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People v. Harnett

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I. INTRODUCTION

"[A] guilty plea is a grave and solemn act to be accepted only with care and discernment . . . ."[1] When an individual pleads guilty to a crime, they are waiving several constitutional rights: the right against self-incrimination, the right to a trial by jury, and the right to confront one's accusers.[2] As a result, due process requires that guilty pleas "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."[3]

A trial court must therefore guarantee that before pleading guilty the defendant has a full understanding of the plea and its consequences.[4] New York has defined the extent of the court's obligation according to a categorical analysis.[5] Drawing a distinction between direct and collateral consequences, New York requires courts to inform defendants of only *direct* consequences.[6] This approach promotes finality and efficiency in the plea bargaining process, yet can ignore the caution with which a plea agreement should be handled.[7]

In *People v. Harnett*, the New York Court of Appeals held that provisions of the Sex Offender Management and Treatment Act (SOMTA), which can result in civil confinement beyond a defendant's prison sentence, are collateral consequences.[8] As a result, the Court of Appeals determined that a trial court was under no obligation to inform the defendant of such consequences arising from a guilty plea.[9] However, this case comment contends that the court's use of New York's rigid categorical approach failed to protect the defendant's due process rights given the unique and harsh consequences of SOMTA and the fact that they cannot be squarely classified as either direct or collateral.[10] The Court of Appeals should instead have analyzed whether the possibility of civil confinement under SOMTA was so severe a

1. Brady v. United States, 397 U.S. 742, 748 (1970) (recognizing the extensive protections guarding guilty pleas while upholding defendant's guilty plea as valid).

2. Boykin v. Alabama, 395 U.S. 238, 243 (1969) (holding guilty plea invalid where trial record lacked confirmation of defendant's knowledge and voluntariness); U.S. Const. amend. V (right against self-incrimination); U.S. Const. amend. VI (right to trial by impartial jury and right to confront adversarial witnesses).

3. *Brady*, 397 U.S. at 748.

4. People v. Ford, 86 N.Y.2d 397, 402–03 (1995) (citing People v. Harris, 61 N.Y.2d 9, 19 (1983)).

5. *See id.* at 403 (citing Fruchtman v. Kenton, 531 F.2d 946, 948 (9th Cir. 1976)).

6. *Id.*

7. Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators,"* 93 Minn. L. Rev. 670, 672–75 (2008) (proposing a reasonableness standard in determining the duty to inform about consequences rather than the traditional collateral and direct consequences doctrine).

8. People v. Harnett, 16 N.Y.3d 200, 206 (2011).

9. *See id.* at 205.

10. *See generally* Padilla v. Kentucky, 130 S. Ct. 1473, 1476 (2010) (finding deportation uniquely difficult to classify as either direct or collateral because of its close connection to the criminal process).

consequence of the defendant's plea that fundamental fairness and due process required the trial court to disclose it to the defendant before accepting his plea.[11]

II. BACKGROUND

On March 13, 2008, in the County Court of Schenectady County, New York, David Harnett pleaded guilty to sexual abuse in the first degree and was thereafter convicted and sentenced to a prison term of seven years and ten years of post-release supervision.[12] On appeal to the Appellate Division, Third Department, Harnett argued that his guilty plea was not knowingly, intelligently, or voluntarily entered because the County Court had failed to advise him that a guilty plea to a sex offense would subject him to the provisions of SOMTA.[13] In other words, Harnett maintained that he was unaware that by pleading guilty to sexual abuse in the first degree he could be subjected to confinement or an intensive supervision program beyond his prison sentence.[14]

The Third Department, in deciding Harnett's case, applied the well-settled New York rule that a trial court is required to advise defendants of only direct, and not of indirect, consequences prior to their pleading guilty.[15] The court distinguished the two consequences as follows: "Collateral consequences are peculiar to the individual and generally result from the actions taken by agencies the court does not control [, whereas a] direct consequence is one which has a definite, immediate, and largely automatic effect on [a] defendant's punishment."[16]

SOMTA proceedings are extensive civil proceedings for individuals with sex offense convictions,[17] which the Third Department labeled as "entirely separate from and independent of the original criminal action."[18] Upon a convicted sex offender's release from prison, SOMTA provides that the Office of Mental Health will conduct a review and prepare a psychiatric report to determine whether the individual needs civil management or has a mental abnormality.[19] The defendant will then be evaluated

11. *See* State v. Bellamy, 835 A.2d 1231, 1238 (N.J. 2003).

12. People v. Harnett, 894 N.Y.S.2d 614, 615 (3d Dep't 2010).

13. *Id.*

14. *Id.*

15. *Id.*; *see* People v. Catu, 792 N.Y.S.2d 887, 888 (2005); People v. Ford, 86 N.Y.2d 397, 403 (1995).

16. *Harnett*, 894 N.Y.S.2d at 615 (alterations in original) (quoting *Catu*, 792 N.Y.S.2d at 888).

17. N.Y. Mental Hyg. Law § 10.03 (McKinney 2011).

18. *Harnett*, 894 N.Y.S.2d at 615 (footnote omitted).

