

**“CREDITING THE FICTION”: HOW JUDICIAL MISLABELING OF INDETERMINATE CIVIL
COMMITMENT FOR SEXUALLY VIOLENT PERSONS AS COLLATERAL IS UPHOLDING
UNCONSTITUTIONAL PLEAS**

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INTRODUCTION

Sex offenders. That phrase itself may incite fear or disgust from many readers. Putting that aside, even the most unsavory defendants accused of the most heinous of crimes are afforded constitutional protections.¹ However, a recent wave of “tough on sex crimes” laws has swept the United States, placing in jeopardy the constitutional protections that all United States citizens, including sex offenders, should enjoy. This article addresses specifically the rights that criminal defendants accused of sexually violent offenses waive when they enter a plea of guilty and questions whether those waivers pass constitutional muster.

The Supreme Court described in *Boykin v. Alabama* that a person who pleads guilty “simultaneously waive[s] several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers.”² In order for these waivers to be valid under the Due Process Clause, they must be an “intentional relinquishment or abandonment of a known right or privilege.”³

Reading the language from *Boykin* would lead one to believe that pleas are solemn acts and only taken with extreme caution by trial courts. In reality, however, trial courts accept guilty

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¹ As Justice Frankfurter observed, “the safeguards of liberty have frequently been forged in controversies involving not very nice people.” *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

² *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

³ *Id.*

pleas quickly and often.⁴ It has been estimated – and recognized by the Supreme Court – that about ninety to ninety-five percent of all criminal convictions are by pleas of guilty.⁵ Rarely do defendants actually have their “day in court.” These guilty pleas are often the result of plea bargaining, a criminal justice necessity that results in a more resource-efficient system.⁶ The prevalence and necessity of guilty pleas, though, does not validate the pleas themselves.⁷

As the *Boykin* Court addressed, a defendant who pleads guilty waives important fifth and sixth amendment rights.⁸ The defendant willingly accepts a conviction equivalent to, and as binding as, a conviction after a trial on the merits,⁹ leaving the court with nothing to do but give judgment and sentence.¹⁰ The defendant who enters a plea of guilty accepts this conviction that carries the same force as a conviction resulting from a jury trial and now faces a world of deprivations.¹¹ While courts have consistently held that guilty pleas must be knowingly and voluntarily entered in order to pass constitutional muster, courts have drawn an arbitrary line distinguishing direct consequences to guilty pleas from collateral consequences to guilty pleas – the latter of which defendants need not be aware of before entering a guilty plea.¹² One commentator notes that the “real work of the conviction is performed by the collateral consequences.”¹³ For defendants pleading guilty to sexually violent offenses, this statement is

⁴ Although this paper takes a critical look at the manner in which trial courts accept guilty pleas, the author does acknowledge that many judges take the time to scrutinize the voluntary and intelligent nature of guilty pleas.

⁵ *Brady v. U.S.*, 397 U.S. 742, 752 n. 10 (1970).

⁶ Priscilla Budeiri, *Collateral Consequences of Guilty Pleas in the Fed. Crim. Just. Sys.*, 16 HARV. CIV. RIGHTS-CIV. LIBS. L. REV. 157 (1981).

⁷ *Id.*

⁸ 395 U.S. at 243 (quoting *Zerbst*, 304 U.S. at 464).

⁹ *Von Moltke v. Gillies*, 332 U.S. 708, 719 (1948) (quoting *Kercheval v. U.S.*, 274 U.S. 220, 223 (1927)).

¹⁰ *Kercheval*, 274 U.S. at 223.

¹¹ Priscilla Budeiri, 16 HARV. CIV. RIGHTS - CIV. LIBS. L. REV. at 158. The deprivations an individual convicted of a crime face are they same whether they pleaded guilty or are found guilty by a full trial on the merits. After pleading guilty, a defendant is labeled a “felon” and even if he or she never serves prison time, he or she loses many of the freedoms formerly enjoyed prior to conviction.

¹² Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 699 (Mar. 2002).

¹³ *Id.* The following hypothetical is taken largely verbatim from Chin & Holmes’s article.

especially relevant where they may face civil commitment proceedings potentially resulting in an indeterminate commitment shortly before their expected release date. Even if the defendant is unaware that pleading guilty to a sexually violent offense will subject him to potential indefinite commitment, his or her plea of guilty passes constitutional muster and is considered to be voluntarily and intelligently entered because potential civil commitment for a sexually violent person is considered a “collateral consequence.”¹⁴

The thesis of this paper is that potential indefinite civil commitment is a direct consequence of a guilty plea to a sexually violent offense and that this potential indefinite civil commitment is currently mistreated as a collateral consequence. Further, I argue that courts have strayed from early decisions, namely *Kercheval v. United States*,¹⁵ in determining what constitutes a knowing and voluntary waiver in guilty pleas and have since drawn an arbitrary and harmful distinction between direct and collateral consequences. I argue that courts are propounding a legal fiction when they characterize pleas made by defendants ignorant of severe consequences as constitutionally valid and intelligent waivers. In any event, I propose that potential indefinite commitment is so uniquely severe that fundamental fairness requires a defendant’s recognition of such a possibility prior to a court’s acceptance of a defendant’s guilty plea.

In part I of this paper, I will address what admonishments a trial court must make before accepting a defendant’s guilty plea. I will also examine the division between direct and collateral consequences of guilty pleas. I will continue in part II of this paper by arguing that potential indefinite commitment as a sexually violent person is a direct consequence to pleading

¹⁴ See e.g., *Cuthrell*, 475 F.2d at 1366 (“Commitment thus depended not directly on the defendant’s plea but on a subsequent, independent civil trial. It was a collateral consequence of his plea.”); *George v. Black*, 732 F.2d at 111 (concluding civil commitment is collateral consequence in part reasoning that civil commitment does not flow automatically from the plea).

¹⁵ 274 U.S. 220.

guilty to a sexually violent offense. I will assert that its current characterization as a collateral consequence is wrong. In part III of this paper, I will examine the path courts have followed since *Kercheval*.¹⁶ I will assert that the *Kercheval* Court deliberately drafted its opinion using broad language, envisioning that voluntary guilty pleas would only be accepted by trial courts after proper advice and with *full* understanding of the consequences.¹⁷ I will demonstrate how the current law has departed and requires courts neither to ensure that guilty pleas are entered after proper advice nor ensure that guilty pleas are entered with full understanding of consequences. In regards to the latter, I will trace the case law and how it grew to limit the broad language originally embraced in *Kercheval*.

I will then argue in part IV that even if the distinction between direct and collateral consequences continues to hold significance and potential indefinite commitment for sexually violent persons remains a collateral consequence, it is an extremely severe collateral consequence. I will assert that because potential indefinite commitment is so uniquely severe, fundamental fairness requires a defendant's acknowledgment of this possibility prior to entering a plea of guilty to a sexually violent offense. I will close in part V by advocating a simple change to the current boilerplate admonishments. The addition of a simple dialogue between the judge and a defendant pleading guilty to a sexually violent offense before a trial court accepts a plea of guilty can provide greater assurance that pleas of guilty truly pass constitutional muster and are only accepted after proper advice and with full understanding of the consequences.

I. WARNINGS AND DENIALS: ADMONISHING THE DIRECT CONSEQUENCES AND IGNORING THE COLLATERAL CONSEQUENCES

Defendants waive important fifth and sixth Amendment rights when they choose to plead guilty. These rights were introduced by the first Congress convened under the United States

¹⁶ *Id.*

¹⁷ *Id.*

Constitution to act as barriers against “arbitrary or unjust deprivation of human rights.”¹⁸ Courts have acknowledged that the rights embodied in the fifth and sixth amendments serve as constant reminders that if constitutional safeguards are not respected, justice will not be served.¹⁹ In *Johnson v. Zerbst*, the Supreme Court set forth that waivers of constitutional rights require a court’s finding that such waiver is an intelligent and intentional choice by the defendant.²⁰ In fact, the Supreme Court has repeatedly insisted that courts indulge every reasonable presumption against waiver of fundamental constitutional rights and do not presume acquiescence in the loss of fundamental rights.²¹ It would be reasonable to conclude that courts examine guilty pleas where defendants simultaneously waive multiple constitutionally protected rights with the same scrutiny as courts apply to other waivers of constitutional rights. While the Supreme Court has stated that *Johnson v. Zerbst* announced the correct test to be applied to guilty pleas,²² courts have at the same time engaged in word games, allowing defendants to unknowingly and unintelligently plead guilty.²³

¹⁸ *Zerbst*, 304 U.S. at 461.

¹⁹ *Id.* (citing *Palko v. Conn.*, 302 U.S. 319, 325 (1937)).

