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Joanna C. Peck
New York Law School

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JOANNA C. PECK

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ABOUT THE AUTHOR: Joanna C. Peck received her J.D. from New York Law School in February of 2012.

I. INTRODUCTION

When faced with the risk of losing one's own life and liberty, a plea bargain provides a defendant with reasonable certainty of the outcome and sentence as opposed to the uncertainty, risk, and gamble that exists in pursuing a trial.[1] The U.S. Constitution provides defendants with critical protections, including the right to due process.[2] Pursuant to the Fifth Amendment, due process requires that a defendant knowingly, intelligently, and voluntarily enter his plea agreement.[3] In exchange for the certainty of a sentence pursuant to a plea bargain, a defendant waives several fundamental constitutional rights, including the right to a trial by jury, the right to confront his or her accusers, the right to raise a defense, and the right to assistance of counsel.[4] In New York, a defendant may also be required as part of his plea agreement to waive his right to appeal the sentence.[5]

New York court sentencing judges must exercise sound judicial discretion with respect to plea agreements and should consider such factors as the "[i]ntegrity of the criminal justice system in relation to the plea bargaining process as well as in relation to its protective, retributive, deterrent and rehabilitative aspects."[6]

> 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 . . . . Although the court is not required to engage in any particular litany when allocuting the defendant, due process requires that the

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1. People v. McConnell, 49 N.Y.2d 340, 346 (1980) ("[A] defendant who pleads guilty waives a number of valuable constitutional rights in order to obtain reasonable assurance of certainty rather than gamble the possibility of a not guilty verdict against the heavier punishment, the greater anxiety and, in some cases at least, the greater expense, involved in a full trial."). The Oscar-winning movie *Heaven Can Wait* provides a poignant illustration of the dire consequences of making a decision based on incomplete information. The film is about an angel who chooses certainty over chance for an individual he is responsible for watching over. *See* Heaven Can Wait (Paramount Pictures 1978). Believing that the film's protagonist, Joe Pendelton (played by Warren Beatty), will meet his death in a horrifying and painful head-on collision while biking through a mountain tunnel, the angel brings on Joe's death moments before the accident. *Id*. The angel elected the certainty of death over taking the chance that Joe would severely suffer in the accident. *Id*. The angel's belief that Joe would have been killed, however, was faulty. In fact, Joe would have survived the accident and would not have been injured. *Id*. The angel's mistake led to troublesome consequences for the protagonist. *Id*. Like the angel in *Heaven Can Wait*, who did not have the stomach to gamble the risk of Joe dying in a horrible accident, defendants pursue similar opportunities in the plea bargain process in order to avoid the potential for "heavier punishment, the greater anxiety and . . . the greater expense, involved in a full trial." *McConnell*, 49 N.Y.2d at 346.

2. U.S. Const. amend. V.

3. Duperry v. Kirk, 563 F. Supp. 2d 370, 385 (D. Conn. 2008) ("It is axiomatic that a defendant pleading guilty must do so knowingly, intelligently, and voluntarily in order to pass constitutional muster. That is because, by pleading guilty, a defendant accepts significant consequences and waives several important constitutional rights—namely, the right against self-incrimination, the right to confront one's accusers, and the right to a trial by jury." (citing Boykin v. Alabama, 395 U.S. 238, 243 (1969))).

4. *Boykin*, 395 U.S. at 242–44.

5. People v. Seaberg, 74 N.Y.2d 1, 5 (1989).

6. *McConnell*, 49 N.Y.2d at 346.

> record must be clear that the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant . . . .[7]

In considering whether to accept a plea agreement, a defendant balances the benefit of gaining certainty of his punishment obtained through a plea against the risk of waiving several constitutional rights and the probability and likely outcome of being found guilty at trial.[8] It is axiomatic that the plea bargain process hinges on a defendant having "a reasonable assurance of certainty" of the outcome of the plea agreement.[9] Additionally, sentencing conditions must be consistent with due process requirements.[10] Conditions associated with guilty pleas must "not amount to overreaching or a denial of a defendant's entitlement to fundamental fairness."[11] But when a defendant enters into a plea bargain with incomplete information in violation of his due process rights, he can assert that his plea bargain was invalid because it did not meet fundamental due process requirements.[12]

In *People v. Harnett*, the New York Court of Appeals (the "Court of Appeals") held that David Harnett's plea to the crime of sexual abuse in the first degree was made knowingly, voluntarily, and intelligently, even though he was not informed that entering a plea would subject him to the provisions of New York's Sex Offender Management and Treatment Act (SOMTA) and potential civil confinement after his prison term.[13] The defendant, David M. Harnett ("Harnett"), asserted that the trial court did not advise him of this prior to his plea, and therefore violated his right to due process.[14] SOMTA provides that a defendant could be subject to civil

7. People v. Catu, 4 N.Y.3d 242, 245 (2005) (citations omitted) (internal quotation marks omitted).

8. *McConnell*, 49 N.Y.2d at 346 ("[A] defendant who pleads guilty waives a number of valuable constitutional rights in order to obtain reasonable assurance of certainty rather than gamble the possibility of a not guilty verdict against the heavier punishment, the greater anxiety and, in some cases at least, the greater expense, involved in a full trial."). These constitutional rights include "[t]he privilege against compulsory self-incrimination guaranteed by the *Fifth Amendment* and applicable to the states through the *Fourteenth Amendment*[,] . . . the right to trial by jury[,] . . . [and] the right to confront one's accusers." 1 New York Criminal Practice § 12.07(5) (2d ed. 2011).

9. *McConnell*, 49 N.Y.2d at 346; *see also Seaberg*, 74 N.Y.2d at 7 ("The plea bargain . . . enables the parties to avoid the delay and uncertainties of trial and appeal and permits swift certain punishment of law violators with sentences tailored to the circumstances of the case at hand . . . ." (citations omitted)).

10. *See* People v. Parker, 711 N.Y.S.2d 656, 661 (4th Dep't 2000).

11. People v. Miller, 434 N.Y.S.2d 36, 37 (2d Dep't 1980) (finding that the defendant's rights were not violated after he accepted an offer for a concurrent sentence for two felony counts in exchange for a withdrawal of an omnibus motion and entering a guilty plea).

12. *See* Padilla v. Kentucky, 130 S. Ct. 1473 (2010).

13. *See* People v. Harnett, 16 N.Y.3d 200 (2010). Though the specific charges and acts are not available, pursuant to section 130.65 of New York Penal Law, sexual abuse in the first degree is defined as follows:

> A person is guilty of sexual abuse in the first degree when he or she subjects another person to sexual contact: 1. By forcible compulsion; or 2. When the other person is incapable of consent by reason of being physically helpless; or 3. When the other person is less than eleven years old.