19. *See id.*; N.Y. Mental Hyg. Law § 10.05 (McKinney 2011). The Office of Mental Health reviews all relevant records, such as an offender's rap sheet, his pre-sentence investigation report, Department of Corrections files, and sex offender program results. This review is intended to determine the offender's level of dangerousness and whether any mental abnormality exists that would predispose him to commit new sex crimes. *See* State v. Enrique T., No. 250306-11, 2011 WL 2201220 (Sup. Ct. Bronx Cnty. June 7, 2011); *SOMTA/Civil Management DOCS Fact Sheet*, Department of Corrections and Community Supervision (Dec. 2007), http://www.docs.state.ny.us/FactSheets/PDF/somta.pdf.

in a series of civil hearings[20] to determine whether further confinement or intensive supervision is needed.[21] Based on the multiple steps in SOMTA's civil process, the Third Department determined that civil confinement under the statute is not an automatic result of a guilty plea to a sex offense. The court therefore concluded that it was a collateral consequence under New York law and did not need to be disclosed to Harnett before he entered a guilty plea.[22]

The dissent, however, found that, "as a matter of fundamental fairness," a defendant must be made aware of the possibility of civil confinement under SOMTA, regardless of whether the consequence was found to be direct or collateral.[23] The dissent relied on the New Jersey Supreme Court's decision in *State v. Bellamy*, which held that the decision to advise a defendant about a consequence should not depend on its legal categorization, but should instead be based on whether its "impact is devastating."[24] In arguing for disclosure despite the "collateral" label, the dissent disregarded New York's formalistic distinction between direct and collateral consequences and instead sought an outcome in line with the constitutional notion of "fundamental fairness" and the protections of due process.[25]

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20. Based on the review conducted by the Office of Mental Health, the Attorney General may petition to seek civil management if probable cause that the offender is a threat to society can be established. The case will then go before a jury who must agree with the Attorney General's petition. Finally, a judge will decide whether to place the individual in a secure treatment facility or under intensive supervision. *See SOMTA/Civil Management DOCS Fact Sheet*, *supra* note 19.

21. *See Harnett*, 894 N.Y.S.2d at 616; Mental Hyg. §§ 10.06–07. Civil confinement under SOMTA consists of treatment in a secure Office of Mental Health facility. *See* 2009 N.Y. State Office of Mental Health, 2009 Annual Report on the Implementation of Mental Hygiene Law Article 10: Sex Offender Management and Treatment Act of 2007 18 (2010), http://www.omh.state.ny.us/omhweb/statistics/SOMTA_Report.pdf. Those committed proceed through a four-step treatment process that is designed to help them acquire healthy skills and habits in order to ultimately re-enter civilization. *See id.* at 19–20. As of October 2009, 100 sex offenders had been deemed dangerous sex offenders requiring confinement. *Id.* at 18. Not one offender has completed the four-step process and been released. *Id.* at 20. The conditions of intensive supervision are extensive and often include conditions such as global positioning satellite (GPS) tracking, polygraph monitoring, specification of residence, prohibiting contact with identified past or potential victims, frequent sex offender treatment sessions, curfew, and abstinence from alcohol. *Id.* at 16.

22. *Harnett*, 894 N.Y.S.2d at 616.

23. *Id.* at 617 (Stein, J., dissenting).

> [A] trial court has the constitutional duty to ensure that a defendant, before pleading guilty, has a full understanding of what the plea connotes and its consequences. Thus, due process requires that the plea and the waiver of rights it necessarily encompasses represent a knowing, voluntary and intelligent choice among the alternative courses of action available to the defendant. . . . [W]e would find, as a matter of fundamental fairness, that the possibility of civil commitment under SOMTA must be disclosed to a defendant prior to his or her plea of guilty, regardless of whether such commitment is considered to be a direct or penal consequence of the plea.

Id. (internal quotation marks and citations omitted).

24. State v. Bellamy, 835 A.2d 1231, 1238 (N.J. 2003) (requiring trial courts to inform a defendant of civil commitment under the New Jersey Sexually Violent Predator Act due to fundamental fairness).

25. *Harnett*, 894 N.Y.S.2d at 617 (Stein, J. dissenting).

On appeal to the New York Court of Appeals, Harnett first argued that SOMTA consequences are direct and therefore require pre-plea disclosure.[26] However, a majority of the court quickly dismissed this argument as "plainly without merit" based on its precedents in *People v. Ford* and *People v. Gravino*.[27] Specifically, the court analogized SOMTA consequences to the possibility of deportation (*Ford*) and the requirements of the Sex Offender Registration Act (SORA) (*Gravino*),[28] both of which the Court of Appeals had previously declared to be collateral consequences.[29]

Relying primarily on *Bellamy*, Harnett also argued that, regardless of whether SOMTA consequences are direct or collateral, they are so severe that a lack of disclosure renders plea proceedings fundamentally unfair.[30] The majority acknowledged this as Harnett's stronger argument, yet ultimately declined to adopt it.[31] Specifically, the court conceded that the facts of *Bellamy* indeed raised serious issues of fundamental fairness, but only because the defendant in *Bellamy* was *actually* committed to civil confinement under New Jersey's equivalent of SOMTA.[32] Harnett, on the other hand, had not yet been committed, and the trial record was unclear as to whether there was ever any significant likelihood that Harnett would be committed.[33] As a result, the majority found *Bellamy* inapplicable.[34]

In rendering its decision, the Court of Appeals also addressed its language from *People v. Gravino*, in which it stated: "[t]here may be cases in which a defendant can show he pleaded guilty in ignorance of a consequence that, although collateral for purposes of due process, was of such great importance to him that he would have

26. People v. Harnett, 16 N.Y.3d 200, 203–04 (2011).

27. *Id.; see also* People v. Gravino, 902 N.Y.3d 851, 852 (2010) (holding sex offender registration a collateral consequence); People v. Ford, 86 N.Y.2d 397 (1995) (holding possible deportation a collateral consequence).