²⁰ *Id.* at 464-465 (waiver of right to counsel must be intelligent, intentional, and competent depending on the facts and circumstances surrounding the case); *Brookhart v. Janis*, 384 U.S.1, 4-5 (1966) (*Zerbst* waiver standard extended to waiver of right to confrontation); *Barker v. Wingo*, 407 U.S. 514, 525-529 (*Zerbst* waiver standard incorporated into standard for waiver of right to speedy trial); *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 278 (1942) (*Zerbst* waiver standard extended to waiver of right to jury trial); *Green v. U.S.*, 355 U.S. 184, 191 (1957) (*Zerbst* waiver standard applied to waiver of right not to be put in double jeopardy); *Smith v. U.S.*, 337 U.S. 137 (1949) (*Zerbst* waiver standard applies to waivers of right against self-incrimination before administrative agencies); *Emspak v. U.S.*, 349 U.S. 190 (1955) (*Zerbst* standard applied to waivers of right against self-incrimination before congressional committees); *In re Gault*, 387 U.S.1 (1967) (*Zerbst* standard applied to waivers of right to counsel in juvenile proceedings); *Miranda v. Arizona*, 384 U.S. 436, 475 (1966) (*Zerbst* standard applied to right to counsel during in-custody interrogation); *U.S. v. Wade*, 388 U.S. 218, 237 (1967) (*Zerbst* standard applied to right to counsel at a lineup).

²¹ *See Zerbst*, 304 U.S. at 464 (citing *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937); *Hodges v. Easton*, 106 U.S. 408, 412 (1882); *Ohio Bell Tel. Co. v. Pub. Utilities Commn.*, 301 U.S. 292, 307 (1937)).

²² *Brady*, 397 U.S. at 748 (recognizing that a plea of guilty is also a waiver of constitutional rights so must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences); *see also Kercheval*, 274 U.S. at 223 (“courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences”).

²³ Courts have distinguished direct consequences of a guilty plea from collateral consequences stemming from a guilty plea and have consistently held that defendants need not be aware of potential collateral consequences in order to validly waive their constitutional rights. *See U.S. v. Parrino*, 212 F.2d 919, 921-922 (2d Cir. 1954). *Parrino*

1. Courts must warn defendants of the direct consequences to a plea of guilty.

After being convicted of a crime, whether the conviction results from a plea of guilty or a trial, a defendant will likely face numerous legal consequences under various federal and state civil and criminal statutes.²⁴ For the purpose of ascertaining a trial court's compliance with constitutional requirements that a plea and its simultaneous waivers be voluntary and intelligent, the courts concentrate on direct consequences that must be explained to the defendant.²⁵ Courts may accept guilty pleas only if they are voluntary – “entered by one fully aware of the direct consequences.”²⁶ “Direct consequences” include the maximum punishment provided by law, ineligibility for parole, and a mandatory special parole term.²⁷ To prevent the acceptance of unintelligently and unknowingly entered pleas in federal courts, Rule 11²⁸ of the Federal Rules

is a leading case where a long-term lawful resident of the United States was misinformed by his attorney that deportation would not result from his conviction. Defendant pleaded guilty and was later ordered to be deported. The court rejected defendant's motion to withdraw his guilty plea, reasoning that “the claimed surprise was not of the severity of the sentence directly flowing from the judgment but a collateral consequence thereof.” *See also* Sanchez v. U.S., 572 F.2d 210 (9th Cir. 1977) (defendant needs to be advised of direct consequences of plea but need not be informed of all collateral consequences); Cuthrell v. Dir., Patuxent Inst., 475 F.2d 1364, 1366 (4th Cir. 1973) (failure to inform of separate civil proceedings against defendant for commitment to a mental health facility does not render a plea invalid); U.S. v. Sambro, 454 F.2d 918, 922 (D.C. Cir. 1971) (“We presume that the Supreme Court meant what it said when it used the word ‘direct’; by doing so, it excluded *collateral* consequences.”).

²⁴ For a survey of the legal consequences facing convicted felons, *see* Chin and Holmes, 87 CORNELL L. REV. at 697.
²⁵ *Id.* at 704.

²⁶ Brady, 397 U.S. at 755 (quoting Shelton v. U.S., 246 F.2d 571, 572 (5th Cir. 1957), rev'd on confession of error on other grounds by Shelton, 358 U.S. 26 (1958)).

²⁷ Ethan Venner Torrey. “*The Dignity of Crimes*”: *Jud. Removal of Aliens and the Civ.-Crim. Distinction*, 32 COLUM. J. L. & SOC. PROBS. 187 (Winter 1999).

²⁸ Fed. R. Crim. P. 11(b). Considering and Accepting a Guilty or Nolo Contendere Plea. (1) Advising and Questioning the Defendant. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following: (A) the government's right, in prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath; (B) the right to plead not guilty, or having already so pleaded, to persist in that plea; (C) the right to a jury trial; (D) the right to be represented by counsel – and if necessary have the court appoint counsel – at trial and every other stage of the proceeding; (E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses; (F) the defendant's waiver of these rights if the court accepts a plea of guilty or nolo contendere; (G) the nature of each charge to which the defendant is pleading; (H) any maximum possible penalty, including imprisonment, fine, and term of supervised release; (I) any mandatory minimum penalty; (J) any applicable forfeiture; (K) the court's authority to order restitution; (L) the court's obligation to impose a special assessment; (M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to

of Criminal Procedure was enacted to establish a specific procedure to be followed by trial judges.²⁹ While the procedure encoded in Rule 11 has not been held to be constitutionally mandated,³⁰ it is designed both to assist the judge in ensuring that a defendant's plea is truly voluntary and to produce a complete record at the time the plea is entered of factors relevant to the voluntariness determination.³¹ While courts continue to recognize the constitutional implications involved in guilty pleas, they nevertheless steadfastly exclude any examination of collateral consequences.³² Absent any statutory enactments to the contrary,³³ courts are only required to address the direct consequences resulting from a plea of guilty.

2. Courts are not required to admonish defendants of the “collateral consequences” to a plea of guilty.

Whether the *Brady v. United States* Court intended to do so or not, their adoption of a Fifth Circuit's decision stating that guilty pleas must be entered by “one fully aware of the direct consequences”³⁴ was interpreted to explicitly exclude any notice of collateral consequences.³⁵

consider that range, possible departure under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. Section 3553(a); and (N) the terms of any plea-agreement provision waiving the right to appeal or collaterally attack the sentence. (2) Ensuring That a Plea Is Voluntary. Before accepting a plea of guilty or nolo contendere, the court must address the defendant in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement). (3) Determining the Factual Basis for a Plea. Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

²⁹ *Waddy v. Heer*, 383 F.2d 789, 794 (2d Cir. 1967).

³⁰ *Id.*

³¹ *McCarthy v. U.S.*, 394 U.S. 459, 465 (1969). The *McCarthy* Court granted certiorari because of the importance of proper construction of Rule 11 to the administration of criminal law in federal courts. Without reaching any of the constitutional arguments, the decision was made pursuant to the Court's supervisory power over the lower federal courts.

³² While this list is not exhaustive, the following are some examples of cases distinguishing between collateral and direct consequences of a conviction. *Parrino*, 212 F.2d 919; *U.S. v. Russell*, 686 F.2d 35 (D.C. Cir. 1982); *U.S. v. Crowley*, 529 F.2d 1066, 1072 (3d Cir. 1976); *Cuthrell*, 475 F.2d 1364; *Meaton v. U.S.*, 328 F.2d 379 (5th Cir. 1964); *see also Budeiri*, 16 HARV. CIV. RIGHTS.-CIV. LIBS. L. REV. at 157.

³³ Some states have begun to enact statutes requiring trial courts to inquire of alien status of a defendant entering a plea of guilty. *See Attila Bogdan, Guilty Pleas by Non-Citizens in Ill.: Immigration Consequences Reconsidered*, 53 DEPAUL L. REV. 19, 21 (Fall 2003) (examining 735 Ill. Comp. Stat. 5/113-8 which requires a trial court to advise that a conviction may have the consequence of deportation before accepting a plea of guilty).

³⁴ 397 U.S. at 755 (quoting *Shelton*, 246 F.2d at 572).

³⁵ *Sambro*, 454 F.2d at 922 (“We presume that the Supreme Court meant what it said when it used the word ‘direct’; by doing so, it excluded *collateral* consequences.”).

An extreme “hands off” judicial approach results once a consequence is labeled “collateral.” Because of the judiciary’s reluctance to start considering whether collateral consequences can also impact a defendant’s knowing and intelligent decision to plead guilty, defendants continue to enter into pleas unaware of severe life-changing “collateral” consequences that will most certainly occur after their convictions.