N.Y. Penal Law § 130.65 (McKinney 2011).

14. *Harnett*, 16 N.Y.3d at 204.

confinement or strict and intensive supervision after he has served a prison term for a sex offense.[15] The Court of Appeals concluded that the possibility of civil confinement under SOMTA proceedings was a collateral and not a direct consequence of Harnett's plea and, therefore, that the trial court had no requirement to disclose this to him in the plea bargain process.[16] The Court of Appeals also found that in this instance, notions of fundamental fairness did not apply because the defendant did not make a factual showing that his lawyer did not disclose SOMTA to him and that SOMTA would have been a critical factor in his decision to enter his guilty plea.[17]

This case comment makes three contentions. First, the court incorrectly concluded that SOMTA was a collateral consequence of entering a guilty plea to a sex offense crime because the court ignored the language and intent of SOMTA, which provides that criminal and civil proceedings for sex offenders are to follow an "integrated approach."[18] Second, irrespective of the classification of the consequence of SOMTA as either "collateral" or "direct," the U.S. Supreme Court's holding in *Padilla v. Kentucky* challenges the use of this categorical approach and raises constitutional considerations in determining mandatory disclosures by a trial court to criminal defendants.[19] Third, the court's consideration of fundamental fairness both underestimates the potential severity and weight of SOMTA proceedings in a defendant's decision to enter a plea bargain and puts the onus on the defendant to anticipate the impact of SOMTA as a consequence of his voluntary plea.[20] Based on these contentions, this case comment argues that the court incorrectly held that the defendant's plea in *Harnett* was valid and that the trial court did not violate his right to due process. A defendant's constitutional right to due process is violated when he enters a guilty plea in exchange for a sentence without knowing that he potentially is subject to such severe consequences, including the potential for indefinite civil confinement or strict supervision, as a result of SOMTA's proceedings.[21]

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15. *See generally* N.Y. Mental Hyg. Law § 10.01 (McKinney 2011).

16. *Harnett*, 16 N.Y.3d at 206–08. The court rather strangely suggests that the defendant may have won his argument had he "moved to withdraw his plea" by establishing that he did not know about SOMTA, and that had he known about SOMTA, it "would have been a significant factor in the evaluation of a plea bargain." *Id.*

17. *Id.* at 208.

18. Mental Hyg. § 10.01(a).

19. Padilla v. Kentucky, 130 S. Ct. 1473, 1481–82 (2010).

20. *Harnett*, 16 N.Y.3d. at 203–07.

21. *Id.* at 206. "By pleading guilty, defendant exposed himself to the possibility that he would be confined after expiration of his prison sentence, *perhaps indefinitely*." *Id.* at 210 (Ciparick, J., dissenting) (emphasis added); *see also* State v. Suggs, 920 N.Y.S.2d 644, 647 (Sup. Ct. N.Y. County 2011) ("Involuntary civil confinement [pursuant to Article 10] may entail indefinite confinement, [which] could be a more intrusive exercise of state power than incarceration following a criminal conviction." (alterations in original) (internal quotation mark omitted) (citing Mental Hygiene Legal Serv. v. Spitzer, No. 07 Civ. 2935 (GEL), 2007 U.S. Dist. LEXIS 85163, at *21 (S.D.N.Y. Nov. 16, 2007), *aff'd sub nom.* Mental Hygiene Legal Serv. v. Paterson, No. 07-5548-cv, 2009 U.S. App. LEXIS 4942 (2d Cir. Mar. 4, 2009)));

II. *HARNETT*'S PRODEDURAL HISTORY AND THE COURT'S RATIONALE

On March 13, 2008, the New York State Supreme Court, Schenectady County (the "County Court"), issued a judgment against Harnett, convicting him of the crime of sexual abuse in the first degree based on his plea of guilty.[22] In exchange for a guilty plea, Harnett waived his constitutional rights to due process, including the right to a trial by jury, the right to confront his accusers, the right to raise a defense, and the right to assistance of counsel.[23] He also waived his right to appeal and was sentenced to a seven-year prison term, with ten years of post-release supervision.[24] The County Court also entered a fifteen-year order of protection in favor of the victim.[25] Harnett appealed this judgment to the Supreme Court of New York, Appellate Division, Third Department (the "Third Department"), contending that his plea agreement should be invalid because he did not knowingly, intelligently, or voluntarily enter the plea.[26] Harnett asserted that the trial court did not advise him prior to his plea that his admission to a sex offense conviction would automatically subject him to the provisions of SOMTA.[27] SOMTA proceedings provide that Harnett could be subject to civil confinement or strict and intensive supervision after he has served his prison term.[28] The Third Department concluded that the disclosure of SOMTA proceedings was a collateral and not a direct consequence of his plea and, therefore, the trial court had no obligation or requirement to disclose SOMTA proceedings to Harnett in the plea bargain process.[29] The Third Department's conclusion was based on the finding that SOMTA proceedings were "entirely separate from and independent of the original criminal action," and that, because factors specific to a defendant were in the SOMTA proceedings, it could not "be reasonably said that the potential for the future civil confinement or intensive supervision of defendant is an immediate, definite or automatic result of his guilty plea."[30]

Defendant appealed to the New York Court of Appeals on the grounds that he did not enter into the plea agreement knowingly, intelligently, and voluntarily because

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People v. Nieves, 896 N.Y.S.2d 644, 593 n.2 (Sup. Ct. N.Y. County 2010) ("Article 10 of the Mental Hygiene Law, enacted by the Legislature in 2007, authorizes certain convicted sex offenders to be subject to indefinite civil confinement in a secure mental health facility or indefinite strict and intensive supervision and treatment in the community upon a finding by a jury that such an offender suffers from a 'Mental Abnormality' as defined by the statute.").

22. People v. Harnett, 894 N.Y.S.2d 614, 615 (3d Dep't 2010), *aff'd*, 16 N.Y.3d 200 (2011).

23. Boykin v. Alabama, 395 U.S. 238, 242–44 (1969).

24. *Harnett*, 894 N.Y.S.2d at 615.

25. *Id*.

26. *Id*.

27. *Id*.

28. *Id*.

29. *Id*. at 615–16.