28. SORA requires convicted sex offenders to annually provide their identifying information, photo, fingerprints, underlying crime, place of employment, and address of residence to local law enforcement. N.Y. Correct. Law § 168b (McKinney 2008). Upon a change in this information, the individual is responsible for notifying local law enforcement. *See* § 168f. The information can be placed on a regional or national registry. *See* § 168b. Offenders are also ranked by the Board of Examiners of Sex Offenders according to risk level, which is based on the severity of their underlying crimes. *See* § 168l. Depending on this ranking, a sex offender will have to register for anywhere between twenty years to life. *See* § 168h. Defendants who are convicted of crimes defined under New York penal law as sex offenses or other "sexually motivated" felonies are subject to both SORA and SOMTA. *See generally* § 168a; N.Y. Mental Hyg. Law § 10.03 (McKinney 2010); N.Y. Penal Law § 130.00 et seq. Both SORA and SOMTA are regulatory statutes and were designed to prevent future crimes, not to punish past crimes. *Harnett*, 16 N.Y.3d at 206. Further, both statutes require important decisions and recommendations by administrative agencies only after a guilty plea or trial. *Id.*

29. *Harnett*, 16 N.Y.3d at 206; *Ford*, 86 N.Y.2d at 403; *Gravino*, 902 N.Y.3d at 852.

30. *Harnett*, 16 N.Y.3d at 206.

31. *Id.*

32. *Id.*

33. *Id.* at 207.

34. *Id.*

made a different decision had that consequence been disclosed."[35] In these instances, the court explained that a guilty plea would be rendered involuntary and could be successfully withdrawn by the defendant.[36] However, the Court of Appeals found this exception unavailable to Harnett because, in the eyes of the court, he had not established a significant likelihood that he would actually be subject to civil confinement under SOMTA.[37] In doing so, the majority placed a heavy burden on sex offenders subject to SOMTA[38] by requiring them to prove that civil confinement under SOMTA is such a strong possibility that knowledge of the consequence would have caused them to reject their plea bargain.[39] Because Harnett did not meet this burden, a majority of the Court of Appeals determined that withdrawal of his plea was not justified, thereby affirming the Third Department's decision.[40]

The dissent acknowledged the similarities between the statutes at issue in *Gravino* (SORA) and *Harnett* (SOMTA) and did not dispute the majority's classification of SOMTA as a collateral consequence.[41] Nonetheless, the dissent noted that, although this consequence is neither punitive in nature nor applicable to every defendant, it could result in a period of confinement that is longer than a defendant's initial prison sentence.[42] Viewing this as a "grave deprivation of liberty,"[43] the dissent maintained, relying on *Bellamy,* that due process requires a defendant to understand the "full extent of confinement that might result from his conviction."[44] Otherwise, a waiver of the constitutional right to a trial will not be knowing and voluntary.[45] Under this analysis, the dissent concluded that due process required the court to notify Harnett of the consequences of his plea arising under SOMTA.

III. DISCUSSION

The New York Court of Appeals majority and dissent both correctly concluded that the possibility of civil confinement under SOMTA does not neatly fit within the definition of a *direct* consequence of a plea.[46] However, upon closer examination, the possibility of civil confinement under SOMTA does not entirely fit within the definition of a *collateral* consequence either. Nevertheless, in strictly adhering to New

35. *Id.* at 207 (quoting People v. Gravino, 14 N.Y.3d 546, 559 (2010)).

36. *Gravino*, 14 N.Y.3d at 559.

37. *Harnett,* 16 N.Y.3d at 206.

38. *Id.* at 207.

39. *Id.*

40. *Id.* at 208.

41. *Id.* at 208 (Ciparick, J., dissenting).

42. *Id.* at 209.

43. *Id.* at 208.

44. *Id.* at 209.

45. *Id.*

46. *Id.* at 205.

