perpetrator when he stated, "I begged her not to tell, but I gave in to her demands."[1]

The report stated Petitioner also winked at one of the interviewers during the evaluation.

[1] To be clear, the report alleged Petitioner claimed that one of his victims—a child—had demanded oral sex from him.

After reading the report, the trial court denied probation on January 26, 2012. Plea counsel then filed a motion for reconsideration and requested a hearing. On February 17, 2002 (which was shortly before the court's jurisdiction to place Petitioner on probation under § 559.115 would expire), the court held a hearing on the motion to reconsider.

During this hearing, Petitioner was represented by a new attorney. This attorney had extensive experience with SOAU reports; she had worked as a probation and parole officer before attending law school and had drafted the same type of report. The court denied Petitioner's request for reconsideration on February 22, 2012.

Petitioner subsequently filed a state post-conviction motion alleging his attorney during the plea stage was ineffective for: (1) failing to properly investigate and advise Petitioner about the nature of the SOAU; (2) failing to timely request a hearing when the SOAU report did not indicate that he had failed to successfully complete a program, and by failing to present evidence at that hearing, specifically by not calling Petitioner's parents and staff members from the SOAU; and (3) allegedly advising Petitioner that despite the court's comments during the guilty plea, he would serve only 120 days in prison. Petitioner also argued (4) any sentence to the SOAU violates due process because successful completion of SOAU as provided for in § 559.115 creates a liberty interest in release on probation.

The state post-conviction motion court denied these claims. It also held the claims related to the reconsideration hearing on the report from the SOAU were outside the scope of a post-conviction motion. The state court of appeals affirmed the denial on April 7, 2015.

On October 14, 2015, Petitioner filed the pending Amended Petition (Doc. 2) for a writ of habeas corpus under 28 U.S.C. § 2254. On December 28, 2017, the case was reassigned to the undersigned judge.

STANDARD OF REVIEW

Federal courts may not grant a writ of habeas corpus on any claim that was adjudicated on the merits in a state court proceeding unless adjudication of the claim,

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

28 U.S.C. § 2254(d)(1)-(2) (2009).

A decision is contrary to clearly established Supreme Court law if the "state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or . . . decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Williams v. Taylor,* 529 U.S. 362, 412-13 (2000). A decision unreasonably applies clearly established Supreme Court law "if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* This standard is objective, not subjective. *Id.* at 409. An unreasonable application of federal law is different from an incorrect application of federal law. *Id.* at 410.

As for the "decision based on an unreasonable determination of the facts" prong of the analysis, a factual issue made by a state court is presumed correct. 28 U.S.C. § 2254(e). The petitioner bears the burden of rebutting this presumption by clear and convincing evidence. *Id.*

DISCUSSION

Petitioner raises four claims for relief, none of which establishes grounds for granting relief. The Court analyzes each claim in turn.

I. The state court denying Petitioner probation was not a denial of due process.

Petitioner first argues he was

> denied due process of law under U.S. Const. Amend. XIV in that he was directed to participate in a "program" [under subsection 3 of Rev. Stat. Mo. § 559.11] which does not exist, and the availability of probation was contingent on his completion of the "program." This denied his right to adequate notice of the consequences of his actions, and his right to due process of law before being deprived of liberty.

Am. Pet. at 11-12 (Doc. 2).

This claim does not establish grounds for relief because the state court of appeals' decision rejecting it was not contrary to clearly established federal law, nor did it involve an unreasonable application of clearly established Federal law. Petitioner's claim rests on an incorrect legal assumption, namely, that the SOAU "program" he was sent to for 120 days was not a program under Missouri law. As the Missouri Court of Appeals explained:

> The gist of Kilgore's claim is that he was guaranteed a one hundred twenty day program that he could complete, but that the SOAU was not in fact a 'program' under section 559.115. However, our Supreme Court has already directly addressed this exact issue and found that the SOAU is in fact a program which falls within the terms of section 559.115. *State ex rel. Valentine v. Orr*, 366 S.W.3d 534 (Mo. banc 2012). While Kilgore admits in his Reply Brief that our Supreme Court has already decided that the SOAU is in fact a program, he continues to dispute its holding, stating that "*Valentine* was correctly decided, but SOAU is not a program." *See Valentine*, 366 S.W.3d at 540-41. We are, however, bound by the well-reasoned *Valentine* decision to hold that the SOAU is a "program" pursuant to the terms of this statute. *See State ex rel. Bank of Am. N.A. v. Kanatzar*, 413 S.W.3d 22, 27 n.4 (Mo. App. W.D. 2013) (citation omitted) (stating we are bound by the most recent controlling decision of the Supreme Court).
>
> Moreover, there is no liberty interest attached to placement in the SOAU; rather, Kilgore's liberty interest in the grant or denial of probation remains within the complete discretion of the court. § 559.115.3. In other words, even if Kilgore had successfully completed the assessment program, the probation decision is still discretionary and does not hinge upon whether he "passes" or "fails"

> the program. "The court shall follow the recommendation of the department unless the court determines that probation is not appropriate." *Id.* While the recommendation of the SOAU is considered by the court, it is not binding. *See, e.g., Valentine*, 366 S.W.3d at 541 (holding that under section 559.115.3, the circuit court has the authority to review the SOAU's recommendation of probation but may still order the execution of sentences). Further, a defendant "is not, as a matter of right, entitled to probation under the terms of section 559.115." *Brown v. State*, 67 S.W.3d 708, 711 (Mo. App. E.D. 2002). "Rather, the court has discretion to grant probation pursuant to the statute." *Id.* (citation omitted).