Courts’ categorization of direct consequences versus collateral consequences “is obvious at the extremes and often subtle at the margin.”³⁶ While direct consequences are considered to be definite, immediate, and largely automatic,³⁷ collateral consequences are defined as speculative or under the control of a different government agency.³⁸ Common consequences considered to be collateral include numerous losses of liberty.³⁹ Such potential losses include voter disenfranchisement, disqualification from federal benefits, ineligibility to possess a firearm, ineligibility to serve on a federal jury, civil commitment, registration requirements, loss of professional or business license, and deportation.⁴⁰ Some of these consequences labeled as collateral, such as indeterminate civil commitment for individuals pleading guilty to sexually violent offenses, may be a larger impediment on a defendant’s life than the sentence bargained for by the defendant in exchange for his or her plea of guilty.⁴¹

³⁶ Russell, 686 F.2d at 38.

³⁷ *Torrey v. Estelle*, 842 F.2d 234, 236 (9th Cir. 1988) (citing *George v. Black*, 732 F.2d 108, 110 (8th Cir. 1984)(quoting *Cuthrell*, 475 F.2d at 1366)).

³⁸ *Estelle*, 842 F.2d at 236; *Sanchez*, 572 F.2d at 211 (“potential deportation of an alien defendant is deemed a collateral consequence of his guilty plea because that sanction is controlled by an agency which operates beyond the direct authority of the trial judge”).

³⁹ Chin & Holmes, 87 CORNELL L. REV. at 705-706.

⁴⁰ *Id.*

⁴¹ *See Parrino*, 212 F.2d 919 (where defendant bargained for two year sentence in exchange for his plea of guilty to a charge of conspiracy to kidnap and collateral consequence of deportation proceeding is subsequently instituted against defendant); *In re Detention of Lindsay*, 333 Ill.App.3d 474, 776 N.E.2d 304 (Ill. App. 5th Dist. 2002) (where defendant bargained for six year sentence in exchange for his plea of guilty to the charge of aggravated criminal sexual abuse and collateral consequence of indeterminate civil commitment proceeding was subsequently instituted against the defendant); *see also* Steve Colella, “*Guilty Your Honor*”: *The Direct and Collateral Consequences of Guilty Pleas and the Courts That Inconsistently Interpret Them*, 26 WHITTIER L. REV. 305, 309 (Fall 2004).

II. MISLABELED: WHY A SEXUALLY VIOLENT PERSONS COMMITMENT PROCEEDING RESULTING IN POTENTIAL INDETERMINATE COMMITMENT IS A DIRECT CONSEQUENCE FOLLOWING A GUILTY PLEA TO A SEXUALLY VIOLENT OFFENSE

Statutory enactments regarding the civil commitment of sex offenders have swept the country in recent years. In fact, the Adam Walsh Child Protection and Safety Act of 2006 has authorized the federal government to distribute grants for those jurisdictions establishing, enhancing, or operating effective civil commitment programs for sexually dangerous persons.⁴² The likelihood that each state will soon have its own commitment statute for sex offenders is high. For individuals who had pleaded guilty in exchange for the recommendation of a certain term sentence, knowledge of subsequent proceedings subjecting them to indefinite periods of commitment would have certainly changed their plea bargaining decisions.

Courts overwhelmingly label civil commitment for sex offenders subsequent to a criminal proceeding as a collateral consequence of the criminal conviction, focusing on the speculative and civil nature of subsequent commitment proceedings.⁴³ However, civil commitment proceedings for sexually violent persons (hereinafter “SVPs”) are becoming largely automatic due to statutory enactments.⁴⁴ These proceedings are likely to directly interfere with the criminal sentence for which the defendant originally exchanged a plea of guilty. Moreover, the nature of the proceedings resulting in potential indefinite commitment is unique in its severity. Because SVP civil commitment proceedings directly interfere with the criminal

⁴² Bill H.R. 4472 enacted in 18 U.S.C.A. § 4248 (West 2008) (delegates responsibility for instituting civil commitment proceedings to state officials and allows for the timing of commitment proceedings to commence upon the impending release of any person incarcerated by the State who either has been convicted of a sexually violent offense or has been deemed by the State to be at high risk for recommitting any sexual offense against a minor). Please note that two courts have found this Act to be unconstitutional. *See* U.S. v. Shields, 522 F.Supp.2d 317, 319 (D. Mass. Nov. 7, 2007); U.S. v. Comstock, 507 F.Supp.2d 522, 524 (E.D.N.C. Sep. 7, 2007).

⁴³ *Supra*, n. 14.

⁴⁴ Throughout this paper, I will use the term “sexually violent persons” or “SVPs” to refer to those individuals facing civil commitment because of their convictions of sexual offenses. My use of the term encompasses those subject to acts that refer to the accused as “sexually dangerous persons,” “sexually dangerous predators,” “sexually violent predators,” or some similar labeling.

punishment, are automatic, and are analogous to criminal proceedings, civil commitment proceedings subsequent to – and often dependent on – a criminal conviction should be considered a direct consequence of a conviction.⁴⁵ Thus, individuals entering a guilty plea to a qualifying sexually violent offense must be aware of the potential for future commitment prior to entering a constitutionally valid plea.⁴⁶

1. The initiation of SVP civil commitment proceedings directly interferes with the punishment initially set forth by the criminal sentencing judge.

Courts label consequences as direct if they have an impact on the range of the defendant’s punishment.⁴⁷ The initiation of civil commitment proceedings under SVP Acts directly interferes with the sentence that individuals receive after pleading guilty to a sexually violent offense; thus, these proceedings have a direct impact on the range of the defendant’s punishment.

Once an individual pleads guilty to a sexually violent offense, he⁴⁸ will begin to serve the sentence for which he exchanged his plea of guilty. In fact, in the most common scenario, this individual will not even hear about potential civil commitment proceedings and his looming label as a “sexually violent person” until his sentence is nearly complete.⁴⁹ It is not until this

⁴⁵ Two states with SVP commitment statutes, Minnesota and North Dakota, do not statutorily require a criminal conviction or adjudication of a sex offense for a civil commitment proceeding. However, both states require a history of similar sexual misconduct that will presumably be proven through convictions.

⁴⁶ I am using the term “sexually violent offense” to refer to those statutorily qualifying offenses under relevant SVP Acts.

⁴⁷ See *People v. Moore*, 81 Cal.Rptr.2d 658 (Cal. App. 1 Dist. 1998) (consequence is direct if it has a definite, immediate, and largely automatic effect on the range of the defendant’s punishment); see also Fed. R. Crim. P. 11(b)(1)(H).

⁴⁸ Although the SVP Commitments Acts do not *only* apply to men, I am using masculine pronouns because the individuals most drastically affected by the SVP Commitment Acts are overwhelmingly men.

⁴⁹ See e.g., Ariz. Rev. Stat. § 36-3701 (stating that before a potential SVP is released from custody, the Attorney General or the county State’s Attorney petitions a court to find probable cause that the person is a SVP); New Jersey Stat. Ann. § 30:4-27.26 (stating that Attorney General is permitted to initiate commitment proceedings of inmates schedule for release upon expiration of a maximum term of incarceration); Cali. Welf. & Inst. Code § 6601 (stating that whenever the Director of Corrections determines that a person in custody may be a SVP, the director shall at least 6 months prior to scheduled release, refer the individual for an evaluation); 725 Ill. Comp. Stat. 207/9 (stating that the Corrections facility shall not later than 6 months prior to the anticipated release or entry into mandatory

time – when the individual has almost completed his sentence and served his time – that the proceedings for an indefinite civil commitment begin.

When the first step in many steps of the civil commitment proceeding is initiated only months prior to a defendant’s anticipated release, the slow-moving wheels of justice nearly ensure that such proceeding will directly interfere with the sentence granted by the initial sentencing judge. Although years may likely have passed since the sentence was given as punishment for the sexually violent offense, the individual facing potential commitment will be detained pending the proceeding.⁵⁰ This individual will be detained pending initial evaluations to determine whether he has a mental defect; pending referrals to county attorneys regarding his SVP status; pending county attorneys’ decisions to file petitions regarding his SVP status; pending the actual filing of the petition for commitment; pending the probable cause determination hearing; pending civil discovery proceedings; and pending outcome of the bench or jury trial regarding whether he is a SVP.⁵¹ Regardless of whether he ultimately is indefinitely committed as a SVP, the defendant is continuously detained. In some circumstances, his parole or mandatory supervised release, of which he *was* advised during his plea, will be tolled pending SVP commitment proceedings.⁵² SVP commitment proceedings directly impact the defendant’s punishment and sentencing.⁵³

supervised release of an individual adjudicated of a sexually violent offense send written notice to the State’s Attorney informing that the person will be considered for commitment).

⁵⁰ All current SVP laws allow for the detention of a defendant pending proceedings, *see infra*, n. 55.