York's categorical approach, the Court of Appeals forced a collateral consequence label on the possibility of civil confinement under SOMTA. In doing so, the court failed to consider the special and severe consequences that may result from a guilty plea to a sex offense.[47] The court also ignored the U.S. Supreme Court's disapproval of the categorical approach in *Padilla v. Kentucky*, too quickly dismissed the constitutional concerns in *Bellamy*, and failed to follow its own guidance in *Gravino*.[48]

This case comment contends that the Court of Appeals erred in applying New York's categorical rule to determine whether a court must inform a defendant of the possibility of consequences under SOMTA prior to accepting a guilty plea to a sex offense. First, SOMTA consequences are harsh and cannot be squarely classified as either direct or collateral.[49] As a result, the Court of Appeals should have found the categorical approach inapplicable. Instead, to determine whether knowledge of civil confinement under SOMTA was required, the court should have weighed the severity of the consequence against the need for institutional efficiency.[50] If it had done so, the court should have concluded that civil confinement under SOMTA was so severe that fundamental fairness and due process required its disclosure prior to Harnett's plea.[51]

A. SOMTA Cannot Be Squarely Classified as Direct or Collateral

Recently, the U.S. Supreme Court acknowledged the limitations of a direct/collateral consequences categorical rule in *Padilla v. Kentucky*.[52] In that case, the Kentucky Supreme Court used a categorical approach in determining that the defendant's counsel had not been ineffective for failing to advise him that pleading guilty to drug distribution charges would subject him to automatic deportation.[53] During post-conviction proceedings, however, the Court declined to apply Kentucky's categorical rule in evaluating whether Padilla's counsel was constitutionally ineffective for failing to inform him of this consequence.[54] The Court held that the categorical rule was poorly tailored to determining the scope of counsel's Sixth Amendment obligations when the consequence at issue was "uniquely difficult to classify as either a direct or a collateral consequence."[55]

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47. *See* State v. Bellamy, 835 A.2d 1231, 1238 (N.J. 2003); People v. Harnett, 894 N.Y.S.2d 614, 617–18 (3d Dep't 2010) (Stein, J., dissenting).

48. *See generally* People v. Harnett, 16 N.Y.3d 200 (2011).

49. *See generally* Padilla v. Kentucky, 130 S. Ct. 1473, 1482 (2010) (holding the direct versus collateral distinction ill-suited for a consequence that is uniquely difficult to classify).

50. *See Bellamy*, 835 A.2d at 1238–39; *see also* Roberts, *supra* note 7, at 720 (suggesting that severity should be a central factor in determining constitutional criminal procedural rights).

51. *See Harnett*, 894 N.Y.S.2d at 617 (Stein, J., dissenting); *Bellamy*, 835 A.2d at 1238.

52. *See Padilla*, 130 S. Ct. at 1473.

53. *Id.* at 1478.

54. *Id.*

55. *Id.* at 1482.

In *Padilla*, the Court determined that deportation has long been recognized as a severe "penalty," despite the civil nature of removal proceedings.[56] In addition, the Court recognized that the progression of immigration law over the past century has "enmeshed" deportation and criminal convictions, making deportation "intimately related to the criminal process."[57] As a result, the Court concluded that classifying deportation as either a direct or collateral consequence of a criminal conviction was uniquely difficult and that Kentucky's rigid categorical distinction was ill-suited to evaluating an ineffective assistance of counsel claim concerning the specific risk of deportation.[58] Therefore, the Court declined to apply that approach and conducted its *Strickland* test without labeling deportation as either a direct or collateral consequence.[59]

Throughout its analysis in *Padilla*, the Supreme Court emphasized that a defendant's knowledge of possible deportation could only help both parties achieve their interests in reaching plea agreements that comport with due process.[60] Furthermore, the Court explained that a defendant's informed consideration of deportation would not open the floodgates to challenges of convictions obtained through plea bargains.[61] Specifically, the Court reasoned:

> The nature of relief secured by a successful collateral challenge to a guilty plea—an opportunity to withdraw the plea and proceed to trial—imposes its own significant limiting principle: Those who collaterally attack their guilty pleas lose the benefit of the bargain obtained as a result of the plea. Thus, a different calculus informs whether it is wise to challenge a guilty plea in a habeas proceeding because, ultimately, the challenge may result in a *less favorable* outcome for the defendant, whereas a collateral challenge to a conviction obtained after a jury trial has no similar downside potential.[62]

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56. *Id.* at 1481.

57. *Id.*

58. *Id.* at 1482.

59. *Id.* at 1482; *see* Strickland v. Washington, 466 U.S. 668, 687 (1984) (establishing a two-pronged test to determine whether counsel was constitutionally ineffective in representing the accused).

60. *Padilla*, 130 S. Ct. at 1486.

> [I]n this case, a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.

Id.

61. *Id.* at 1477.

62. *Id.* at 1485–86.

In *Harnett*, the Court of Appeals should have applied the U.S. Supreme Court's analysis of deportation in *Padilla* to its own analysis of civil confinement under SOMTA. In doing so, the Court of Appeals should have concluded that New York's categorical approach was ill suited for determining the validity of a guilty plea under due process when the specific risk of civil confinement is involved.