Kilgore v. Missouri, No. WD76937 at 9-10 (Mo. Ct. App. Dec. 23, 2014) (per curiam). Because this Court as a federal court defers to the Missouri state courts' rulings on the proper interpretation and application of state law, *Nunley v. Bowersox*, 784 F.3d 463, 471 (8th Cir. 2015), and Missouri's courts have held that the SOAU is a program under § 559.115 and that no liberty interest attaches with placement in it, Petitioner's first claim is denied.

II. Counsel was not ineffective in advising Petitioner about the likelihood that he would receive probation.

Next, Petitioner argues he was denied due process of law and effective assistance of counsel when his attorney during the plea stage (allegedly) failed to advise him that because the SOAU program consisted of a single interview and that he would have no opportunity to demonstrate he was amenable to treatment during his 120 day incarceration, he was unlikely to be released on probation after 120 days. Petitioner contends that had he known this information, he would not have pled guilty. In so arguing, Petitioner seeks to extend the holding in *Padilla v. Kentucky*, 559 U.S. 356 (2010) (holding counsel was ineffective for failing to advise his client that a collateral consequence of pleading guilty would be deportation), to cases where defense counsel incorrectly advises a client about what his odds of receiving probation are.

To succeed on a claim of ineffective assistance of counsel, a movant must show that "(1) trial counsel's performance was so deficient as to fall below an objective standard of the customary skill and diligence displayed by a reasonably competent attorney, and (2) trial counsel's deficient performance prejudiced the defense." *Armstrong v. Kemna*, 534 F.3d 857, 863 (8th Cir. 2008) (citing *Strickland v. Washington*, 466 U.S. 668, 687-94 (1984)). Judicial review of trial counsel's performance is highly deferential, "indulging a strong presumption that counsel's conduct falls within the wide range of reasonable professional judgment." *Middleton v. Roper*, 455 F.3d 838, 846 (8th Cir. 2006). To establish prejudice, a movant must show that the outcome would have been different had counsel's performance not been deficient. If the movant cannot show a reasonable probability that the outcome would have been different, he cannot show prejudice. *DeRoo v. United States*, 223 F.3d 919, 925 (8th Cir. 2000). Failure to satisfy either prong is fatal to the claim, and the court need not reach the performance prong if the defendant suffered no prejudice from the alleged ineffectiveness. *See Pryor v. Norris*, 103 F.3d 710, 713 (8th Cir. 1997).

Assuming for the sake of argument that counsel incorrectly advised Petitioner about his prospects of receiving probation,[2] this claim is still without merit. First, it is uncontroverted that before the trial court accepted Petitioner's guilty plea, Petitioner repeatedly acknowledged that under the agreement the judge could sentence him up to the statutory maximum of 30 years (if the sentences were run consecutively), and that he was not assured of receiving probation. Thus, the court imposed a sentence which was within the range of what everyone agrees he was advised of in open court that he could receive.

[2] What exactly counsel told Petitioner his chances of receiving probation were is in dispute. Counsel testified at the state evidentiary hearing that he told Petitioner that the SOAU assessment process was very subjective and that he would be at the mercy of the evaluators in determining whether he would be called back. Petitioner rejected this account; he claimed counsel gave him a more rosy—and inaccurate—estimate of his chances.

Second, Petitioner seeks to extend *Padilla* to collateral consequences other than deportation, but a state court does not unreasonably apply federal law when it declines to extend a precedent to a new context. *White v. Woodall*, 134 S. Ct. 1697, 1705-07 (2014). So there is no unreasonable application of federal law here. In fact, the state court of appeals correctly applied the applicable federal law: The Eighth Circuit has rejected extending *Padilla* to collateral consequences other than deportation. *See Plunk v. Hobbs*, 766 F.3d 760, 769 (8th Cir. 2014) (declining to extend *Padilla* to require accurate advice about parole eligibility, noting that even if it extended *Padilla* this far, it would be a new rule of constitutional law inapplicable to cases on collateral review).

Third, Petitioner cannot demonstrate prejudice. That is, he cannot show that but for counsel's (allegedly) incorrect advice, he would not have pled guilty. Petitioner produced no evidence at the motion hearing suggesting he had given up a viable defense in exchange for his guilty plea. On the other hand, by entering the plea agreement, Petitioner received quite a lot: The State dismissed one of the three charges against him, reducing his maximum potential sentence from forty-five years to thirty years, and it recommended the court impose a twelve-year sentence with the possibility of probation. This was a good deal. Thus, the motion court reasonably rejected Petitioner's self-serving testimony that he would have gone to trial if his attorney had better explained to him how the SOAU program works and what his chances of receiving probation were.

For the above reasons, Petitioner's second claim is denied.

III. Petitioner has procedurally defaulted his third claim.

Petitioner's third claim is that he was denied effective assistance of counsel when his initial attorney failed to object at sentencing to witness testimony concerning the dismissed third count. Because the parties agree Petitioner never presented this claim to the state court, the Court must

first decide whether Petitioner procedurally defaulted this claim by failing to exhaust his state remedies first.