⁵¹ For an example of the stages of a SVP commitment proceeding, *see Watrous v. State*, 793 So.2d 6 (Fla. App. 2 Dist. 2001). While there is discretion at nearly every stage for the proceedings to stop, the defendant is nevertheless detained while proceedings are pursued.

⁵² For example, the Illinois Civil Commitment Statute (725 Ill. Comp. Stat. 207) mandates tolling of a defendant’s parole during civil commitment proceedings.

⁵³ I argue that this direct impact on the sentence which the defendant received exists regardless of whether the defendant is held in the same prison or moved to a different confinement pending these proceedings. Either way, the defendant continues to be confined past the scheduled date of his anticipated release.

The direct interference with the initial judge’s sentencing described above demands that civil commitment proceedings for sex offenders be acknowledged as direct consequences. The defendants are in custody and nearing completion of their criminal sentences when the proceedings begin. The initiation of the proceedings has the consequence of directly prolonging the defendants’ sentences. Even if a defendant at trial is ultimately determined not to be a SVP and thus not face civil commitment, the SVP proceedings have interfered and extended the defendant’s sentence for which he originally pleaded guilty.

2. The initiation of SVP civil commitment proceedings are best characterized as automatic.

Courts label consequences as direct if they have an automatic impact on a defendant’s sentence.⁵⁴ Although actual civil commitment pursuant to SVP statutes is not automatic, the initiation of the SVP civil commitment proceedings is automatic to a specific class of individuals – those convicted of “sexually violent offenses.” In states operating the Adam Walsh Act or similar statutes, civil commitment proceedings subsequent to a conviction for a sexually violent offense has become largely automatic and definite, extending the period of confinement and detention for criminal defendants. To date, at least eighteen states have enacted civil commitment statutes to be initiated against defendants convicted of sexually violent offenses prior to their release from incarceration.⁵⁵

⁵⁴ Russell, 686 F.2d at 38.

⁵⁵ New Hampshire: N.H. Rev. Stat. § 135-E; Arizona: Ariz.Rev.Stat. § 36-3701; California: Cali. Welf. & Inst.Code § 6600; Florida: Fl. Stat. Ch. 394, part 5; Illinois: 725 Ill. Comp. Stat. 207; Iowa: Iowa Stat. Ann. § 229.A1; Kansas: Kan. Stat. Ann. § 59-29a.01; Massachusetts: Mass. Gen. Laws, Title XVII, Ch. 123A; Minnesota: Minn. Stat. Ann. . § 253B.01; Missouri: Missouri Stat. Ann. . § 632.480; New Jersey: N.J. Stat. Ann. . § 30:4-27.24; New York: N.Y. C.L.S. Men/ Hyg. Sec. 10.00; North Dakota: N.D. Stat. Ann. . § 25.03-3.01; “sexually predatory conduct”; South Carolina: S.C. Stat. Ann. . § 44-48-10; Texas: TX Health & Safety Code . § 841.001; Virginia: Virginia Stat. Ann. . § 37.1-70.1; Washington: Wash. Stat. Ann. . § 71.09.010; Wisconsin: Wisc. Stat. Ann. § 980.01. Each of the above states apply civil commitment proceedings to defendants convicted of sexually violent offenses, with the exception of Minnesota (who applies commitment proceedings to defendants who have engaged in sexual conduct that creates a substantial likelihood of serious physical or emotional harm to another) and New York (who applies

Courts have even recognized the automatic nature of the SVP commitment proceedings.⁵⁶ Nonetheless, courts have continued to label potential civil commitment subsequent to a criminal conviction a collateral consequence, drawing a meaningless distinction between the SVP commitment proceedings and the SVP commitment itself.⁵⁷

In 1999, an Arizona Appellate Court reviewed the appeal of a defendant who had pleaded guilty to a sexually violent offense.⁵⁸ The petitioner unsuccessfully argued that his plea was entered involuntarily because he did not know about the consequence of potential commitment as a SVP.⁵⁹ Defining potential commitment as a collateral consequence, the court stated that “while review under the [SVP Act] is automatically triggered by the charge of a specified crime, Petitioners complain not of the review, but of the potential commitment.”⁶⁰

Similarly, in 2001, a Florida Appellate Court reviewed the case of a defendant facing civil commitment as a SVP.⁶¹ He also argued that his plea was entered involuntarily and unknowingly because he was unaware that he would face commitment following his criminal conviction.⁶² Again, this court explicitly recognized that the proceedings are automatic stating “[assessment to determine whether the defendant suffers from a mental abnormality or personality disorder] is automatically triggered as a result of the conviction for a qualifying

commit proceedings to detained sex offenders). All sex offender commitment acts cited above allow for the detention of defendants pending proceeding. The Adam Walsh Act also allows for the staying of detention pending commitment proceedings. See 18 U.S.C.A. § 4248.

⁵⁶ *E.g.*, *Martin v. Reinstein*, 987 P.2d 779 (Ariz. App. Div. 1 1999), *Watrous*, 793 So.2d at 6, *George v. Black*, 732 F.2d 108 (Ct. of Appeals 8th Cir. 1984). *But see* *People v. Norris*, 767 N.E.2d 904 (Ill. App. 3d Dist. 2002) (stating that the penalty imposed as direct consequence of defendant’s plea did not automatically include any period of commitment under the SVP Act.)

⁵⁷ *George*, 732 F.2d 108 (stating that while proceedings are mandatory when a mentally disordered sex offender is released from prison, commitment is not).

⁵⁸ *Martin*, 987 P.2d 779.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Watrous*, 793 So.2d at 6.

⁶² *Id.*

offense.”⁶³ However, because this court viewed the many layers of government agents’ discretionary recommendations for commitment and the chances at hearings as significant, it concluded the commitment was a collateral consequence.⁶⁴

Exposure to the SVP commitment proceedings as opposed to the ultimate detention as a SVP is clearly automatic enough to be a direct consequence of the plea in and of itself.⁶⁵ Every person who has pleaded guilty to a sexually violent offense will automatically face some stage of a SVP commitment proceeding. After the defendant has served his time, he is automatically subject to continued detention pending the pursuance of proceedings at the discretion of government agents. Additionally, a skeptic may argue that although defendants are granted jury trials and government agents have discretion at every level, commitment as a SVP is a foregone conclusion where prior adjudication, accusation, popular fear of sexually violent crimes, and indifference to the defendants will make a fair adjudication difficult.⁶⁶

3. SVP civil commitment proceedings for sexually violent persons are analogous to criminal proceedings.

Courts continuously distinguish civil commitment proceedings as collateral consequences because they are civil proceedings and not criminal proceedings.⁶⁷ This argument is continuously contentious. The United States Supreme Court reviewed the Kansas Sexually Violent Predator Act, a civil commitment statute, in 1997.⁶⁸ In *Hendricks*, four justices strongly disagreed with the majority’s conclusion that the statute permitting for involuntary commitment of “sexually violent predators” after the completion of their prison sentences did not qualify as a

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Martin, 987 P.2d at 810 (Kleinschmidt, J. dissenting).

⁶⁶ *Id.*

⁶⁷ *E.g.*, George 732 F.2d 108.

⁶⁸ *Hendricks v. Kansas*, 521 U.S. 346 (1997).

penal statute. Writing for the dissent, Justice Breyer noted the criminal nature of the commitment proceedings, finding that the statute “was not simply an effort to commit Hendricks civilly, but rather an effort to inflict further punishment on him.”⁶⁹ The procedural framework in civil commitment statutes yielded multiple similarities to traditional notions of criminal punishment.⁷⁰ Further, proceedings initiated under civil commitment statutes are sought by prosecutors who represent the people of the states – often the same prosecutors who had initiated the original criminal proceeding.⁷¹ The *Hendricks* dissenters found the rehabilitative and civil purpose behind civil commitment proceedings to only be a mask over the actual punitive nature of the commitment proceedings subsequent to criminal convictions.⁷²

The similarities between SVP proceedings and criminal proceedings are high. In denying appellants’ claims that commitment is a direct consequence of which defendants should be admonished, courts often relish in the fact that persons facing SVP commitment are granted numerous protections, such as a jury trial or right to counsel.⁷³ These procedural safeguards are most often enjoyed by criminal defendants. Further, some civil commitment proceedings are even ruled by criminal court judges.⁷⁴

⁶⁹ *Id.* at 373 (Breyer, J. dissenting).

⁷⁰ *Id.* at 379-80. The dissenters noted that the statute’s “civil confinement,” like criminal punishment, involved secure confinement and incarceration against one’s will. Both involved incapacitation, which since the time of Blackstone’s commentaries on the English law, has been a purpose underlying criminal punishment. Both imposed confinement only upon individuals who had previously committed a criminal offense. Also, both employed similar practices and procedures in imposing confinement.