Civil confinement under SOMTA, like deportation in *Padilla*, is neither a squarely direct nor a squarely collateral consequence of a guilty plea to a sex offense. In classifying a consequence as either direct or collateral, the New York Court of Appeals has considered the following factors: "the nexus between the entry of a guilty plea and the consequence," whether the consequence was "presumptively mandatory," and whether the resulting consequence is more "punitive or policy driven."[63] Typically, immediate punishments resulting from the criminal justice system are considered direct consequences.[64] On the other hand, potential consequences that are civil in nature and predicated on policy are considered collateral.[65]

The Court of Appeals correctly determined that the possibility of civil confinement under SOMTA cannot be classified as a direct consequence.[66] First, the nexus between a guilty plea and civil confinement is too attenuated given the time and civil process between them.[67] The decision to confine a sexual offender comes only after the individual has served the term of incarceration and has been evaluated by administrative agencies and adjudicated in a series of civil proceedings.[68] Further, although commencement of SOMTA's civil process is an automatic effect of a guilty plea to a sex offense, there remains only the possibility of future civil confinement.[69] Thus civil confinement is not definite or "presumptively mandatory."[70]

Civil confinement under SOMTA also cannot be squarely classified as a collateral consequence. Civil confinement for convicted sex offenders under SOMTA is, on its face, policy-driven.[71] A system placing convicted, dangerous sex offenders in civil confinement after they are released from prison protects our communities.[72]

63. People v. Duffy, 902 N.Y.S.2d 805, 808 (Sup. Ct. Nassau Cnty. 2010) (citing People v. Ford, 86 N.Y.2d 397 (1995)).

64. *See id.* at 808–10.

65. *Id.*

66. People v. Harnett, 16 N.Y.3d 200, 205 (2011).

67. *See* People v. Harnett, 894 N.Y.S.2d 614, 616 (3d Dep't 2010). *See generally* N.Y. Mental Hyg. Law §§ 10.05–07 (McKinney 2010) (requiring extensive civil proceedings to determine if an individual is a dangerous sexual offender in need of civil confinement).

68. *See Harnett*, 894 N.Y.S.2d at 616. *See generally* N.Y. Mental Hyg. Law §§ 10.05–07 (McKinney 2010).

69. *See* Mental Hyg. §§ 10.01–03 (requiring only those sex offenders determined to be dangerous or recidivist to be civilly confined).

70. People v. Duffy, 902 N.Y.S.2d 805, 808 (Sup. Ct. Nassau Cnty. 2010) (citing People v. Ford, 86 N.Y.2d 397 (1995)).

71. *See* State v. Bellamy, 835 A.2d 1231, 1237 (N.J. 2003).

72. *See* Mental Hyg. § 10.01(d) (stating that one of the goals of SOMTA is to protect the public).

Additionally, collateral consequences "generally result from the actions taken by agencies the [criminal] court does not control."[73] Civil confinement under SOMTA is decided and imposed by the Office of Mental Health, the Attorney General, and the civil courts, none of which is an agency within the control of the criminal court system.[74] The foregoing characteristics of the SOMTA consequences tend to weigh in favor of a collateral classification. Nonetheless, SOMTA consequences can be seen as punitive, especially in the eyes of a defendant; "[t]he person who finds himself securely locked up and designated as a sexual violent predator will experience it as quite similar to incarceration, and therefore punishment."[75] And confinement, whether coming from the criminal or civil process, is still imprisonment and has a decidedly punitive impact.[76] The punitive feel that attaches to SOMTA consequences is similar to the punitive nature of deportation recognized by the Supreme Court in *Padilla*; in both instances the notion that the consequence is completely collateral is blurred.[77]

Additionally, federal circuit courts of appeal have determined that the following consequences are collateral: loss of the right to vote or travel abroad, loss of civil service employment, loss of a driver's license, and undesirable discharge from the armed services.[78] Although the application of any one of these consequences may affect the livelihood of a defendant, none would significantly affect the physical liberty of a defendant.[79] To the contrary, civil confinement under SOMTA is a combination of "incarceration and exile" resulting in the complete deprivation of physical liberty.[80] This fact weighs against a collateral classification. Clearly,

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73. People v. Ford, 86 N.Y.2d 397, 403 (1995).

74. *See* Mental Hyg. §§ 10.05–07.

75. Roberts, *supra* note 7, at 708–09.

76. *See id.* at 708.

77. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010) ("[W]e find it 'most difficult' to divorce the penalty from the conviction in the deportation context.").

78. *See Ford*, 86 N.Y.2d at 403; *see also* Meaton v. United States, 328 F.2d 379, 381 (5th Cir. 1964) (holding the loss of civil rights as collateral effect of a plea); United States v. Crowley, 529 F.2d 1066, 1072 (3d Cir. 1976) (holding the loss of civil service employment as a collateral consequence); Moore v. Hinton, 513 F.2d 781, 782–83 (5th Cir. 1975) (holding loss of driver's license a collateral consequence); Redwine v. Zuckert, 317 F.2d 336, 338 (D.C. Cir. 1963) (holding undesirable discharge from armed services a collateral consequence).

79. *See* People v. Harnett, 894 N.Y.S.2d 614, 616 (3d Dep't 2010) (Stein, J., dissenting) (noting that civil confinement is a "potentially greater deprivation of liberty than the criminal sentence imposed upon most defendants" and other consequences previsouly deemed collateral).

80. Roberts, *supra* note 7, at 708; *see* State v. Bellamy, 835 A.2d 1231, 1238 (N.J. 2003).

> [Civil] [c]onfinement under [SOMTA] is theoretically without end. In that sense, it constitutes a greater deprivation than that imposed upon a criminal defendant who, in all but a handful of cases, is given a maximum release date. A more onerous impairment of a person's liberty interest is difficult to imagine.