When an inmate has not properly exhausted state remedies on a claim and the time for doing so has expired, he has procedurally defaulted the claim. *Welch v. Lund*, 616 F.3d 756, 758 (8th Cir. 2010). In order for a federal court to review a claim that should have been raised in state court by post-conviction motion counsel, a prisoner must demonstrate that post-conviction motion counsel was ineffective under the *Strickland* standard and that the underlying claim is a substantial one, that is, that the claim has some merit. *Martizez v. Ryan*, 566 U.S. 1, 13-17 (2012).

Petitioner cannot show that this claim has any merit. Missouri law presumes that in a judge-tried matter such as a sentencing hearing, the court was not influenced by any inadmissible testimony in reaching a judgment "unless it is clear from the record that the trial judge considered and relied upon the inadmissible evidence." *State v. Crites*, 400 S.W.3d 828, 834 (Mo. Ct. App. 2013) (internal quotations omitted). And it is clear enough that the trial judge did not rely on any inadmissible evidence here. Petitioner pleaded guilty to two counts of child molestation involving two victims. In explaining the departure from the parties' joint recommendation of imposing concurrent twelve-year sentences, the court indicated that there were *two* victims and that there should be consequences for each victim. There is no indication the court considered, much less relied upon, any inadmissible evidence in reaching its sentencing decision, nor is there a reasonable probability that had post-conviction counsel raised this claim in the state court habeas proceeding the state court would have granted relief. Accordingly, the Court holds Petitioner has procedurally defaulted this claim.

IV. Petitioner has procedurally defaulted his fourth claim.

Petitioner's fourth and final claim is that he was denied effective assistance of counsel during the hearing on his motion for reconsideration. Among other things, Petitioner complains his attorney did not present him with the SOAU report so he could not identify the "substantial" inaccuracies in it. Also, counsel should have presented evidence at the hearing from other prison staff who would have disagreed with the report. Petitioner raised this claim in his state post-conviction motion, but did not include it in his state post-conviction appeal.

Where post-conviction counsel raises a claim in the initial round of state post-conviction proceedings, but does not include the claim in the state court appeal, the claim is defaulted and cannot be raised in federal court. *Coleman v. Thompson*, 501 U.S. 722, 752-57 (1999); *Arnold v. Dormire*, 675 F.3d 1082, 1087 (8th Cir. 2012). That is exactly what happened here, and so Petitioner's fourth claim is procedurally defaulted.

Conclusion

For the reasons discussed above, Petitioner's Amended Petition for a Writ of Habeas Corpus (Doc. 2) brought under 28 U.S.C. § 2254 is DENIED.

IT IS SO ORDERED.

Date: May 23, 2018

/s/ Greg Kays
GREG KAYS, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

DANIEL H. KILGORE, Petitioner, v. RONDA J. PASH, Warden, Crossroads Correctional Center, and CHRIS KOSTER, Missouri Attorney General, Respondents.	)	No. 4:15-CV-00794-DGK

ORDER GRANTING IN PART MOTION TO AMEND JUDGMENT

This case arises from Petitioner Daniel Kilgore's guilty plea to two counts of first-degree child molestation in Missouri state court. The court sentenced Petitioner to twenty-four years' imprisonment with the possibility of release on probation after 120 days. The court later determined Petitioner should not be released on probation, and sentenced him to twenty-four years' imprisonment.

Petitioner subsequently moved for a writ of habeas corpus in federal court. On May 23, 2018, this Court denied Petitioner's Amended Petition for a writ of habeas corpus brought under 28 U.S.C. § 2254.

Now before the Court is Petitioner's Motion to Amend Judgment and Alternative Request for Certificate of Appealability (Doc. 16). Petitioner argues the Court should amend its judgment denying habeas relief because it committed numerous errors of fact and law, or alternately, the Court should issue a certificate of appealability.

A motion to alter or amend judgment pursuant to Federal Rule of Civil Procedure 59(e) serves the limited purpose of correcting manifest errors of law or fact or presenting newly discovered evidence. *Hagerman v. Yukon Energy Corp.*, 839 F.2d 407, 414 (8th Cir. 1988). Rule

59(e) motions "cannot be used to introduce new evidence, tender new legal theories, or raise arguments which could have been offered or raised prior to entry of judgment." *Innovative Home Health Care, Inc. v. P.T.-O.T. Assocs. of the Black Hills*, 141 F.3d 1284, 1286 (8th Cir. 1998). Nor is it appropriate to use Rule 59(e) to repeat arguments, *In re G.M. Corp. Anti-Lock Brake Prods. Liab. Lit.*, 174 F.R.D. 444, 446 (E.D. Mo. 1997), or "'relitigate old matters.'" *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 486 n.5 (2008) (quoting 11 C. Wright & A. Miller, Federal Practice and Procedure § 2810.1 (2d ed. 1995)).

After carefully reviewing Petitioner's briefing, the Court finds no manifest error of law or fact that would entitle him to relief under Rule 59(e). On the contrary, the Court finds the motion largely fine-tunes arguments Petitioner previously made, or could have made, prior to the entry of judgment.

The exception, however, is Petitioner's observation that the Court's previous order failed to discuss whether a certificate of appealability should be issued. The Court inadvertently failed to address this question and does so now.