30. *Id*. at 616.

the trial court failed to disclose that he would be subject to SOMTA proceedings before he entered his plea.[31] Under SOMTA, any person who is qualified as a detained sex offender pursuant to New York Mental Hygiene Law section 10.03(g) is subject to the provisions of the statute.[32] SOMTA proceedings provide that individuals convicted of a sex offense could be subject to indefinite confinement or strict and intensive supervision.[33]

Harnett argued that the trial court's failure to inform him that he would be subjected to SOMTA proceedings as a result of his conviction "invalidated his plea because (1) they are direct consequences of the plea, and (2) whether direct or

31. People v. Harnett, 16 N.Y.3d 200, 204 (2011).

32. Section 10.03(g) of the New York Mental Hygiene statute provides:

> "Detained sex offender" means a person who is in the care, custody, control, or supervision of an agency with jurisdiction, with respect to a sex offense or designated felony, in that the person is either:
>
> (1) A person who stands convicted of a sex offense as defined in subdivision (p) of this section, and is currently serving a sentence for, or subject to supervision by the division of parole, whether on parole or on post-release supervision, for such offense or for a related offense;
>
> (2) A person charged with a sex offense who has been determined to be an incapacitated person with respect to that offense and has been committed pursuant to article seven hundred thirty of the criminal procedure law, but did engage in the conduct constituting such offense;
>
> (3) A person charged with a sex offense who has been found not responsible by reason of mental disease or defect for the commission of that offense;
>
> (4) A person who stands convicted of a designated felony that was sexually motivated and committed prior to the effective date of this article;
>
> (5) A person convicted of a sex offense who is, or was at any time after September first, two thousand five, a patient in a hospital operated by the office of mental health, and who was admitted directly to such facility pursuant to article nine of this title or section four hundred two of the correction law upon release or conditional release from a correctional facility, provided that the provisions of this article shall not be deemed to shorten or lengthen the time for which such person may be held pursuant to such article or section respectively; or
>
> (6) A person who has been determined to be a sex offender requiring civil management pursuant to this article.

N.Y. Mental Hyg. Law § 10.03(g) (McKinney 2011). A "sex offense" is defined in section 10.03(p):

> "Sex offense" means an act or acts constituting: (1) any felony defined in article one hundred thirty of the penal law, including a sexually motivated felony; (2) patronizing a prostitute in the first degree as defined in section 230.06 of the penal law, incest in the second degree as defined in section 255.26 of the penal law, or incest in the first degree as defined in section 255.27 of the penal law; (3) a felony attempt or conspiracy to commit any of the foregoing offenses set forth in this subdivision; or (4) a designated felony, as defined in subdivision (f) of this section, if sexually motivated and committed prior to the effective date of this article.

Id. § 10.03(p).

33. *Id.* § 10.01. For an explanation of confinement and strict and intensive supervision, see *infra* notes 36–43 and accompanying text.

collateral, they are so important that their nondisclosure rendered the plea proceedings fundamentally unfair."[34] The Court of Appeals determined that the trial court's failure to inform Harnett that he would be subject to the provisions of SOMTA and face potential civil confinement or strict and intensive supervision upon his conviction for the crime of sexual abuse in the first degree did not automatically invalidate his plea.[35]

Specifically, SOMTA proceedings provide that multidisciplinary staff conduct a preliminary review of a detained sex offender prior to his release from prison in order to determine if the respondent should be referred to a case review team for further evaluation.[36] The multidisciplinary staff can use the detained sex offender's records, including his criminal history and details of the sex offense that constituted his sex offense.[37] Upon referral, the case review team can also review the same records in order to determine if the detained sex offender requires civil management.[38] Civil management includes being either placed in a "secure treatment facility" operated by the Office of Mental Health or put under strict and intensive supervision and treatment by the Division of Parole and the Office of Mental Health within the community.[39] The New York attorney general may also elect to file a sex offender civil management petition in the respective court.[40] If the case review team recommends civil management or the attorney general files a civil management petition, the supreme court or county court conducts a hearing without a jury to "determine whether there is probable cause to believe that the respondent is a sex offender requiring civil management."[41] If probable cause exists, the same court will "conduct a jury trial to determine whether the respondent is a detained sex offender

34. *Harnett*, 16 N.Y.3d at 248.

35. *Id*. at 203.

36. Mental Hyg. § 10.05(d).

37. *Id*.

38. *Id*. § 10.05(c)–(e).

39. *See DOCS Fact Sheet: SOMTA/Civil Management*, State of N.Y. Dep't of Corr. Servs. (Dec. 2007), http://www.doccs.ny.gov/FactSheets/PDF/somta.pdf [hereinafter *DOCS Fact Sheet*]. A "secure treatment facility" is defined in section 10.03(o) as

> a facility or a portion of a facility, designated by the commissioner, that may include a facility located on the grounds of a correctional facility, that is staffed with personnel from the office of mental health or the office . . . for people with developmental disabilities for the purposes of providing care and treatment to persons confined under this article, and persons defined in paragraph five of subdivision (g) of this section. Personnel from these same agencies may provide security services, provided that such staff are adequately trained in security methods and so equipped as to minimize the risk or danger of escape.

Mental Hyg. § 10.03(o).

40. *Id*. § 10.06(a). This must include "[a] statement or statements alleging facts of an evidentiary character tending to support the allegation that the respondent is a sex offender requiring civil management." *Id.*

41. *Id*. § 10.06(g), (k).

who suffers from a 'mental abnormality'" based on "clear and convincing evidence"[42] and, if so, the court will consider "whether the respondent is a dangerous sex offender requiring confinement or a sex offender requiring strict and intensive supervision."[43]

First, the Court of Appeals found Harnett's argument that SOMTA proceedings are a direct consequence "without merit" because being subjected to SOMTA proceedings was a collateral, not a direct, consequence of Harnett's guilty plea.[44] Second, the Court of Appeals determined that the case on which Harnett relied in asserting his fairness argument was distinguishable from his case because Harnett did not put forth facts on the record that indicated there was any "significant likelihood" that he would be subject to confinement under SOMTA proceedings.[45]

In concluding that being subjected to SOMTA proceedings was a collateral consequence of his plea, the Court of Appeals first observed that courts are required to disclose direct consequences of guilty pleas to defendants, but are not obligated to disclose collateral consequences.[46] The Court of Appeals defined direct consequences as "those that have a 'definite, immediate and largely automatic effect on defendant's punishment.' Consequences that are 'peculiar to the individual's personal circumstances and . . . not within the control of the court system' have been held to be collateral."[47] The Court of Appeals looked to its decision in *People v. Gravino* for guidance on what constitutes a collateral consequence.[48] In *Gravino*, the New York Court of Appeals held that the Sex Offender Registration Act (SORA) was collateral.[49] Drawing analogies between SOMTA and SORA, the court in *Harnett* reasoned that both were civil statutes "designed to prevent a future crime," not penal statutes designed to punish a past crime, and that both SOMTA and SORA involved

42. *Id.* § 10.07(a). "The jury, or the court if a jury trial is waived [by respondent], shall determine by clear and convincing evidence whether the respondent . . . suffers from a mental abnormality. . . . A determination . . . must be by unanimous verdict." *Id.* §10.07(d). The respondent is released if a unanimous verdict is not reached. If the jury is unable to reach a unanimous verdict, a second trial is scheduled and the same procedure is followed. *Id.* § 10.07(e).