Id. at 1238 (quoting *In re* Civil Commitment of D.L., 797 A.2d 166, 173 (N.J. Super. Ct. App. Div. 2002)).

attempting to categorize SOMTA consequences as either direct or collateral brings to light the problems inherent in a rigid categorical system.[81]

B. Efficiency and Finality vs. Constitutional Rights

To be clear, a categorical rule that distinguishes between direct and collateral consequences can be an effective tool for courts and should not be completely eliminated,[82] despite the suggestion of the Third Department's dissent.[83] Given the high volume of guilty pleas in our criminal justice system, this well-settled approach promotes efficiency and finality.[84] To require a judge to inform a defendant of all anticipated "multifarious peripheral contingencies which may affect the defendant's civil liabilities, his eligibility for a variety of societal benefits, his civil rights or his right to remain in this country"[85] would undermine the institutional values of speed and economy.[86] The direct/collateral distinction limits the number of warnings a court must give to a defendant pre-trial, thereby lessening the chance of a successful post-conviction attack based on a failure to warn claim.[87] The categorical rule also helps control the volume of judicial work and promotes an orderly administration of justice through guilty pleas.[88]

However, the Court of Appeals decision in *Harnett* appears to value the benefits of New York's categorical rule over the constitutional rights of the defendant. As stated above, due process requires pleas to be knowing and voluntary. This honors the gravity of waiving one's right against self-incrimination, right to trial by a jury, and right to confront one's accusers.[89] By allowing Harnett to plead guilty without knowing the full extent of his possible confinement, the court disregarded the

81. *See Padilla*, 130 S. Ct. at 1481–82 (2010).

82. *See* Roberts, *supra* note 7, at 672–73 (discussing how circumscribing to the categorical approach benefits judicial economy).

83. *See Harnett*, 894 N.Y.S.2d at 618 (Stein, J., dissenting).

84. *See* Roberts, *supra* note 7, at 735 ("Indeed, guilty pleas in the past several decades have risen even from their previously high levels, now constituting upwards of ninety-nine percent of convictions in some jurisdictions. The courts, and many commentators, have opined that the criminal justice system would grind to a halt, or even crumble, without plea bargaining.").

85. Michel v. United States, 507 F.2d 461, 466 (2d Cir. 1974) (holding that trial courts do not have an obligation to inform defendants of possible deportation upon pleading guilty because they cannot be required to "draw up a complete list of possible consequences . . . [and] determine the degree of probability of their happening").

86. *See* United States v. Wiggins, 905 F.2d 51, 54 (4th Cir. 1990) (holding that to allow a defendant to appeal the very sentence he agreed to, after he expressly waived the statutory right to raise objections to the sentence, is contrary to the "chief virtues of the plea system—speed, economy, and finality" (quoting Blackledge v. Allison, 431 U.S. 63, 71 (1977))).

87. Roberts, *supra* note 7, at 672–73.

88. *See* United States v. Smith, 440 F.2d 521, 528 (7th Cir. 1971) (suggesting that procedures which decrease the concept of finality increase the volume of judicial work and impair the administration of justice).

89. *See* Boykin v. Alabama, 395 U.S. 238, 243 (1969).

principle that "[f]reedom from bodily restraint is at the core of the liberty protected by the Due Process Clause . . . ."[90]

Additionally, by not requiring disclosure of the possibility of civil confinement under SOMTA, the court is promoting silence on behalf of judges who preside over the pleas of sex offenders.[91] If judges provide misinformation to a defendant, their decisions run the risk of being reversed.[92] On the other hand, if they remain tight-lipped regarding SOMTA, they not only protect their decisions from reversal, but also avoid any delay in the plea process that might be caused by a defendant's consideration of civil confinement.[93] In the interest of finality, judges are incentivized to remain silent about SOMTA.[94]

C. Due Process and Fundamental Fairness Warrant the Disclosure of SOMTA

If the Court of Appeals had followed its own precedent in *Gravino* and utilized the reasoning set forth in *Padilla* and *Bellamy*, the dictates of due process and fundamental fairness would have been faithfully served. Instead, the court in *Harnett* forced a collateral label on civil confinement under SOMTA by analogizing the consequence to sex offender registration under SORA, which had previously been deemed collateral in *Gravino*.[95] SOMTA, like SORA, is remedial, controlled by agencies after a plea is entered, and is therefore not automatic.[96] Additionally, a larger percentage of sex offenders are ultimately subject to SORA's registration requirements than SOMTA's harsh consequences.[97] However, in labeling SOMTA consequences "collateral," the Court of Appeals ignored a critical difference between SORA and SOMTA: SORA *cannot* result in civil confinement for life, while SOMTA *can*. The fact that a smaller percentage of sex offenders are subject to civil confinement under SOMTA does not minimize the seriousness of this consequence to a conviction for a sex offense.[98]

The Court of Appeals also compared the possibility of deportation, which it had previously deemed collateral, to civil confinement under SOMTA in an attempt to

90. People v. Harnett, 16 N.Y.3d 200, 209 (2011) (Ciparick, J., dissenting) (quoting Foucha v. Lousiana, 504 U.S. 71, 80 (1992)).