⁷¹ *Id.*

⁷² *Id.* at 386 (“it is difficult to see why rational legislators who seek treatment would write the Act in this way – providing treatment years after the criminal act that indicated its necessity. And it is particularly difficult to see why legislators who specifically wrote into the statute a finding that ‘prognosis for rehabilitating ... in a prison setting is poor’ would leave an offender in that setting for months or years before beginning treatment.”) (internal citations omitted).

⁷³ *E.g.*, *Martin v. Reinstein*, 987 P.2d 779 (Ariz. App. Div. 1 1999), *George v. Black*, 732 F.2d 108 (Ct. of Appeals 8th Cir. 1984).

⁷⁴ *E.g.* 725 Ill. Comp. Stat. 207. It is also interesting to note that the Illinois Sexually Violent Persons Act is found within the Illinois Compiled Statutes Chapter labeled “Criminal Procedure.:

Even if SVP Acts are labeled “civil,” they have a clear quasi-criminal nature. In any event, the labeling of an Act as “civil,” should not deprive defendants of the knowledge of the SVP Act’s existence at the time they enter a plea of guilty. In fact, defendants are often made aware of consequences despite their questionably civil nature, such as restitution fines, registration requirements, or revocation or suspension of driving privileges.⁷⁵ Defendants facing quasi-criminal SVP Acts should be afforded the benefit of an admonishment warning them of the potential civil commitment proceedings they may face.

A new rush of civil commitment proceedings for sex offenders is sweeping the nation. While these proceedings are arguably mischaracterized as civil, they are undoubtedly mischaracterized as collateral consequences to a criminal conviction. The proceedings are largely dependent upon and automatic to criminal convictions for sexual offenses. Their direct interference with the sentence originally imposed by the sentencing judge who had accepted a defendant’s plea of guilty demand their re-characterization as direct consequences. It is time to “rethink the fundamentals”⁷⁶ - defendants need to be aware of potential SVP commitment prior to entering pleas of guilty because such knowledge is likely to change the weights of considerations in choosing to plead guilty. Under the current law, defendants are deprived of information necessary to make knowing and voluntary pleas.⁷⁷ Common sense indicates that an individual cannot be characterized as exercising a knowing and intelligent waiver of his constitutional rights in pleading guilty where he is pleading guilty to potential indefinite detention.

⁷⁵ *E.g.* People v. Moore, 81 Cal.Rptr.2d at 658.

⁷⁶ Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immig. Judge*, 51 EMORY L. J. 1131, 1136-1137 nn. 19-23 (2002).

⁷⁷ *See* Bellamy, 835 A.2d at 1231.

III. MISUNDERSTOOD: THE TWISTED ROAD COURTS TOOK THAT LED TO THE DISREGARD OF SO-CALLED COLLATERAL CONSEQUENCES

As described above, in cases of sexually violent persons and other criminal defendants, courts repeatedly uphold guilty pleas as constitutional where defendants entered their pleas without knowing all of the important consequences stemming from the guilty plea. This manner of disregarding the “collateral consequences” is starkly contrasted by earlier court decisions that embraced knowledge of all consequences before entering a guilty plea.

In order to ensure that no person shall be deprived of certain rights or privileges without due process of law, the notion that pleas of guilty in criminal cases must be knowing and voluntary is ingrained in the criminal justice system. One who enters a plea of guilty simultaneously waives several constitutional rights; thus, for the waiver to be valid it must be “an intentional relinquishment or abandonment of a known right or privilege.”⁷⁸ As mentioned above, defendants need not be aware of consequences labeled as collateral prior to entering a plea of guilty. The road that criminal courts took to this outcome is telling and discouraging, but not irreversible.

In 1927, the Supreme Court discussed guilty pleas in *Kercheval v. United States*.⁷⁹ The *Kercheval* Court immediately recognized the uniqueness of pleas of guilty.⁸⁰ It even noted that trial courts do not have much to do in accepting a guilty plea – “the court has nothing to do but give judgment and sentence.”⁸¹ Recognizing the solemn nature of guilty pleas, the Court stated that courts are careful that guilty pleas are not accepted unless made “voluntarily after *proper*

⁷⁸ Boykin, 395 U.S. at 243 (quoting Zerbst, 304 U.S. at 464).

⁷⁹ 274 U.S. 220 (holding that plea of guilty withdrawn by leave of court was inadmissible in subsequent prosecutions).

⁸⁰ *Id.* at 223. (“A plea of guilty differs in purpose and effect from a mere admission or an extrajudicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive.”)

⁸¹ *Id.*

advice and with full understanding of the consequences.”⁸² While not fully explaining what it meant by these terms “proper advice” and “full understanding,” the Court was noticeably concerned with “just consideration for persons accused of crimes.”⁸³ It looked to cases where courts actually noted whether defendants were intelligent and whether defendants acted under the advice of intelligent and faithful attorneys.⁸⁴ Drafting its opinion in a time where the withdrawal of pleas of guilty and substitution of pleas of not guilty was permitted frequently⁸⁵ and courts carefully scrutinized defendants’ waivers of constitutional rights,⁸⁶ the *Kercheval* Court appeared to acknowledge a wise inclination to let a defendant withdraw a guilty plea made unknowingly and unintelligently rather than to let injustice stand.⁸⁷

Kercheval has never been overturned. However, subsequent courts have not followed the *Kercheval* rule to ensure that defendants enter guilty pleas only after proper advice and full understanding of the consequences. Rather, courts have focused only on the direct consequences

⁸² *Id.* (emphasis added).

⁸³ *Id.*

⁸⁴ The *Kercheval* Court cites a Southern District of New York Circuit Court decision: *U.S. v. Bayaard*, 23 F. 721, 723 (S.D.N.Y. 1883) (not allowing defendants to withdraw plea where defendants were intelligent and fully aware of the meaning and effect of their plea of guilty and where defendants acted under the advice of intelligent and faithful attorneys.)

⁸⁵ *Id.* at 225. The *Kercheval* Court cites a California Supreme Court case where the court explained its inclination towards permitting the withdrawal of pleas. *People v. McCrory*, 41 Cal. 458, 464, 1871 WL 1404 (Cal. 1871) (“But when there is reason to believe that the plea has been entered through inadvertence, and without due deliberation, or ignorantly, and mainly from the hope that the punishment, to which the accused would otherwise be exposed, may be mitigated, the Court should be indulgent in permitting the plea to be withdrawn. It must necessarily exercise a sound discretion in such matters ...” *Kercheval* also cites a Louisiana Supreme Court opinion offering a similar sentiment. *State v. Coston*, 113 La. 717, 37 So. 619 (La. 1904) (“The withdrawal of the plea of guilty should not be denied in any case where it is in the least evident that the ends of justice will be subserved by permitting not guilty to be pleaded in its place. It is proper to grant the withdrawal if the accused makes it appear that an error has been committed. The least surprise or influence causing him to plead guilty when he had any defense at all should be sufficient to cause to permit a change of the plea from guilty to not guilty.”)(citing *State v. Williams*, 45 La. Ann. 1357, 14 South. 32 (La. 1893)).

⁸⁶ The author makes this conclusion about the time in which the *Kercheval* decision was published because *Zerbst* was published only slightly more than a decade. *Zerbst* insisted that courts indulge every reasonable presumption against waiver of fundamental constitutional rights. 304 U.S. at 464. Five members of the Court were the same during both decisions. See *Members of the Sup. Ct. of the U.S.*, prepared by the Sup. Ct. of the U.S. and published with funding from the Sup. Ct. Hist. Soc., available at <http://www.supremecourtus.gov/about/members.pdf> (accessed Mar. 6, 2008).

⁸⁷ *Kercheval*, 274 U.S. at 223-224. The Court recognized that courts will vacate guilty pleas if the plea is shown to have been “...given through ignorance or inadvertence” and recognized that courts have the discretion to permit the vacating of a guilty plea if for any reason “the granting of the privilege seems fair and just.”

of guilty pleas and left defendants with no recourse, unable to withdraw their unknowingly and unintelligently entered pleas.

1. Courts no longer consider a defendant’s full understanding of consequences essential to the constitutional validity of a guilty plea.