43. *Id.* §10.07(f).

> If the court finds by clear and convincing evidence that the respondent has a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that the respondent is likely to be a danger to others and to commit sex offenses . . . , the respondent shall be committed to a secure treatment facility for care, treatment, and control until such time as he or she no longer requires confinement.

Id.

44. People v. Harnett, 16 N.Y.3d 200, 205–06 (2011).

45. *Id.* at 206–07.

46. *Id.* at 205.

47. *Id.* (alteration in original) (citations omitted) (quoting People v. Ford, 86 N.Y.2d 397, 403 (1995)).

48. *Id.* at 206.

49. *Id.*; People v. Gravino, 14 N.Y.3d 546 (2010). SORA requires sex offenders, as defined as "any person who is convicted of" certain sex offenses identified in the statute, to register as a sex offender. *See* N.Y. Correct. Law § 168-a (McKinney 2011).

"decisions and recommendations . . . made, after the time of a guilty plea, by administrative agencies not under the court's control."[50] The Court of Appeals also reasoned that SOMTA was not an "automatic" consequence of a defendant's guilty plea because the majority of sex offenders ultimately are not found to be subjected to SOMTA's consequences of civil confinement and intensive supervision.[51] To support this contention, the Court of Appeals considered statistics from a 2010 report that found that approximately "six percent of those detained sex offenders . . . were or were likely to be subjected to civil confinement" under SOMTA.[52] Therefore, the Court of Appeals concluded that the consequences of SOMTA are collateral and not direct.[53]

Second, the Court of Appeals considered whether "fundamental fairness" nevertheless warranted a reversal.[54] The court analogized Harnett's situation to that of the defendant in *State v. Bellamy*, in which the New Jersey Supreme Court held "that fundamental fairness requires that prior to accepting a plea to a predicate offense, the trial court must inform a defendant of the possible consequences under the [Sexually Violent Predator] Act."[55] In *Bellamy*, the defendant had served a significant portion of his sentence for a sex crime at the time of his guilty plea, with only a short time remaining before his release.[56] A week before he was released, however, he discovered that he was going to be civilly committed under New Jersey's Sexually Violent Predator Act (SVPA), a statute similar to SOMTA.[57] The *Bellamy* court found that the SVPA was collateral because the legislative intent was regulatory, not punitive, and the consequences of the statute did not "automatically flow from the conviction."[58] Despite this finding, the *Bellamy* court concluded that

> fundamental fairness requires that the trial court inform a defendant of the possible consequences under the Act. A defendant who has committed a predicate offense may be faced with commitment under the Act for a period in excess of his or her sentence. [New Jersey rules] require[] the court to determine whether a defendant clearly understands "the nature of the charge and the consequences of the plea."[59]

50. *Harnett*, 16 N.Y.3d at 206 (citation omitted).

51. *Id*.

52. *Id*. at 205 (citing N.Y. State Office of the Att'y Gen., A Report on the 2007 Law That Established Civil Management for Sex Offenders in New York State (2010), http://www.ag.ny.gov/bureaus/sexual_offender/pdfs/April2010YearlyReport.pdf).

53. *Id*. at 206.

54. *Id*. at 206–08.

55. *Id*.; State v. Bellamy, 835 A.2d 1231 (N.J. 2003).

56. *Bellamy*, 835 A.2d at 1234.

57. *Id*. at 1233–35; *see also* N.J. Stat. Ann. § 30:4-27.24 (West 2011).

58. *Bellamy*, 835 A.2d at 1237–38.

59. *Id*. at 1238.

In *Harnett*, the Court of Appeals distinguished *Bellamy* from Harnett's case, observing that, unlike the defendant in *Bellamy*, Harnett has not been "made the subject of a SOMTA proceeding," and that he did not put forth facts on the record that indicated that there was any "significant likelihood that that would occur."[60] The Court of Appeals noted that notions of fairness provide that some pleas may be entered into "involuntarily" because, whether collateral or not, the consequences of the plea may be "of such great importance to [the defendant] that he would have made a different decision had that consequence been disclosed."[61]

Based on this reasoning, the Court of Appeals concluded that SOMTA is a collateral consequence to Harnett's plea, and the facts did not suggest that fundamental fairness was at risk here.[62] The Court of Appeals, therefore, affirmed the Third Department's decision holding that Harnett's plea agreement was valid.[63]

The dissent, however, disagreed with the majority on several grounds.[64] First, the dissent found that the consequences of SOMTA, which could result in confinement longer than a defendant's prison term, may constitute "potentially greater deprivation[s] of liberty than the criminal sentence imposed," making it more like a direct consequence.[65] Second, the dissent argued that trial courts have "a constitutional obligation to ensure that a defendant has a 'full understanding of what the plea connotes and its consequences. [D]ue process requires that the record must be clear that the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'"[66] The dissent also contended that, while SOMTA may be a collateral consequence, a defendant cannot "knowingly and voluntarily" waive his "right to a trial if he does not know the full extent of confinement that might result from his conviction."[67] Third, the dissent disagreed with the majority's logic that disclosure is not required simply because SOMTA proceedings take place under a separate administrative process.[68] As the dissent explained, this logic does not hold because it is the "initial conviction that determines a defendant's eligibility for that evaluative process"—that is, it is a defendant's initial conviction that triggers SOMTA proceedings.[69] Fourth, the dissent also took issue with the majority's analysis of the probability that SOMTA's civil confinement provisions would be applied to Harnett.[70] The dissent emphasized that "*any chance*

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

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

62. *Id*. at 206–08.

63. *Id*.

64. *Id*. at 208–10 (Ciparick, J., dissenting).

65. *Id*. at 209 (citing People v. Harnett, 894 N.Y.S.2d 614 (3d Dep't 2010)).

66. *Id*. (alteration in original) (citation omitted) (quoting People v. Ford, 86 N.Y.2d 397, 402–03 (1995)).

67. *Id*.

68. *Id*.

69. *Id*.