91. *See* Jenny Roberts, *Ignorance is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty Plea Process*, 95 Iowa L. Rev. 119, 121 (2009) (arguing that the collateral consequences rule and the affirmative misadvice exception create "a perverse incentive structure" that promotes silence on behalf of defense attorneys, prosecutors, and judges).

92. *Id.* at 140–41; *see also* State v. Bellamy, 835 A.2d 1231, 1235 (2003) ("A defendant has the right not to be 'misinformed' about a material element of a plea agreement and to have his or her 'reasonable expectations' fulfilled.").

93. Roberts, *supra* note 91, at 141.

94. *Id.*

95. *Harnett*, 16 N.Y.3d at 206.

96. *Id.*

97. *Id.*

98. *Id.* at 210 (Ciparick, J., dissenting).

drive home the point that it, too, is collateral.[99] However, in doing so, the court failed to give weight to the Supreme Court's characterization of deportation as "a particularly severe 'penalty'" that is the "equivalent of banishment or exile."[100] Had the court adopted this view of deportation and recognized that it shared the same severe, punishment-like qualities as civil confinement, a comparison of deportation and civil confinement would have led to the same determination as in *Padilla*. Specifically, the Court of Appeals would have found that civil confinement, just like deportation, was "uniquely difficult" to classify as direct or collateral, and thus use of New York's categorical rule was inappropriate in assessing whether Harnett's guilty plea was knowing and voluntary.

Although use of a categorical approach promotes the institutional interests of efficiency and finality, these interests are not of the same constitutional caliber as the Fifth and Sixth Amendment trial rights of a defendant.[101] Therefore, a court must only utilize a categorical approach based on formalistic distinctions up to the point where due process requires a defendant's knowledge of a consequence that would significantly affect the defendant's decision to plead guilty.[102] As the New Jersey Supreme Court emphasized in *Bellamy*,

> [w]e continue to stress the necessity of determining whether a consequence is direct or penal when analyzing whether a defendant must be informed of a particular consequence. However, when the consequence of a plea may be so severe that a defendant may be confined for the remainder of his or her life, fundamental fairness demands that the trial court inform [the] defendant of that possible consequence.[103]

The Court of Appeals' dismissal of *Bellamy* as relevant guidance is erroneous. In *Bellamy*, the defendant pled guilty to a sex crime and, one week before his release proceedings began, application of the New Jersey Sexually Violent Predator Act resulted in his further commitment.[104] The Court of Appeals honed in on the fact that Bellamy was actually committed under the New Jersey statute and, accordingly, distinguished his situation from that of Harnett, who had not been committed nor—according to the Court of Appeals—made a showing that he realistically could be committed.[105] Although this is a notable distinction between the cases, it does not make the *Bellamy* court's analysis inapplicable to *Harnett*. To the contrary, *Bellamy* serves as a good example of the serious problems that can result from the application

99. *Id.* at 206.

100. Padilla v. Kentucky, 130 S. Ct. 1473, 1481, 1486 (2010).

101. *See* Roberts, *supra* note 7, at 740 (noting that "finality and efficiency are legitimate concerns" but not of a "constitutional dimension").

102. *See generally* North Carolina v. Alford, 400 U.S. 25, 31 (1970) (finding that due process requires a plea to represent "a voluntary and intelligent choice among the alternative courses of action open to the defendant").

103. State v. Bellamy, 835 A.2d 1231, 1238–39 (N.J. 2003).

104. *Id.* at 1234–35.

105. People v. Harnett, 16 N.Y.3d 200, 208 (2011).

of a categorical approach and of the need to comport with fundamental fairness, especially where civil confinement is concerned.[106] As the New Jersey Supreme Court sympathized, "[a] more onerous impairment of a person's liberty interest is difficult to imagine."[107] The court therefore held that trial courts must ensure that defendants accepting a plea to a sex offense understand that, as a result of their plea, "there is the possibility of future commitment," otherwise the plea would not be knowing and voluntary.[108] Accordingly, the court remanded Bellamy's case to permit him to move to withdraw his plea.[109] Similarly, the potential for civil confinement under SOMTA, given its severity, is information that should have been made known to Harnett by the trial court in order for his plea to be valid under the Due Process Clause.[110]

The Court of Appeals previously accepted this theory in *Gravino*: "[I]n the vast majority of plea bargains the overwhelming consideration for the defendant is whether he will be imprisoned and for how long."[111] By ignoring this interest, however, the court eliminated Harnett as the key player in the plea bargaining process.[112] The whole concept of plea bargaining is premised upon the knowing waiver of the defendant's rights.[113] Thus, in order to satisfy due process, a guilty plea can only be entered after a plea colloquy, during which the trial court engages the defendant in a dialogue regarding his intention to plea. "What is at stake for an accused facing . . . imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter *with the accused* to make sure he has a full understanding of what the plea connotes and of its consequence."[114] By not informing Harnett of potential SOMTA consequences, the court left him ignorant of information that *Gravino* acknowledged to be most important to a defendant—the potential length of his full term of confinement. This undermines the integrity of plea bargains, which are supposed to revolve around the knowing waiver of the defendant's Fifth and Sixth Amendment trial rights.