In order to appeal an adverse decision on a writ of habeas corpus, a movant must first obtain a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(A). A court may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This requires the movant to demonstrate "that reasonable jurists could debate whether (or for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 464 U.S. 800, 893 n.4 (1983)). The Court holds no reasonable jurist could disagree with its decision and declines to issue a certificate of appealability.

Petitioner's motion is GRANTED IN PART. The Court agrees it erred by not addressing whether a certificate of appealability should be issued, and it now holds it should not. The Court finds no error of law or fact with respect to that portion of its order denying Petitioner a writ of habeas corpus.

IT IS SO ORDERED.

Date: September 5, 2018

/s/ Greg Kays
GREG KAYS, CHIEF JUDGE
UNITED STATES DISTRICT COURT

In the
Missouri Court of Appeals
Western District

DANIEL H. KILGORE,	)	
	)	
Appellant,	)	**WD76937**
	)	
v.	)	**ORDER FILED:**
	)	**December 23, 2014**
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

Appeal from the Circuit Court of Clay County, Missouri
The Honorable Shane T. Alexander, Judge

Before Division Three: Karen King Mitchell, Presiding Judge, Cynthia L. Martin, Judge and Gary D. Witt, Judge

ORDER

Per curiam:

Daniel Kilgore was charged with three counts of the class B felony of child molestation in the first degree pursuant to section 566.067.1. Kilgore pled guilty to two counts of child molestation and the State dismissed the third count. The circuit court sentenced Kilgore to twelve years on each count, to be served consecutively, as well as placement in the Sexual Offender Assessment Unit. Following Kilgore's participation in the Unit's assessment program, the circuit court declined to grant Kilgore probation under

section 559.115.3. Kilgore appeals. We affirm. Rule 84.16(b). A memorandum explaining our decision has been provided to the parties.

In the
Missouri Court of Appeals
Western District

DANIEL H. KILGORE,	)	
	)	
Appellant,	)	**WD76937**
	)	
v.	)	**MEMORANDUM**
	)	**FILED: December 23, 2014**
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

MEMORANDUM SUPPLEMENTING ORDER AFFIRMING JUDGMENT PURSUANT TO RULE 84.16(b)

This memorandum is for the information of the parties and sets forth the reasons for the order affirming the judgment.

THIS STATEMENT DOES NOT CONSTITUTE A FORMAL OPINION OF THIS COURT. IT IS NOT UNIFORMLY AVAILABLE. IT SHALL NOT BE REPORTED, CITED OR OTHERWISE USED IN UNRELATED CASES BEFORE THIS COURT OR ANY OTHER COURT. IN THE EVENT OF THE FILING OF A MOTION TO REHEAR OR TRANSFER TO THE SUPREME COURT, A COPY OF THIS MEMORANDUM SHALL BE ATTACHED TO ANY SUCH MOTION.

Daniel Kilgore ("Kilgore") was charged with three counts of the class B felony of child molestation in the first degree pursuant to section 566.067.1.[1] Kilgore pled guilty to two counts of child molestation and the State dismissed the third count. The Circuit Court of Clay County sentenced Kilgore to twelve years on each count, to be served consecutively. The court also placed Kilgore in the Sexual Offender Assessment Unit ("SOAU") for a one hundred twenty-day period, pursuant to section 559.115.3. Following Kilgore's participation in the SOAU's assessment program, the circuit court declined to grant Kilgore probation under section 559.115.3. It then ordered Kilgore to serve his sentences. Kilgore filed a motion for reconsideration and, following a hearing, the court reaffirmed its denial of probation. Thereafter, Kilgore filed a motion to vacate or set aside the judgment pursuant to Rule 24.035,[2] which the court denied after an evidentiary hearing. Kilgore timely appeals. We affirm. Rule 84.16(b).

FACTS AND PROCEDURAL HISTORY[3]

Kilgore pled guilty to two counts of first-degree child molestation and signed a written plea agreement stating that he understood the applicable punishment range to be five to fifteen years' imprisonment for each count. The State agreed to recommend to the court that Kilgore be sent to the SOAU and if successfully completed, receive five years

[1] All statutory references are to RSMo 2000 cumulative as currently supplemented unless otherwise indicated.

[2] All rule references are to Missouri Supreme Court Rules (2014).

[3] Rule 24.02(e) requires the court to determine that there is a factual basis for a defendant's guilty plea in order to enter a judgment on the plea. "Where the information or indictment clearly charges the defendant with all the elements of the crime, the nature of the charge is explained to the defendant, and the defendant admits guilt, a factual basis is established." *Mitchell v. State*, 337 S.W.3d 68, 70 (Mo. App. W.D. 2011). Thus, we review the facts in the light most favorable to the motion court's judgment. *McCauley v. State*, 380 S.W.3d 657, 659 (Mo. App. S.D. 2012).

of probation in lieu of incarceration. The agreement further stated that the State's sentencing recommendation was not binding on the court.

The State provided the following factual basis for the plea:

> As to Count I, the State would prove beyond a reasonable doubt that between April 14th, 2010, and August 31st, 2010 … Defendant knowingly subjected [Victim 1], who was less than 14 years old, to sexual contact by licking her vagina.
>
> As to Count II, the state would prove beyond a reasonable doubt that between April 14th, 2010, and August 31st, 2010 … Defendant knowingly subjected [Victim 2], who was less than 14 years old, to sexual contact by licking her vagina.
>
> As to both counts, Division of Family Services received a hotline call that [Victim 1] and [Victim 2] had been molested by the defendant. A Children's Division caseworker spoke to both of the victims, who indicated that the defendant, their uncle, licked their vaginas while they were at their great-grandparents' house.