70. *Id*. at 209–10.

that a defendant will face further confinement as a result of his plea should be made known to him at the time the plea is taken."[71] Therefore, consistent with *Bellamy*, the dissent found that notions of "fundamental fairness require[] the defendant's knowledge of that consequence," even though being subjected to SOMTA proceedings is collateral.[72]

III. *HARNETT* COURT'S HOLDING CONTRAVENES CONSTITUTIONAL DUE PROCESS REQUIREMENTS

The Court of Appeals's holding that SOMTA proceedings are a collateral consequence of entering a plea agreement to sexual offenses and, therefore, are not required to be disclosed to criminal defendants, contravenes the constitutional requirement under the Fifth Amendment that a defendant enter a plea knowingly, intelligently, and voluntarily.[73] This case comment makes three contentions. First, the court incorrectly concluded that SOMTA was a collateral, not a direct, consequence of entering a guilty plea to a sex offense because the court failed to consider the language and intent of SOMTA, which provides that criminal and civil proceedings for sex offenders are to follow an "integrated approach."[74] In so holding, the court failed to sufficiently account for the close relationship between the criminal and civil proceedings and underestimated the significance of statistical data regarding the possibility of civil confinement or strict and intensive supervision for defendants convicted of sex offenses. Further, the court relied upon *Gravino* to substantiate its claim that being subject to the provisions of SOMTA is a collateral consequence that can be readily distinguished from the case in *Harnett*.

Second, the U.S. Supreme Court's decision in *Padilla* challenges the *Harnett* court's use of a categorical methodology for determining disclosures to criminal defendants, raising important constitutional concerns regarding information that must be made available to defendants to ensure that plea bargains are entered into knowingly, intelligently, and voluntarily. Specifically, civil confinement and strict and intensive supervision, like deportation in *Padilla*, are significant because they deprive a defendant of his liberty. The *Harnett* court also did not properly apply notions of fundamental fairness, as articulated in *Bellamy*, in deciding whether the consequences under SOMTA of a guilty plea must be disclosed to Harnett.

IV. THE *HARNETT* COURT'S CONSEQUENTIAL ANALYSIS: DIRECT OR COLLATERAL?

In *Harnett*, the Court of Appeals concluded that SOMTA is a collateral consequence because it is civil and not penal, it is administered by an agency separate

71. *Id*. at 209 n.1 (emphasis added).

72. *Id*. at 209–10 .

73. Boykin v. Alabama, 395 U.S. 238, 243–44 (1969).

74. N.Y. Mental Hyg. Law § 10.01(a) (McKinney 2011).

from the courts, and its application to Harnett was "far from automatic."[75] The Court of Appeals failed to properly consider the language and purpose of SOMTA.

A. Legislative Intent: The State's "Integrated Approach"

It is well settled that New York courts find that "the statutory text . . . is the clearest indicator of legislative purpose."[76] Contrary to the Court of Appeals's findings, the language of SOMTA makes clear that the legislature did not intend for the criminal and civil process to be separate and distinct as applied to sex offenders.[77] SOMTA section 10.01(a) states that

> recidivistic sex offenders pose a danger to society that should be addressed through comprehensive programs of treatment and management. Civil and criminal processes have distinct but overlapping goals, and both should be part of an *integrated* approach that is based on evolving scientific understanding, flexible enough to respond to current needs of individual offenders, and sufficient to provide meaningful treatment and to protect the public.[78]

The goal of SOMTA is clear—to protect society from sex offenders who might commit offenses again.[79] The method by which SOMTA reaches this goal is an "integrated approach" between the civil and criminal proceedings.[80]

The ordinary meaning of the term "integrated" sheds light on how a court should interpret the term "integrated approach." Integrated means: "Combined into a whole; united; undivided. Also of a personality in which the component elements combine harmoniously. . . . Or [u]niting in one system several constituents previously regarded as separate."[81] With respect to this "integrated approach," SOMTA section 10.01(e) further states that, "[i]deally, effective risk assessment should begin to occur prior to sentencing in the criminal process, and it should *guide* the process of civil commitment."[82] By failing to analyze the language of the statute, the plain meaning of "integrated," and its use within section 10.01(e) of SOMTA, the Court of Appeals ignored the legislature's intent that criminal and civil proceedings involving SOMTA should be united "in one system."[83]

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75. *See Harnett*, 16 N.Y.3d at 206.

76. *In re* M.B., 6 N.Y.3d 437, 447 (2006).

77. Mental Hyg. § 10.01(a)–(b).

78. *Id.* § 10.01(a) (emphasis added).

79. S. 3318 (N.Y. 2007), 2007 Legis. Bill Hist. N.Y. S.B. 3318 (LEXIS) (sponsor's memorandum in support).

80. Mental Hyg. § 10.01(a).

81. Oxford English Dictionary 1065 (2d ed. 1989).

82. Mental Hyg. § 10.01(e) (emphasis added).

83. *See supra* notes 76–82 and accompanying text.

B. Gravino *Is Distinguishable from* Harnett

In taking a categorical approach to SOMTA, the Court of Appeals also incorrectly relied on its prior holding in *Gravino*.[84] The *Gravino* court concluded that a defendant's guilty plea was valid despite the fact that she was not informed of SORA prior to entering her plea because SORA was a collateral consequence.[85] Gravino contended that "her guilty plea was involuntary because the judge did not tell her that she would have to register as a sex offender" until after she entered her guilty plea and was sentenced.[86] She contended that SORA was a direct consequence of her guilty plea due to the significance of "the ramifications of being identified as a sex offender."[87] The court found that SORA was civil in nature and not part of the penal phase of sentencing.[88] Similarly, the *Harnett* court reasoned that SOMTA is a civil, not penal, statute "designed to prevent future crime," and that SOMTA relies on administrative agencies outside a court's control.[89] SORA and SOMTA, however, are readily distinguishable from each other in two ways, thereby further challenging the Court of Appeals's reasoning.

First, the language of SOMTA clearly provides that the civil and criminal proceedings are to follow an integrated approach.[90] The language that the legislature chose for SORA, however, does not include or reference any type of relationship between the civil and penal phase of a defendant's proceedings.[91] Second, in contrast to SORA, SOMTA involves the potential for a defendant's liberty to be taken away from him indefinitely.[92] While a released sex offender is required to register with state authorities pursuant to SORA's requirements[93] and, as a result, may suffer difficulties matriculating into society because of the public stigma associated with such registration, his liberty has not been taken away from him.[94] The Court of Appeals's failure to acknowledge these critical differences between the two statutes

84. People v. Harnett, 16 N.Y.3d 200, 205–06 (2011).

85. People v. Gravino, 14 N.Y.3d 546, 554–59 (2010).

86. *Id*. at 551.

87. *Id*. at 555–56.

88. *Id*. at 556.