In *Gravino*, the Court of Appeals determined that the requirements of SORA were collateral consequences.[115] Additionally, the court suggested an exception to New York's categorical rule for those cases where a defendant can show that a

106. *See* Roberts, *supra* note 7, at 726 (suggesting that a reasonable defendant would place significant weight on the possibility of lifelong involuntary commitment during the decisionmaking process).

107. *Bellamy*, 835 A.2d at 1238 (alteration in original) (quoting *In re* Civil Commitment of D.L., 797 A.2d 166, 173 (N.J. Super. Ct. App. Div. 2002)).

108. *Id.* at 1238–39.

109. *Id.* at 1239.

110. *See id.*

111. People v. Gravino, 14 N.Y.3d 546, 559 (2010).

112. *See* Roberts, *supra* note 7, at 713–14 (arguing that the defendant's perspective is what gives meaning to a voluntary and knowing plea).

113. Boykin v. Alabama, 395 U.S. 238, 243 (1969).

114. *Id.* at 243–44 (emphasis added).

115. *Gravino*, 14 N.Y.3d at 559.

particular consequence is of such great importance that knowledge of it at the time of the defendant's plea would have caused him not to enter a plea.[116] Here, the Court of Appeals should have looked to this exception and determined that disclosure of the possibility of civil confinement under SOMTA was necessary to create a valid guilty plea under due process, especially given the inherent difficulty in classifying the consequence.[117]

Instead, the Court of Appeals ignored its prior case law and imposed a heavy burden on defendants who might become subject to SOMTA: "[I]f a defendant can show that the prospect of SOMTA confinement was *realistic enough* that it reasonably could have caused him, *and in fact would have caused him*, to reject an otherwise acceptable plea bargain," then a plea can be found involuntary.[118] Clearly, by placing a higher burden on Harnett than *Gravino* requires, the court is establishing a preference in New York for the benefits of the formalistic rule over the constitutional demands of due process.[119] Regardless of Harnett's chances of being confined under SOMTA, his lack of knowledge and consideration of the consequence undermines the notion of fairness and legitimacy in his guilty plea.[120] The mere possibility of confinement alone should be enough to require disclosure.[121] Against the dictates of due process, the Court of Appeals' decision sanctions a court's acceptance of the ignorance of sex offenders when pleading guilty.[122]

Applying this additional disclosure obligation where severe consequences cannot be squarely classified as either direct or collateral will not place a heavy burden on trial courts because such circumstances are rare.[123] Furthermore, trial courts are generally aware of SOMTA, and taking a moment to educate the defendant will not significantly impair the court's efficiency.[124] It may even promote judicial economy, as a greater number of knowing pleas could result in fewer post-conviction challenges.[125] Significantly, the Court of Appeals, despite its conclusion in *Harnett*, expressly encouraged trial courts to inform defendants of the consequences of SOMTA.[126]

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116. *Id.*

117. *See id.*

118. People v. Harnett, 16 N.Y.3d 200, 207 (2011).

119. Roberts, *supra* note 7, at 735.

120. *See* People v. Harnett, 894 N.Y.S.2d 614, 618 (3d Dep't 2010) (Stein, J., dissenting).

121. *See Harnett*, 16 N.Y.3d at 209 (Ciparick, J., dissenting) ("I believe a defendant cannot be said to knowingly and voluntarily forgo his right to trial if he does not know the full extent of confinement that might result from his conviction.").

122. *See* Roberts, *supra* note 7, at 735 (claiming the categorical approach promotes defendant ignorance and is indifferent to its effect on the defendant).

123. People v. Gravino, 14 N.Y.3d 546, 559 (2010).

124. *See Harnett*, 894 N.Y.S.2d at 618 (Stein, J., dissenting).

125. *See generally* Roberts, *supra* note 7, at 737 (suggesting that a reasonableness standard, which would ensure front-end warnings by the court, would lead to more knowing pleas).

126. *Harnett*, 16 N.Y.3d at 207.

IV. CONCLUSION

The Court of Appeals erred by applying New York's categorical rule in a case involving a unique and severe consequence of a plea agreement. Such consequences, when they walk the fine line between a direct and collateral label, require the consideration of fundamental fairness and due process. Otherwise, consequences that entail grave impairments to life and liberty may go undisclosed and, as a result, unconsidered by a defendant who is contemplating a guilty plea, thereby allowing him to waive his Fifth and Sixth Amendment trial rights without the protections of due process. In rendering its decision in *Harnett*, the Court of Appeals diluted the meaning of knowledge under due process, and it has shaken the integrity of the most integral mechanism of our criminal justice system: plea bargaining.[127] This will cause more defendants, and not just sex offenders, to waive their Fifth and Sixth Amendment trial rights in ignorance of the harsh consequences that await them.

127. *See* Roberts, *supra* note 7, at 735 ("The courts, and many commentators, have opined that the criminal justice system would grind to a halt, or even crumble, without plea bargaining."); Santobello v. New York, 404 U.S. 257, 261 (1971) ("Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons.").