The *Kercheval* Court envisioned a system where defendants only waived their constitutional rights and entered pleas of guilty after a full understanding of the consequences.⁸⁸ At some point after 1927, this judicial hesitation that pleas of guilty only be entered after fully understanding the consequences morphed into a belief that the Constitution only requires that defendants be aware of the direct consequences resulting from their guilty pleas.⁸⁹

In 1944, the Third Circuit summed up the contemporaneous case law regarding when a motion to withdraw a guilty plea should be entertained.⁹⁰ It cited to *Kercheval* as succinctly stating the rules for accepting a guilty plea and withdrawing a guilty plea.⁹¹ Noting that withdrawal of a guilty plea is not a matter of right, the Third Circuit followed the law that the “cases uniformly held” – that guilty pleas were not able to be withdrawn if there was no presence of force, mistake, misapprehension, fear, inadvertence or ignorance of his rights and understanding of the consequences of the plea at the time the defendant entered his or her plea.⁹² The court’s embracement of some of the *Kercheval* notions is evident in the language of its opinion, recognizing that a guilty plea will not be withdrawn if the defendant made the plea “[w]ith full knowledge of the facts and *possible* consequences...”.⁹³ At this time, it is reasonable to conclude that the courts were still contemplating a defendant entering a plea of guilty with a full understanding of the consequences as envisioned by *Kercheval*.

⁸⁸ *Id.* at 223.

⁸⁹ Compare *id.* with *supra* n. 23 (cases distinguishing between direct and collateral consequences).

⁹⁰ *U.S. v. Colonna*, 142 F.2d 210, 211 (3d Cir. 1944).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* (citing *U.S. v. Fox*, 130 F.2d 56 (3rd Cir. 1942))(emphasis added).

The curtailing and limiting of the *Kercheval* language may have been hastened in *United States v. Parrino* in 1954.⁹⁴ When the defendant attempted to withdraw his plea of guilty based on misinformation from his attorney in regards to deportation, the *Parrino* court read prior judicial opinions requiring full understanding to be distinguishable.⁹⁵ The *Parrino* court labeled deportation a collateral consequence – one which the defendant need not recognize prior to entering a constitutionally sound plea of guilty – since it was a consequence not related to the severity of the sentence directly flowing from the judgment.⁹⁶ It stated that it had no authority to apply the requirement of a defendant’s contemporaneous realization of the collateral consequences in order to accept a guilty plea.⁹⁷ A decision with language in sharp contrast to *Kercheval*’s regard for fairness and justice,⁹⁸ *Parrino* was never overturned and actually became often cited by other courts in distinguishing collateral consequences from direct consequences.

In 1957, the Fifth Circuit reviewed a case that would set the stage for the future adoption by the Supreme Court of the notion of direct consequences.⁹⁹ The defendant in the Fifth Circuit case, Mr. Shelton, moved to vacate a one-year prison sentence imposed for violating an act governing the interstate transportation of a stolen motor vehicle.¹⁰⁰ He argued that he entered a

⁹⁴ 212 F.2d at 921-922.

⁹⁵ *Id.* (“It is true that many statements in judicial opinions and by text-writers may be found – and the appellant here cites several such – the general effect that a defendant should not be holden to a plea of guilty without an understanding of the consequences. But neither the generalities found in the texts nor the facts underlying such judicial opinions suggest that the authors of such statements mean to imply that the finality of a conviction on a plea of guilty depended upon a contemporaneous realization by the defendant of the collateral consequences thereof. Certainly, the appellant fails to cite a single case so holding.”)

⁹⁶ *Id.* (“We think it plainly unsound to hold, as now in principle we are urged to hold, that such defendants are subjected to manifest injustice, if held to their plea, merely because they did not understand or foresee such collateral consequences. We find no case which even looks in that direction and the absence of cases expressly rejecting such doctrine we attribute to the absence of a rule so palpably unsound.”).

⁹⁷ *Id.*

⁹⁸ *See supra*, n. 51.

⁹⁹ *U.S. v. Shelton*, 242 F.2d 101, 102 (5th Cir. 1957)(rev’d by Shelton, 246 F.2d 571)(rev’d on confession of error on other grounds by Shelton, 358 U.S. 26 (1958)). The *Shelton* case appears to have a rich history. In addition to its appellate travels, Mr. Shelton also had a trial on the merits that resulted in mistrial prior to entering his contested plea of guilty.

¹⁰⁰ *Id.*

plea of guilty involuntarily induced by various promises made by the Government.¹⁰¹ The Fifth Circuit panel court decided in favor of Mr. Shelton, finding that he pleaded guilty in reliance on promises by the Assistant United States Attorney that he would receive a sentence of only one year.¹⁰² Judge Tuttle drafted a dissent to this decision, stating that Mr. Shelton made his decision to plead guilty with full knowledge of the consequences.¹⁰³ Looking to *Parrino* and fashioning his own version of the Third Circuit holding,¹⁰⁴ Judge Tuttle proposed: “A correct statement of the applicable rule might be: a plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor’s business (e.g. bribes).”¹⁰⁵

Less than four months later, the Fifth Circuit *en banc* entertained a motion for rehearing in the case of Mr. Shelton.¹⁰⁶ The roles were reversed this time and Circuit Judge Tuttle drafted the majority opinion, finding that Mr. Shelton’s plea of guilty was voluntarily entered.¹⁰⁷ Noting that the dissenting opinion “correctly expressed the relevant definition of voluntariness,” Judge Tuttle incorporated the language of “direct consequences” into his majority opinion.¹⁰⁸

¹⁰¹ *Id.* Mr. Shelton waived his right to counsel and represented himself *pro se*. He testified that the Government counsel visited him in jail and made various promises about dropping other charges and the length of his sentence if he agreed to plead guilty. A rather heated and personal cross-examination of the former Assistant United States Attorney by Mr. Shelton exists on the record.

¹⁰² *Id.* at 113.

¹⁰³ *Id.* (Tuttle, J. dissenting).

¹⁰⁴ *Colonna*, 142 F.2d at 211.

¹⁰⁵ *Shelton*, 242 F.2d at 114 (Tuttle, J. dissenting).

¹⁰⁶ *Shelton*, 246 F.2d 571.

¹⁰⁷ *Id.* at 572.

¹⁰⁸ *Id.* at 572, n. 2.

The following year, the Supreme Court granted Mr. Shelton's petition for certiorari and reviewed his case in a *per curiam* opinion.¹⁰⁹ After considering the record and a confession of error by the Solicitor General that the plea of guilty may have been improperly obtained, the Supreme Court reversed Judge Tuttle's majority opinion and remanded the case to the district court.¹¹⁰

During the next decade, two landmark cases reviewed guilty pleas: *Boykin v. Alabama* and *Brady v. United States*.¹¹¹ In *Boykin*, the Supreme Court reviewed a case where the record was silent as to whether a defendant voluntarily and understandingly entered his plea of guilty.¹¹² The Court noted that one who enters a plea of guilty simultaneously waives several constitutional rights.¹¹³ For this waiver to be valid, it must be "an intentional relinquishment or abandonment of a known right or privilege."¹¹⁴ In a footnote, the *Boykin* court postulated that to insulate convictions obtained after a plea of guilty the trial court should make an on-the-record examination of the defendant, attempting to satisfy that the defendant understands the nature of the charges, his right to a jury trial, the acts sufficient to constitute the offenses for which he is charged, and the permissible range of sentences.¹¹⁵ While the proposed procedure in the *Boykin* footnote was admirable in attempting to prevent injustice in the form of involuntary off-the-

¹⁰⁹ *Shelton v. U.S.*, 358 U.S. 26 (1958).

¹¹⁰ *Id.*

¹¹¹ As a side note, the constitutionality of a guilty plea had been deemed so important that it had been added to Rule 11 of the Federal Rules of Criminal Procedure by this time. As explained in *McCarthy*, 394 U.S. 459, an amendment in 1966 to Rule 11 added language directing district judges to inquire whether a defendant who pleads guilty understands the nature of the charge against him and whether he is aware of the consequences of his plea. Because the procedure Rule 11 has been deemed not to be constitutionally required (*see Waddy*, 383 F.2d at 794), I chose not to include Rule 11 in my map of the case law.

¹¹² *Boykin*, 395 U.S. 238. Mr. Boykin entered a plea of guilty to robbery and was sentenced to death by electrocution.

¹¹³ *Id.* at 243 (quoting *Zerbst*, 304 U.S. at 464).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 244, n. 7 (quoting *Cmmw. ex rel. West v. Rundle*, 237 A.2d 196, 197-198 (Pa. 1968)).

record pleas, it has acted as a hindrance.¹¹⁶ A review of subsequent case law indicates that trial courts view the inclusions of certain admonishments as limits – with the trial courts only admonishing as much as necessary to “insulate convictions.”