After speaking with the Children's Division worker, Victim 1's mother went to the Liberty Police Department and made a police report. She stated that both girls said Kilgore touched them inappropriately while at their great-grandparents' house. Both submitted to a forensic interview at Synergy Services. Victim 1 stated that the defendant touched her at her great-grandmother's house and licked her vagina. Victim 1 also stated she witnessed Kilgore do the same thing to Victim 2. Victim 2 stated that Kilgore would lick her "pee-pee spot" with his tongue. She also stated that she had witnessed Kilgore do the same thing to Victim 1. Victim 1 was nine and Victim 2 was six when these incidents occurred. Kilgore admitted that these facts were true when he entered his plea.

The SOAU report contained additional details regarding the molestations, including that Kilgore molested each girl with the other girls present, forced one of the

girls' brothers to watch as Kilgore molested his sister, showed the girls pictures on his cell phone of princess cartoon characters such as Snow White but without her clothes on and with a dwarf licking her. One of the victims stated that Kilgore placed a blanket over her, pulled down her pants and started licking her vagina while he recorded the actions with his camera.

At the plea hearing, the court explained the terms of Kilgore's plea agreement to him on the record. The court read the sentencing recommendation contained in the written plea and Kilgore agreed that he had received no other promises or assurances to entice him to enter his plea. The following exchange then took place:

> [The Court]: You understand that the State's position, including a joint recommendation, is not binding on me? In other words, I don't have to do it?
>
> [Defendant]: I wasn't aware of that, but I am now.
>
> [The Court]: Do you need time to talk with your attorney about that?
>
> [Defendant]: Evidently not, sir, no.
>
> [The Court]: Well, it's not an evidently not. I will certainly give you more time if you want it.
>
> [Defendant]: No. That's fine.
>
> [Plea Counsel]: I think, and [Defendant] can correct me, that he understands that the ultimate decision as to whatever –
>
> [Defendant]: Yes. That, I do understand.
>
> [Plea Counsel]: – sentence is imposed is up to the Court, and the state is merely making a recommendation, which we will ask the Court to impose but the Court could accept or reject that.
>
> [Defendant]: And this is what we discussed. That's fine.

> [The Court]: Maybe I wasn't clear in the way I said it. You understand that, although your attorney and the State are going to make the same recommendation, something that's called a joint recommendation –
>
> [Defendant]: Yes. You are the judge, and it's your call in the end. I understand that. (L.F. 29-30).

Kilgore further acknowledged that the sentencing range for each count was five to fifteen years and that his sentences could run consecutively. Defense counsel stated that he had not given Kilgore "any promise or assurance as to when [he] may be eligible for parole if he is sent to the Department of Corrections ["DOC"]." Kilgore acknowledged that any sentencing prediction "is nothing more than mere guesswork because [he] may have to serve every day of whatever sentence [he] receive[s] in this case."

After hearing additional argument and a victim impact statement from the mother of one of the victims, the court sentenced Kilgore to consecutive twelve-year terms on each count and to the SOAU. The court stated that if Kilgore completed the program, the court would "consider five years of probation." The court said that "it is by no means a given" that Kilgore would complete the program. Kilgore was then delivered to the DOC on October 26, 2011 and placed in the SOAU for assessment.

The SOAU performed an assessment and issued a report in late January 2012. The report indicated that Kilgore did not recognize the deviancy of his actions, showed no remorse for his behavior and that he had stated that he was "fulfilling his calling." The interviewers found that Kilgore "did not display guilt, empathy or remorse and felt justified in training the victims sexually . . . [he] teared up only when he realized he could be found out, thereby focusing on his own suffering." The report concluded that Kilgore

had a less than average motivation for treatment and that "he is satisfied with himself as he is and is not experiencing marked distress." When Kilgore was asked how he felt about himself, Kilgore gave himself a score of eight out of ten (ten being highest), and stated, "I'm positive and I feel good about the opportunity to tell people about what happened in my life." These factors indicated that Kilgore was "best suited for sex offender treatment in a highly structured institutional setting." The SOAU report concluded by recommending that probation be denied.

After considering all of the relevant information, including Kilgore's failure to successfully complete the SOAU program, the trial court declined to grant him probation. Kilgore filed a motion to reconsider, arguing that his Static-99[4] score showed a low risk of reoffending and warranted his release on probation. The court held a hearing on the motion, at which Kilgore argued that he was eligible for release under section 559.115.3. The court denied the motion, finding that the SOAU assessment properly found that Kilgore failed to successfully complete the program. Thereafter, Kilgore filed an amended motion for post-conviction relief ("PCR") in which he claimed, *inter alia*, that plea counsel was ineffective for misadvising him about the "lack of specific requirements of SOAU, lack of objective predetermined criteria for its successful completion, and the overwhelmingly low percentage of persons ultimately released on probation." Kilgore also claimed that his "[s]entence to SOAU violate[d] [his] right to substantive and procedural due process."

[4] The Static-99 is an actuarial testing instrument that is used to predict the risk that an offender will commit a future sexual offense.