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

90. N.Y. Mental Hyg. Law § 10.01(a) (McKinney 2011).

91. *Compare* N.Y. Correct. Law § 168 (McKinney 2011) (SORA does not use the term "integrate"), *with* Mental Hyg. § 10.01(a) ("Civil and criminal processes have distinct but overlapping goals, and both should be part of an *integrated approach* that is based on evolving scientific understanding, flexible enough to respond to current needs of individual offenders, and sufficient to provide meaningful treatment and to protect the public." (emphasis added)).

92. *Harnett*, 16 N.Y.3d at 208–09 (Ciparick, J., dissenting).

93. *See id.* at 203–06 (majority opinion).

94. *See generally* People v. Gravino, 14 N.Y.3d 546 (2010).

further calls into question the court's reliance on *Gravino* in holding that confinement under SOMTA is a collateral consequence of a guilty plea to a sex offense.[95]

C. Treatment and the Criminal-Civil Relationship

SOMTA provides that the criminal justice system should offer sex offenders appropriate treatment while incarcerated.[96] By ignoring the language and legislative intent of SOMTA, the court overlooked the relationship between the sex offender treatment administered while the defendant is incarcerated within the criminal system and the outcome of the civil proceedings under SOMTA. Such a relationship further supports the contention that consequences of the civil proceedings under SOMTA are not separate and independent from the criminal proceedings.[97] According to the New York State Department of Correctional Services (DOCS) Sex Offender Counseling and Treatment Guidelines,

> [t]he Department supports and conducts sex offender counseling and treatment programs under the premise that sex offenders can change and that sexual re-offending behavior can be reduced through counseling and treatment. If an inmate is referred for review under Mental Hygiene Law, Article 10, successful completion of the [Sex Offender Counseling and Treatment Program] will be considered during the evaluations which take place as part of that process and *may be viewed as a factor in the inmate's favor regarding the need for civil management*.[98]

The objectives of sex offender treatment are to reduce the likelihood of recidivism and protect the public.[99] Although New York State admits that there are mixed results regarding the effectiveness of treatment, it notes important lessons, including that "treatment can be successful if it is geared toward the type of abuse and reasons behind it."[100] Furthermore, "SOMTA significantly enhanced the caliber of the treatment programs DOCS must provide to all sex offenders . . . . The expanded programs must aim to reduce the likelihood of reoffending by helping those inmates to control the chain of their own behavior that leads to sexual offending."[101]

Pursuant to SOMTA, the treatment a sex offender receives while incarcerated is included in the relevant records used by the multidisciplinary staff in determining

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

96. Mental Hyg. § 10.01(f).

97. *See id*.

98. N.Y. State Dep't of Corr. Servs., Sex Offender Counseling and Treatment Program Guidelines 1, 5 (2008) [hereinafter Guidelines] (emphasis added), http://www.docs.state.ny.us/ProgramServices/SOCTP_Guidelines_Nov08.pdf.

99. Mental Hyg. § 10.01(a)–(f).

100. *"Myths and Facts" Current Research on Managing Sex Offenders April 2008*, N.Y. State Division of Crim. Just. Services, http://criminaljustice.ny.gov/nsor/som_mythsandfacts.htm (last visited Jan. 17, 2011).

101. *DOCS Fact Sheet*, *supra* note 39, at 1–2.

whether a sex offender should be recommended to the case review team.[102] The case review team is also permitted to use this information in determining whether civil management should be recommended.[103]

The fact that the treatment a sex offender receives during the criminal phase is used by the multidisciplinary staff in determining whether the respondent should be referred to a case review team, as well as used by the case review team to determine whether the respondent requires civil management, illustrates the integrated relationship between civil and criminal proceedings. A defendant's progress, or lack thereof, during treatment while criminally incarcerated, therefore, influences recommendations for civil management after incarceration.[104] Though the treatment a defendant receives during the penal phase may not be under the control of the court, the Court of Appeals failed to account for the interrelationship between the criminal proceedings and civil proceedings due to this treatment. Furthermore, this interrelationship is consistent with the legislative intent of SOMTA to provide an "integrated approach" to the "[c]ivil and criminal processes."[105] Accordingly, the criminal proceedings have a direct impact on the civil proceedings under SOMTA.[106]

Also, although confinement or intensive and strict supervision that ultimately may be required under SOMTA proceedings are peculiar to the individual, SOMTA's text makes clear that *all* detained sex offenders are automatically subject to the provisions of SOMTA and, thus, the possibility of indefinite civil confinement.[107] In addition to receiving treatment during incarceration, these provisions require that DOCS notify the New York State Office of Mental Health (OMH) of the respondent's pending discharge from prison.[108] DOCS then discloses all of the respondent's relevant records to the multidisciplinary staff and case review team, including sex treatment he received while incarcerated.[109] The OMH interviews the respondent to determine the offender's dangerousness, with civil confinement and

102. Mental Hyg. § 10.05(d) ("[S]uch staff shall review and assess relevant medical, clinical, criminal, or institutional records, actuarial risk assessment instruments or other records and reports, including records and reports provided by the district attorney of the county where the person was convicted.").

103. *Id.* § 10.05(e) ("Upon such referral, the case review team shall review relevant records, including those described in subdivisions (c) and (d) of this section.").

104. *Id.* § 10.05(d) ("[S]uch staff shall review and assess relevant medical, clinical, criminal, or institutional records, actuarial risk assessment instruments or other records and reports, including records and reports provided by the district attorney of the county where the person was convicted."); *id.* § 10.05(e) ("Upon such referral, the case review team shall review relevant records, including those described in subdivisions (c) and (d) of this section.").

105. *Id.* § 10.01(a).

106. *See id.* § 10.01(a)–(g); Guidelines, *supra* note 98, at 5.

107. Mental Hyg. § 10.05(b) ("When it appears to an agency with jurisdiction that a person who may be a detained sex offender is nearing an anticipated release from confinement, the agency shall give notice of that fact to the attorney general and to the commissioner of mental health."); *DOCS Fact Sheet*, s*upra* note 39.

108. *See DOCS Fact Sheet*, s*upra* note 39.