In 1970, the Supreme Court again reviewed a guilty plea in *Brady v. United States*. This time, Mr. Shelton made an appearance in a Supreme Court opinion.¹¹⁷ The *Brady* Court addressed the solemn and grave nature of the guilty plea and its associated waiver of constitutional rights.¹¹⁸ With language nearly as expansive as that in *Kercheval*, the *Brady* Court began by stating: “Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.”¹¹⁹ However, the *Brady* Court departed from *Kercheval*’s “full understanding” language later in the opinion when it adopted verbatim Judge Tuttle’s definition of voluntariness.¹²⁰ The *Brady* Court held that “the voluntariness of guilty pleas must be essentially that defined by Judge Tuttle of Court of Appeals for the Fifth Circuit: ‘(A) plea of guilty entered by one fully aware of the *direct* consequences ... must stand unless ...’”¹²¹

In embracing Judge Tuttle’s language of direct consequences, the *Brady* Court implicitly accepted the distinction between collateral and direct consequences – forever restricting the broad language in *Kercheval*.¹²² Immediately following the *Brady* decision, lower courts drew

¹¹⁶ Similar to this language and courts limiting their admonishments, Rule 11’s language has also acted as a limit; *see supra*, n. 23 (cases distinguishing between direct and collateral consequences).

¹¹⁷ *Brady*, 397 U.S. at 755 (quoting Shelton, 246 F.2d at 572).

¹¹⁸ *Id.* at 748. (“That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized. Central to the plea and the foundation for entering judgment against the defendant is the defendant’s admission in open court that he committed the acts charged in the indictment. He thus stands as a witness against himself and he is shielded by the Fifth Amendment from being compelled to do so – hence the minimum requirement that his plea be the voluntary expression of his own choice. But the plea is more than admission of past conduct; it is the defendant’s consent that a judgment of conviction may be entered without a trial – a waiver of his right to trial before a jury or a judge.”)

¹¹⁹ *Id.*

¹²⁰ *Id.* at 755 (quoting Shelton, 246 F.2d at 572).

¹²¹ *Id.* (emphasis added).

¹²² *Sambro*, 454 F.2d at 922.

the presumption “that the Supreme Court meant what it said when it used the word ‘*direct*’; by doing so, it excluded *collateral* consequences.”¹²³

The arguably fictional distinction between direct consequences – of which defendants must be aware – and collateral consequences – of which defendants need not be aware – continues. In sum, once a consequence is labeled collateral, no advice or warning about it prior to entering the guilty plea is constitutionally required, no matter how serious the consequence.¹²⁴ The judiciary has built a wall from admonishments it deems necessary and those it does not and now limits itself to those addressed in the *Boykin* footnote and Rule 11. However, the distinction repeatedly faces vehement dissents and objections. Some so-called collateral consequences are so important to a defendant’s liberty that knowledge of their existence profoundly affects a defendant’s decision to plead guilty. The very notion of ignoring these collateral consequences contradicts the Supreme Court’s practice to indulge every reasonable presumption against waiver of fundamental constitutional rights and do not presume acquiescence in the loss of fundamental rights.¹²⁵

Some courts and individual justices, recognizing the probability that pleas entered without knowing the full consequences are not intelligent and knowing pleas, have questioned the validity of such a distinction. Circuit Judge Mikva, extremely troubled with the law that a judge is not required to inform a defendant of certain collateral consequences, stated his “sore difficulty crediting the fiction that the defendant has knowingly pleaded when he is not provided

¹²³ *Id.*

¹²⁴ Leonard N. Sosnov, *Due Process Limits on Senten. Power: A Critique of Pa.’s Imposition of a Recidivist Mandatory Sentence Without a Prior Conviction*, 32 DUQ. L. REV. 461, 512 (Spring 1994).

¹²⁵ See Zerbst, 304 U.S. at 464 (citing Aetna, 301 U.S. at 393; Hodges, 106 U.S. at 412; Ohio Bell Tel. Co., 301 U.S. at 307).

meaningful information about the relevant deportation consequences of his plea.”¹²⁶ Courts have not entirely ignored collateral consequences; rather, they have delegated the task of ensuring defendant’s awareness of such consequences to defense counsel.¹²⁷ This delegation has been largely unsuccessful in guaranteeing that pleas are knowingly and intelligently entered.

2. Courts no longer consider a defendant’s receipt of proper advice essential to the constitutional validity of a guilty plea.

The *Kercheval* Court envisioned a system where defendants only pleaded guilty after proper advice, as constitutionally guaranteed in the sixth Amendment.¹²⁸ While the courts have at least briefly entertained the *Kercheval* notion of fully understanding the consequences to a conviction, courts have not considered proper advice in evaluating the collateral consequences of a guilty plea essential to the voluntariness of a guilty plea.

The sixth amendment to the United States Constitution guarantees that in all criminal trials, the accused shall enjoy the right to have Assistance of Counsel for his defense.¹²⁹ The sixth amendment both guarantees right to counsel at critical stages in the prosecution¹³⁰ and effective assistance of counsel.¹³¹ It has been stated to embody “a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty...”¹³² The Court has recognized an attorney as extremely important in assisting defendants in entering pleas of guilty

¹²⁶ U.S. v. Del Rosario, 902 F.2d 55, 61 (D.C. Cir. 1990) (Mikva, J. concurring). (“[A] defendant wholly ignorant of the possibility that he may be deported as a result of pleading guilty will nonetheless be held to this plea – and its harsh consequences ...”).

¹²⁷ Libretti v. U.S., 516 U.S. 29, 50-51 (1995)(“Apart from the small class of rights that require specific advice from the court under Rule 11(c), it is the responsibility of defense counsel to inform a defendant of the advantages and disadvantages of a plea agreement and the attendant statutory and constitutional rights that a guilty plea would forgo.”).

¹²⁸ 274 U.S. 220.

¹²⁹ U.S. Const. amend. VI.

¹³⁰ U.S. v. Cronin, 466 U.S. 648, 659 (1984).

¹³¹ McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970).

¹³² Zerbst, 304 U.S. at 462 (“That which is simple, orderly and necessary to the lawyer – to the untrained layman – may appear intricate, complex, and mysterious.”).

– “an intelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney.”¹³³ However, the Court has not set forth a proper framework for evaluating what constitutes adequate assistance of an attorney in assessing the relative advantages and disadvantages of pleading guilty.

An attorney deprives a client of his or her sixth amendment rights when the attorney fails to provide “adequate legal assistance.”¹³⁴ It is not too far of a leap then to believe that an attorney fails to provide adequate legal assistance where an attorney neglects to inform or misinforms his or her client of likely collateral consequences to a plea of guilty. Courts have often justified their limited role in admonishments¹³⁵ by allocating the duty of a detailed exploration of collateral consequences to defense counsel.¹³⁶ In fact, the Supreme Court explicitly delegated the duty of exploring collateral consequences to defense counsel.¹³⁷ However, an attorney’s failure to advise his or her client of so-called collateral consequences is not a cognizable claim for invalidating a guilty plea in most jurisdictions.¹³⁸ Even false advice provided by an attorney does not universally invalidate a guilty plea.¹³⁹ There exists no uniform holding requiring that an attorney advise his or her client of any potential collateral consequences. While *Kercheval* set high hopes for the advice of defendants entering pleas of guilty, only some courts have followed. Of these courts requiring that attorneys advise clients of

¹³³ Brady, 397 U.S. at 748 n. 6.

¹³⁴ Sarah Keefe Molina, *Rejecting the Collateral Consequences Doctrine: Silence About Deportation May or May Not Violate Strickland’s Performance Prong*, 51 ST. LOUIS U. L. J. 267, 273 (Fall 2006) (quoting Cuyler v. Sullivan, 446 U.S. 335, 344 (1980)).

¹³⁵ See *supra*, n. 127.

¹³⁶ Chin & Holmes, 87 CORNELL L. REV. 697.

¹³⁷ Libretti, 516 U.S. at 29.

¹³⁸ Molina, 51 ST. LOUIS U. L. J. at 268 (stating that one jurisdiction, New Mexico, has departed and concluded that an attorney’s failure to advise an alien defendant of immigration consequences may violate his Sixth Amendment right to effective assistance of counsel). See also Chin & Holmes, 87 CORNELL L. REV. 697 (stating that the opinions adopting the collateral-direct distinction with respect to duties of counsel cite authority exploring the duties of courts taking guilty pleas).