At the hearing on Kilgore's PCR motion, his counsel testified that during his nineteen years as an attorney, many of his clients who were convicted of child sexual offenses and sentenced to the SOAU "had successfully completed the program" and been given probation. He testified that he told Kilgore that the criteria for completing the SOAU program were "very subjective, potentially, and that he would be at the mercy of the individuals determining whether or not he would be called back . . . so there was that extreme level of risk." Counsel did not tell Kilgore about the statistical odds of being recommended for release. He did, however, inform Kilgore prior to his plea of guilty that "he needed to work on his display of remorse."

Kilgore testified that his counsel told him he would have classes in the SOAU, and that if he listened and did what he was told, he would be released. He said counsel told him that psychological testing would be a part of the program. Kilgore further testified that his previous psychological evaluations had been "extremely positive," which "was part of the reason why [he] agreed to taking [the SOAU] program." Based on counsel's representations, Kilgore had "every confidence" that he would pass the program. Kilgore said he was given a written test and an interview as part of the SOAU program. Kilgore testified that, had he known what the SOAU program entailed, he would not have pled guilty.

Following the hearing, the circuit court denied Kilgore's PCR motion. This appeal follows.

ANALYSIS

Kilgore brings two points on appeal. In his first point, Kilgore argues that the circuit court erred in denying his Rule 24.035 motion because his sentence to the SOAU is a violation of his substantive and due process rights. In his second point, Kilgore alleges that the circuit court erred in denying his motion because his counsel was ineffective by failing to inform him that the SOAU assessment program was "not a 'program' that he could successfully complete but an opinion from a counselor . . . based substantially on presentence information." Kilgore argues in both points that had he known what SOAU entailed, he would not have pled guilty.

Standard of Review

Our standard of review is the same for both points presented. Appellate review of the denial of a post-conviction motion is "limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous." Rule 24.035(k). Clear error is established "if a review of the entire record leaves the appellate court 'with a definite and firm impression that a mistake has been made.'" *Chacon v. State*, 409 S.W.3d 529, 533 (Mo. App. W.D. 2013) (citations omitted). We defer to the motion court's determinations of witness credibility. *Id.* (citation omitted).

POINT I

In his first Point Relied On, Kilgore argues that the denial of his motion to vacate his sentence was in error because he:

> proved that his sentence to SOAU under § 559.115 violated his rights to substantive and procedural due process, in that his guilty plea was induced by the guaranty of a 120-day 'program' that he had the ability to

'successfully complete' but in actuality he was never provided the opportunity to complete any program and the denial of his release on probation was instead due to an arbitrary, subjective recommendation that probation be denied that was improperly based on presentencing factors.

Discussion

Although Kilgore's first Point Relied On is multifarious,[5] at oral argument he clarified that his claim of error is that the statute governing a sentence to SOAU is unconstitutional because it facilitates a person being sentenced to a "program" that does not exist. *See* § 559.115.3 (stating that the court may recommend placement of an offender in a department of corrections' institutional treatment program). Kilgore thus argues that his sentence to SOAU violated his constitutional rights to substantive due process because he was "promised a program that he could successfully complete, yet he was afforded no opportunity to successfully complete a program." This, he contends, made his choice to plead guilty and possibly be sentenced to SOAU, unknowing, unintelligent and involuntary.

The gist of Kilgore's claim is that he was guaranteed a one hundred twenty day program that he could complete, but that the SOAU was not in fact a "program" under section 559.115. However, our Supreme Court has already directly addressed this exact issue and found that the SOAU is in fact a program which falls within the terms of section 559.115. *State ex rel. Valentine v. Orr*, 366 S.W.3d 534 (Mo. banc 2012). While Kilgore admits in his Reply Brief that our Supreme Court has already decided that the

[5] Multiple claims of error in one point relied on render the point multifarious and violate Rule 84.04, made applicable to criminal appeals by Rule 30.06(c). A multifarious point preserves nothing for appellate review and is subject to dismissal. *State v. Brightman*, 388 S.W.3d 192, 197 (Mo. App. W.D. 2012). *Ex gratia*, we review the distinct issues presented in this Point Relied On to the extent we are able to ascertain them.

SOAU is in fact a program, he continues to dispute its holding, stating that "*Valentine* was correctly decided, but SOAU is not a program." *See Valentine*, 366 S.W.3d at 540-41. We are, however, bound by the well-reasoned *Valentine* decision to hold that the SOAU is a "program" pursuant to the terms of this statute. *See State ex rel. Bank of Am. N.A. v. Kanatzar*, 413 S.W.3d 22, 27 n.4 (Mo. App. W.D. 2013) (citation omitted) (stating we are bound by the most recent controlling decision of the Supreme Court).

Moreover, there is no liberty interest attached to placement in the SOAU; rather, Kilgore's liberty interest in the grant or denial of probation remains within the complete discretion of the court. § 559.115.3. In other words, even if Kilgore had successfully completed the assessment program, the probation decision is still discretionary and does not hinge upon whether he "passes" or "fails" the program. "The court shall follow the recommendation of the department unless the court determines that probation is not appropriate." *Id.* While the recommendation of the SOAU is considered by the court, it is not binding. *See, e.g., Valentine*, 366 S.W.3d at 541 (holding that under section 559.115.3, the circuit court has the authority to review the SOAU's recommendation of probation but may still order the execution of sentences). Further, a defendant "is not, as a matter of right, entitled to probation under the terms of section 559.115." *Brown v. State*, 67 S.W.3d 708, 711 (Mo. App. E.D. 2002). "Rather, the court has discretion to grant probation pursuant to the statute." *Id.* (citation omitted).