109. *See id.*

strict and intensive supervision as possible consequences of the OMH's evaluation process.[110] Given the litany of treatments, disclosures, and procedures sex offenders submit to when they have been convicted of, or have entered a guilty plea for, a sex offense, it is difficult to see how the Court of Appeals could find that the majority of detained sex offenders "will suffer no consequences from that designation at all."[111] Further, consistent with the dissent's position, it is the "initial conviction that determines a defendant's eligibility" for SOMTA.[112] Therefore, the interrelationship between the criminal and civil proceedings demonstrates the flaw in the Court of Appeals' oversimplification; that is, because SOMTA proceedings are directed under a separate administrative process, they are collateral.[113]

D. Civil Confinement Statistics

In addition to failing to consider the interrelationship between the criminal and civil proceedings, the Court of Appeals, in concluding that "the consequences of a defendant's plea are far from automatic," underestimated the significance of data collected monthly by the Division of Criminal Justice Services (DCJS).[114] Specifically, the DCJS tracks the number of detained sex offenders referred to case review teams and recommended for civil management, shedding important light on what ramifications are truly at stake for detained sex offenders.[115] The data the Court of Appeals referred to was collected by the Office of Sex Offender Management in the DCJS and supports the view that SOMTA is a direct consequence of a sex offense conviction.[116] According to the DCJS, since April 2007, 13.2% of detained sex offenders reviewed by the multidisciplinary staff at the OMH were referred to a case review team.[117] Of the detained sex offenders recommended to a case review team, almost 45% were subsequently recommended for civil management, or 5.7% of the total number who were referred to OMH for review.[118] In other words, a defendant convicted of a sex offense that subjects him to SOMTA has a 5.7% chance of being

110. *See id.*

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

112. *Id.* at 209 (Cipatrick, J., dissenting).

113. *See id.* at 205–06 (majority opinion).

114. *Id.* at 206; State of N.Y., Div. of Criminal Justice Servs., Evaluation and Processing of Cases, Mar. 13, 2007 Through Dec. 31, 2011 (2011) [hereinafter Evaluation and Processing of Cases] (on file with author).

115. Evaluation and Processing of Cases, *supra* note 114

116. *Id.*

117. *Id.*; N.Y. Mental Hyg. Law § 10.05(d) (McKinney 2011) (In addition to reviewing relevant records, including medical, clinical, criminal, and institutional, the case review team can order a psychiatric examination of the inmate to use in its determination of whether a detainee should be recommended for civil management); *see also id.* § 10.05(e) ("Upon such referral, the case review team shall review relevant records, including those described in subdivisions (c) and (d) of this section, and may arrange for a psychiatric examination of the respondent.").

118. Evaluation and Processing of Cases, *supra* note 114.

recommended for civil management, which includes either civil confinement or strict or intensive supervision, upon release from incarceration.[119]

In concluding that "experience to date indicates that the large majority of people who are 'detained sex offenders' as SOMTA defines the term will suffer no consequences from that designation at all," the Court of Appeals ignored the fact that almost 6 out of every 100 convicted sex offenders in New York could be perpetually confined or subjected to intensive and strict supervision for life after serving an incarcerated sentence as a result of SOMTA's civil management provisions.[120] When a defendant enters a guilty plea, he is making a bargain: he is waiving "a number of valuable constitutional rights in order to obtain reasonable assurance of certainty rather than gamble the possibility of a not guilty verdict against the heavier punishment, the greater anxiety and, in some cases at least, the greater expense, involved in a full trial."[121] The greater this "assurance of certainty is diluted," the greater "the bargaining process becomes less acceptable to defendants."[122] A 5.7% likelihood, therefore, would certainly weigh heavily in a defendant's calculus of choosing the certainty afforded by a plea bargain or taking the chance at trial.[123] When a defendant enters a plea bargain not knowing that there is a 5.7% likelihood

119. *Id*.; *see also DOCS Fact Sheet*, *supra* note 39.

> For those offenders determined by the case review team to have a mental abnormality that predisposes them to commit new sex offenses, the Attorney General's Office files petitions that seek civil management through a process of establishing probable cause and taking the case to a jury. If a jury concurs with the belief that the sex offender may pose a threat to society, the judge can then decide whether to confine the offender at an OMH-operated secure facility or place the offender under [strict and intensive supervision and treatment] in the community.

Id.

120. People v. Harnett, 16 N.Y.3d 200, 206 (2011). "By pleading guilty, defendant exposed himself to the possibility that he would be confined after expiration of his prison sentence, *perhaps indefinitely*." *Id*. at 210 (Cipatrick, J., dissenting) (emphasis added); *see also* State v. Suggs, 920 N.Y.S.2d 644, 647 (Sup. Ct. N.Y. County 2011) ("'Involuntary civil confinement [pursuant to Article 10] may entail indefinite confinement, [which] could be a more intrusive exercise of state power than incarceration following a criminal conviction'" (alterations in original) (quoting Mental Hygiene Legal Serv. v. Spitzer, No. 07 Civ. 2935 (GEL), 2007 U.S. Dist. LEXIS 85163, at *21 (S.D.N.Y. Nov. 16, 2007), *aff'd sub nom*. Mental Hygiene Legal Serv. v. Paterson, No. 07-5548-cv, 2009 U.S. App. LEXIS 4942 (2d Cir. Mar. 4, 2009))); People v. Nieves, 896 N.Y.S.2d 644, 649 (Sup. Ct. N.Y. County 2010) ("Article 10 of the Mental Hygiene Law, enacted by the Legislature in 2007, authorizes certain convicted sex offenders to be subject to indefinite civil confinement in a secure mental health facility or indefinite strict and intensive supervision and treatment in the community upon a finding by a jury that such an offender suffers from a 'Mental Abnormality' as defined by the statute.").

121. People v. McConnell, 49 N.Y.2d 340, 346 (1980).

122. *Id*.

123. It is also important to note that the DCJS does not track these statistics by the specific sex offense. *See* Evaluation and Processing of Cases, *supra* note 114. Such data might be very relevant for a respondent to determine whether there is an increased probability of civil confinement or strict and intensive supervision based on the specific sex offense to which they are admitting guilt. This data would also be suggestive of a consequential relationship solely associated with a particular sex offense and the potential for civil confinement.

that he will be recommended for civil management, the benefits of the bargain between the defendant and the criminal justice system have been significantly compromised to the detriment of both parties.