¹³⁹ See e.g. Parrino, 212 F.2d at 921-922.

collateral consequences, they only require advice of the collateral consequence of potential deportation.¹⁴⁰

Time after time, a defendant with no proper training to gauge the advantages and disadvantages in entering a plea of guilty pleads guilty with no information or misinformation about collateral consequences of his or her guilty plea. When the defendant realizes that they entered this plea unintelligently, without advice of the potential collateral consequences, and attempt to invalidate the plea, they are more often than not rejected.¹⁴¹

IV. MOVING PAST THE LABELS AND BACK TO THE FUNDAMENTALS: WHY FUNDAMENTAL FAIRNESS REQUIRES DEFENDANTS TO KNOW ABOUT SVP CIVIL COMMITMENT PROCEEDINGS RESULTING IN POTENTIAL INDEFINITE DETENTION BEFORE ENTERING GUILTY PLEAS TO SEXUALLY VIOLENT OFFENSES

Even if the distinction between collateral and direct consequences remains and SVP commitment proceedings continue to be considered collateral consequences, a problem of application of the consequence classifications exists because of the magnitude of the risk that criminal defendants face when entering guilty pleas to a sexually violent offenses. Courts should return to the notion of what is truly important when an individual pleads guilty: an

¹⁴⁰ Molina, 51 ST. LOUIS U. L. J. at 275-277: Some jurisdictions do recognize that an attorney provides ineffective assistance when attorneys misadvise their clients, leading them to believe that deportation is not a potential consequence. In these jurisdictions, defense counsel has no affirmative duty to advise defendants that a plea will result in deportation, but advice, if offered, must be accurate. Other jurisdictions recognize that an attorney's performance is objectively unreasonable when she tells her client that a possibility of deportation exists but in actuality, deportation is a certainty.

¹⁴¹ *E.g.* Parrino, 212 F.2d at 921-922 (holding that surprise stemming from reliance by defendant when entering guilty plea to criminal charge on erroneous information from his own counsel that plea of guilty would not subject him to deportation is not such manifest injustice as to require vacation of judgment in absence of showing unprofessional conduct); DelRosario, 902 F.2d 55 (holding that failure to inform deportation consequence of guilty plea did not constitute ineffective assistance of counsel); *People v. Davidovich*, 618 N.W.2d 579 (Mich. 2000) (holding that a defense counsel's failure to advise his client of existing deportation laws does not render a defendant's plea unknowing or involuntary); *Jackson v. State*, 562 S.E.2d 475 (S.C. 2002) (finding that counsel is not required to inform a criminal defendant concerning collateral consequences such as parole eligibility or community supervision requirements); *Morales v. State*, 104 S.W.3d 432 (Mo. App. E.D. 2003) (holding that defendant could not mount a successful ineffective assistance claim based on counsel's failure to inform him of the collateral consequence of civil commitment).

acknowledgment of the facts and possible consequences.¹⁴² Because a guilty plea is a simultaneous waiver of multiple constitutional rights, courts should put aside petty classifications and return to the notion of fundamental fairness.

The New Jersey Supreme Court already has returned to the notion of fundamental fairness to determine that defendants should be admonished of potential SVP civil commitment before they enter pleas of guilty to sexually violent offenses in *New Jersey v. Bellamy*.¹⁴³ Although the *Bellamy* court did conclude that SVP civil commitment is a collateral consequence, “it matters little whether consequences are called direct or collateral when in fact their impact is devastating.”¹⁴⁴ Here, the impact of the initiation of SVP commitment proceedings in and of itself has a devastating effect. The proceedings, being civil in nature, can be extremely lengthy with a lot of discovery. Each individual who has pleaded guilty to a sexually violent offense and who has served his time is subject to continued detention.¹⁴⁵ Assuming the existence of probable cause, every defendant is “subject to trial and detention up to and during trial, with all of the loss of freedom, aggravation, and anxiety that it entails.”¹⁴⁶ This results in a continued deprivation of liberty, without even being found to be a SVP.

Moreover, the impact of actual indefinite civil commitment and the branding of being a “sexually violent person” is extreme. This impact must not be ignored by giving it a label of “collateral.” Under SVP Acts, defendants may face civil commitment for periods greater than their criminal sentences for which they originally pleaded guilty. Recognizing the extreme deprivation of liberty and the severity of commitment for the rest of a person’s life, the *Bellamy*

¹⁴² Boykin, 395 U.S. at 243 (quoting Zerk, 304 U.S. at 464).

¹⁴³ *Bellamy*, 835 A.2d 1231.

¹⁴⁴ *Id.* (quoting Heitzman, 527 A.2d 439 (Wilentz, C.J., dissenting) (“Whether a court should be required to advise defendant of *139 certain consequences of a guilty plea should not depend on ill-defined and irrelevant characterizations of those consequences”)).

¹⁴⁵ *Martin*, 987 P.2d at 810 (Kleinschmidt, J. dissenting).

¹⁴⁶ *Id.*

court stated “fundamental fairness demands that the trial court inform the defendant of that possible consequence.”¹⁴⁷

Undoubtedly, every plea is the result of a risk-benefit analysis, taking into account the likelihood of harm and magnitude of harm that may ensue as a result of a guilty plea.¹⁴⁸ The severe risk of potential indefinite commitment throws the balance of a guilty plea off. The magnitude of potential indefinite commitment to a defendant about to plead guilty would undoubtedly make him think twice about waiving all of those constitutional rights.

The time has come to recognize that a label of potential indefinite commitment as merely “collateral” is fundamentally unfair. The impact of the proceedings and potential commitment is devastating. Defendants should not be held to guilty pleas to sexually violent offenses when such pleas were entered unintelligently because of ill-defined and irrelevant characterizations of serious consequences. Courts reviewing future cases involving a defendant facing indefinite civil commitment after pleading guilty to a sexually violent offense should follow the lead of the New Jersey Supreme Court and return to the notion of fundamental fairness.

V. ADDING AN ADMONISHMENT: AN EASY SOLUTION TO A PRESSING PROBLEM

Provided the judicial history of distinguishing direct consequences from collateral consequences and the severity of potential civil commitment that criminal defendants face today, it is not too late to return to the concept endorsed in *Kercheval* where guilty pleas are not accepted unless made “voluntarily after *proper advice and with full understanding* of the consequences.”¹⁴⁹ Courts are hesitant to change their holdings distinguishing direct consequences from collateral consequences for fear that “[t]he collateral consequences flowing from a plea of guilty are so manifold that any rule requiring a district judge to advise a defendant

¹⁴⁷ Bellamy, 835 A.2d 1231.

¹⁴⁸ Martin, 987 P.2d at 810 (Kleinschmidt, J. dissenting).

¹⁴⁹ *Id.* (emphasis added).

of such a consequence as that here involved would impose an unmanageable burden on the trial judge and ‘only sow the seeds for later collateral attack.’”¹⁵⁰ As discussed above, trial courts are constitutionally required to make a record of admonishing a defendant who enters a plea of guilty.¹⁵¹ The admonishments are largely boilerplate – taken directly from Rule 11 or a similar state statute.¹⁵²

A solution that would not impose an unmanageable burden on the trial judge but would return to the *Kercheval* notion lies in one additional dialogue between the defendant and the judge to the boilerplate admonishments. Such a colloquy would have to ask the defendant if he is aware that he is pleading guilty to a sexually violent offense; that such offense may trigger a civil commitment proceeding to be initiated upon him prior to his release; that if a jury or judge determines that the defendant at that time is a sexually violent person and in need of civil commitment he will be indeterminately committed.

While this colloquy will take more time than its predecessor admonishments, admonishing the class of defendants who face potential SVP civil commitment does not impose an unmanageable burden. The class is very limited – to those individuals pleading guilty to qualifying sexually violent offenses. Most SVP statutes explicitly define those qualifying sexually violent offenses so identification of the class to add an admonishment is very manageable for the judiciary. The burden placed on the judiciary is miniscule in comparison to the severe risk that the defendants face after pleading guilty to a sexually violent offense.

¹⁵⁰ Fruchtman v. Kenton, 531 F.2d 946 (9th Cir. 1976) (quoting U.S. v. Sherman, 474 F.2d 303, 305 (9th Cir. 1973)).

¹⁵¹ See *supra*, nn. 28, 79. For practice implementation of Rule 11, see Fruchtman, 531 F.2d at 948 (“It is equally clear that administration of the rule requires the development of some limiting guide to define the nature of the consequences of which a defendant must be advised so that the requirements of the rule shall have been met. The common distinction drawn is the distinction between consequences characterized as ‘direct’ and those characterized as ‘collateral.’”).

¹⁵² See *supra*, n. 31; 725 Ill. Comp. Stat. 5/113-4(c).

The Constitution requires that every effort be made to ensure that defendants do not unknowingly relinquish basic protections that the Framers thought indispensable for a fair trial.¹⁵³ As *Bellamy* aptly stated, “the failure of either the court or defense counsel to inform defendant that a possible consequence of a plea to a predicate offense under the Act is future confinement for an indefinite period deprives the defendant of information needed to make a knowing and voluntary plea.”¹⁵⁴ Assuredly, this simple additional colloquy to a specific class of individuals would result in a greater likelihood that trial courts accept waivers that are truly intelligently made and constitutionally sound. The Constitution demands this minor extra effort in order to protect the constitutional rights of defendants in the United States.

¹⁵³ *Shiro v. Landrigan*, 127 S. Ct. 1933, 1947 (2007)(quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 241-242 (1973)).

¹⁵⁴ *Bellamy*, 835 A.2d 1231.