To the extent that Kilgore is arguing that he was induced to plead guilty by the misrepresentations of counsel that the SOAU was a program that he was capable of successfully completing, this argument likewise fails. Plea counsel testified at the

evidentiary hearing that, during his nineteen years as an attorney, he has had many clients convicted of child sex offenses who successfully completed the SOAU program and were called back and placed on probation. He informed Kilgore of this fact but also informed him that the requirements for completing the program were "very subjective," that he would be at the mercy of the individuals running the program to determine if he was "successful" and that there was an "extreme level of risk" in entering into the program. While Kilgore attempts to argue that the SOAU was not what he anticipated, this is not grounds for relief. *See Flenoy v. State*, No. WD76722, 2014 WL 5462308, at *5 (Mo. App. W.D. Oct. 28, 2014) (noting the distinction between *inaccurate* versus *inadequate* information being conveyed to a defendant).

At the plea hearing, Kilgore acknowledged that he was aware that the State's recommendation was not binding on the sentencing court and that the court was free to sentence him up to the maximum range of punishment on each count. He acknowledged that the State's plea offer was "merely a recommendation" and not binding on the court. Kilgore further testified under oath that he understood that should the plea court follow the State's recommendation and should he successfully complete the SOAU program, that the court would "consider five years of probation." He agreed that he had not been made any promises to induce him to enter a plea of guilty or what sentence he may receive. "Neither a disappointed expectation of a lesser sentence, nor a mere prediction as to sentencing by counsel that proves incorrect, is sufficient to render a guilty plea involuntary." *Gold v. State,* 341 S.W.3d 177, 181 (Mo. App. S.D. 2011) (citations omitted).

In this case, the record clearly establishes that Kilgore was ***not*** induced to plead guilty based on a promise of being sentenced to the SOAU program, or a promise that he would successfully complete the SOAU program, or even a promise that if he successfully completed the SOAU program, he would automatically receive probation. The record establishes that plea counsel made no such promises to Kilgore. Further, even if he had, the record establishes that the plea court made a record that would have sufficiently disabused Kilgore of any reliance on such promises.

In the last part of this multifarious point, Kilgore appears to argue that the denial of his probation was improperly based on "presentencing factors." However, Kilgore cites absolutely no authority for the proposition that a sentencing court is prohibited from considering presentencing factors in making probation determinations. Rule 84.04 requires the appellant to explain, in the context of the case, what law supports the allegation of reversible error. *Washington v. Blackburn*, 286 S.W.3d 818, 821 (Mo. App. E.D. 2009). Kilgore cites to no legal authority to support this claim.[6] The appellate court does not function in the role of advocate for either party. *State v. Simmons*, 364 S.W.3d 741, 749 (Mo. App. S.D. 2012). An argument on appeal which cites no authority in support and merely relies on conclusions is considered abandoned. *State v. Morgan*, 366 S.W.3d 565, 583 (Mo. App. E.D. 2012).

[6] Although Kilgore does cite one case, that case does not support a prohibition against considering "presentencing factors" in this context. Instead, the case, *State ex rel. Salm v. Mennemeyer*, 423 S.W.3d 319 (Mo. App. E.D. 2014), discusses the denial of probation pursuant to section 217.362, which governs placement into twelve-month long substance abuse programs. The *Salm* court held that the court's probation decision, which it only faces after a defendant has completed a year-long substance abuse treatment program, "must be supported by more than the defendant's pre-sentence conduct." *Id.* at 322. These are so markedly different, as they involve different statutory authority as well as different issues, that Kilgore's reliance on this case is misplaced.

We note that the lack of authority to support Kilgore's argument is not surprising, as a sentencing court is allowed to consider all relevant information, derived both prior to the plea and following the plea, in exercising its discretion and determining the appropriate sentence in a given case.[7] Even if the report from the SOAU could be construed as determining that Kilgore had successfully completed the SOAU program, the trial court was not even required to hold a hearing before exercising its discretion to deny probation to a defendant, where the probation and parole officer had not recommended probation. *State ex rel. Koster v. Suter,* No. WD77188, 2014 WL 3722006, at *5 (Mo. App. W.D. July 29, 2014).

In this case, the report indicated that the assessment determined that he did not display guilt, empathy or remorse for his victims and that he was in need of sex offender treatment in a highly structured setting and recommended that he be denied probation. The sentencing court properly exercised it discretion and denied probation.

Point I is denied.

POINT II

In Point II, Kilgore argues that his counsel was ineffective for failing to "investigate and inform [him] that the SOAU was not a 'program' he could 'successfully complete,' but an opinion from a counselor and institutional parole officer about whether

[7] In fact, the Sentencing Assessment Reports (SARS) and its predecessor, the Presentence Investigation Reports (PSI), both provide a sentencing judge with considerable presentence information, much of which may be advantageous to a defendant and much of which many defendants would prefer the judge not know. But all of it is designed to give the judge a full picture of the positive and negative attributes of a particular defendant, as well as the facts of the crime so that the judge can make an informed sentencing decision. Certainly Kilgore desired the sentencing court to consider the presentence information that this was his first offense and that numerous letters of support had been written on his behalf.

he was likely to reoffend and should therefore continue to be incarcerated based substantially on presentence information." Further, he contends that he "was prejudiced because, but for counsel's failure to advise him of the nature of SOAU, he would not have plead guilty with two 12-year 'back-up' sentences."

Discussion

Kilgore's argument is that his counsel was ineffective for failing to tell him more about "the nature of SOAU."

> To establish ineffective assistance of counsel meriting post-conviction relief, the movant must satisfy the two-prong test of *Strickland v. Washington*, 466 U.S. 668, 687 (1984). First, the movant must show that counsel's performance was deficient by falling below an objective standard of reasonableness. If counsel's performance was deficient, the movant must then prove that he was prejudiced by counsel's deficiency. Prejudice, in the *Strickland* context, is defined as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.
>
> There is a strong presumption that counsel's conduct was reasonable and effective. To overcome this presumption, the movant must point to specific acts or omissions of counsel that, in light of all the circumstances, fell outside the wide range of effective assistance. Further, the choice of one reasonable trial strategy over another is not ineffective assistance. Strategic choices made after a thorough investigation of the law and the facts are virtually unchallengeable.

Deck v. State, 381 S.W.3d 339, 343-44 (Mo. banc 2012) (internal citations omitted).

"After a plea of guilty, however, a claim of ineffective assistance counsel is immaterial except to the extent the conduct affects the knowing and voluntary nature of the guilty plea." *Haddock v. State*, 425 S.W.3d 186, 189 (Mo. App. E.D. 2014) (citation omitted). "On a guilty plea, the movant claiming ineffective assistance of counsel must

establish a serious dereliction of duty which materially affected his substantial rights and show that his guilty plea was not an intelligent or knowing act." *Id.*

There is a basic duty imposed on plea counsel to discuss with a defendant the possible consequences involved in the case, including the range of possible punishment. *Brown*, 67 S.W.3d at 710 (citation omitted). Counsel has an obligation to inform a defendant of the "direct consequences" of a guilty plea but has no duty to inform a defendant of the "collateral consequences" of pleading guilty. *Id.* (citations omitted). As such, the failure of counsel to advise a defendant regarding collateral consequences of a guilty plea cannot rise to the level of constitutionally ineffective assistance of counsel. *Id.* (citations omitted).

At the evidentiary hearing on Kilgore's PCR motion, Kilgore's plea counsel testified that he had represented numerous clients who had been assessed in the SOAU, been deemed to have successfully completed the program and been "called back on probation." He testified that he informed Kilgore that the assessment was "in fact very subjective, potentially, and that he would be at the mercy of the individuals determining whether or not he would be called back." He also told him that he could successfully complete the program by "actively participating in the programs that they offered, by being amenable to suggestions from the staff or counselors, by working on his habit of being reflexively argumentative." Kilgore's counsel further stated that Kilgore was his first client not to successfully complete the SOAU program.

As to representations made to him by his counsel, Kilgore testified that counsel told him that SOAU was an assessment program and that Kilgore was "basically just

going to be doing a 120-day shock," but then later told him it was a program that Kilgore would be expected to go through. He further testified that counsel told him that there would be tests, "classes and programs, and that basically [his] future would be in [his] own hands to pass or fail the program." Kilgore further testified that counsel told him he had "every confidence that I would pass it based on what he knew of me with our conversations" and that counsel "was very confident that there would be no problem."

As noted in our analysis of Point I, at the plea hearing the Court discussed with Kilgore not only the required direct consequences of his plea, but also that the *recommended sentence* included placement in SOAU and probation would be considered if he successfully completed SOAU. Kilgore agreed that he knew the court could sentence him to any amount of time within the range of punishment. He stated multiple times that no one had assured him of anything or promised him anything with regard to when he could be eligible for probation or parole. He stated multiple times that he had no complaints regarding his counsel.

At the sentencing hearing, the court told Kilgore that the SOAU was "an extremely difficult program" but that if Kilgore completed it, the court would "consider" five years' probation. The court then again asked Kilgore about his legal representation. Kilgore responded that his answers were the same and that he remained well-satisfied with his representation.

The probation provisions of section 559.115 are purely discretionary and are only a collateral consequence of Kilgore's guilty plea. Section 559.115.3 is clear that a defendant is not, as a matter of right, entitled to probation under its terms. Because the

probation provisions of section 559.115.3 do not definitely, immediately and largely automatically follow the entry of a guilty plea, they constitute a collateral consequence of a guilty plea. *Haddock*, 425 S.W.3d at 191.

The plea in this case did not require the court to place Kilgore in the SOAU so even the placement in the SOAU was a collateral consequence of his plea. Moreover, Kilgore admitted that he knew he could pass or fail the program and acknowledged that even if he successfully completed the program the sentencing court was only required to "consider" that success in exercising its discretion to grant or deny probation.

In sum, even if Kilgore's counsel did not adequately inform him about the "nature" of the SOAU program, it was a collateral consequence of the plea and did not rise to the level of ineffective assistance of counsel. As such, it is not a ground for relief. Point II is denied.

CONCLUSION

The judgment of the circuit court is affirmed.