V. LIMITATIONS ON THE CATEGORICAL APPROACH: *PADILLA V. KENTUCKY* AND *STATE V. BELLAMY*

A. Padilla v. Kentucky

Aside from whether SOMTA is a direct consequence of pleading guilty to a sex offense and therefore mandates disclosure, the U.S. Supreme Court's 2010 holding in *Padilla v. Kentucky* raises concerns about the New York Court of Appeals's categorical approach in *Harnett* as well as highlights the constitutional and policy arguments in favor of mandating disclosure of SOMTA.[124] The defendant in *Padilla* claimed that his counsel did not inform him, before he entered a guilty plea, that deportation was a consequence of his conviction and that, had he been so informed, he would have chosen to go to trial.[125] In a prior proceeding, the Supreme Court of Kentucky ruled against the defendant, holding that "the Sixth Amendment's guarantee of effective assistance of counsel does not protect a criminal defendant from erroneous advice about deportation because it is merely a 'collateral' consequence of his conviction."[126] Reversing the Supreme Court of Kentucky, the U.S. Supreme Court observed that,

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124. It is important to note that in concluding that SOMTA was a collateral consequence, the court relied on *People v. Ford*, a New York case that concluded that defendants who may be deported after serving their sentences do not have a right to disclosure of deportation consequences. *Harnett*, 16 N.Y.3d at 205 (citing to People v. Ford, 86 N.Y.2d 397 (1995)). The court's reliance is misplaced given the U.S. Supreme Court's more recent holding in *Padilla*, which effectively overruled *Ford*. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010). In *Padilla*, the Supreme Court concluded that the consequences of deportation for a defendant are so severe that attorneys must disclose deportation to their clients prior to them entering a guilty plea. *Id*. The New York Court of Appeals' dependence in *Harnett* on *Ford* calls into question the foundation of the majority's holding that SOMTA is collateral. Notably, the New York Court of Appeals also referenced *Padilla* in the context that a defendant could argue a plea was made involuntarily if he was not informed about SOMTA, the likelihood of being confined under SOMTA was realistic, and such knowledge would have changed his decision to enter a guilty plea.

> But since SOMTA consequences can include extended confinement, a plea made in ignorance of such consequences may sometimes be proved involuntary—if 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. Of course, in such cases the defendant will have to prove that he did not know about SOMTA—i.e., that his lawyer did not tell him about it—before he pleaded guilty. Thus, the issue of whether the plea was voluntary may be closely linked to the question of whether a defendant received the effective assistance of counsel.

Harnett, 16 N.Y.3d at 207 (citing *Padilla*, 130 S. Ct. at 1473). However, the court found that this was not the case with this defendant. "On this record, we do not know either whether his lawyer told him about SOMTA or whether, considering the facts of defendant's situation, SOMTA would have been a significant factor in the evaluation of a plea bargain." *Id.* at 207–08.

125. *Padilla*, 130 S. Ct. at 1478.

126. *Id*.

although deportation is an *entirely* civil process, it is "intimately related to the criminal process" and carries consequences that are "particularly severe."[127] In *Padilla*, the Court held that the "longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families . . . demand no less" than disclosing that entering a guilty plea "carries the risk of deportation."[128] It held that this classification is thus "ill-suited" because the nature of this intimate relationship makes deportation "uniquely difficult to classify as either a direct or a collateral consequence."[129]

The Court also observed that the immigration statute at hand was "succinct, clear, and explicit in defining the removal consequence" for the defendant.[130] In this context, the Court held that even when the specific deportation consequences for a particular defendant are not clear, attorneys must at least advise their clients "that pending criminal charges may carry adverse immigration consequences."[131] This holding is consistent with the policy consideration underlying plea bargains: establishing disclosures and creating a "full record" gives the defendant certainty in the plea bargaining process as well as supports the integrity of the criminal justice proceedings.[132]

The Court's reasoning in *Padilla* suggests two important limitations on applying *Harnett*'s direct-versus-collateral categorical approach.[133] First, a categorical approach

127. *Id*. at 1481.

128. *Id*. at 1486.

129. *Id*. at 1481–82.

130. *Id*. at 1483 ("In the instant case, the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for Padilla's conviction.").

131. *Id*. at 1483, 1485.

132. People v. McConnell, 49 N.Y.2d 340, 346 (1980) ("[T]he importance of a full record so that defendant will understand that he can rely on what is stated on the record, within the limitations stated, and cannot under any but the most unusual circumstances rely on anything not stated on the record no matter what discussion there has been.").

133. *Padilla* also established an important constitutional position regarding the Sixth Amendment on which *Harnett* briefly acknowledged, but did not elaborate. *See* People v. Harnett, 16 N.Y.3d 200 (2011). The Supreme Court asserted that the classification of direct or collateral consequences is "ill-suited" with respect to the guarantee of effective assistance of counsel under the Sixth Amendment. *Padilla*, 130 S. Ct. at 1476. This assertion creates an important paradox against the backdrop of the *Harnett* decision. In determining that deportation must be disclosed to defendants by their attorney pursuant to the Sixth Amendment as measured under the first-prong of the *Strickland* test, the Supreme Court implicitly established that such disclosures must also be made under the Fifth Amendment's requirements of due process. *Id*. at 1477. The first prong of the *Strickland* test is measured by whether or not the defendant received "reasonable professional assistance" from his or her attorney. *See* Strickland v. Washington, 466 U.S. 688, 694–95 (1984) (this is a highly deferential standard by which courts are to apply a wide latitude to attorneys). Applying this highly deferential standard in *Padilla*, the Supreme Court determined that attorneys must make disclosures regarding deportation to their clients prior to the entry of a guilty plea. *See Padilla*, 130 S. Ct. at 1483. Under such a rationale, it is plausible that the Supreme Court effectively imputed such disclosures to the Fifth Amendment's requirements of knowingly, intelligently, and voluntarily entering a guilty plea. *See* N.Y. Crim. Prac. § 12.07(5) (2d ed. 2010). In noting *Padilla*'s holding regarding the Sixth Amendment, *Harnett* opened the door to imputing constitutional due process requirements for SOMTA disclosures.

may be inappropriate where the civil processes and consequences are intimately related to the criminal. Consistent with *Padilla*'s observation of the relationship between a criminal conviction and deportation proceedings, the criminal and civil proceedings to which Harnett is subject under SOMTA are "intimately related." The classification of a civil management consequence as either direct or collateral is therefore "ill-suited." But, as noted by the dissent in *Harnett*, all detained sex offenders are subject to SOMTA, with a 5.7% likelihood of being subjected to indefinite civil confinement or intensive and strict supervision.[134] SOMTA also states specifically that the criminal and civil proceedings are integrated processes and that the treatment a defendant receives during the penal phase can influence the outcome of the civil proceedings.[135] Like deportation, SOMTA is therefore "'most difficult' to divorce the penalty from the conviction."[136] In this respect, *Harnett*'s finding that the criminal and civil proceedings are "not under the court's control" is inapposite under *Padilla*.[137]

Second, *Padilla* challenges using a categorical approach when the language of the statute spells out very clear consequences.[138] The Court in *Padilla* emphasized that the deportation statute in question was "succinct, clear, and explicit" with respect to "the removal consequences for Padilla's conviction."[139] Similarly, SOMTA's language is "succinct, clear, and explicit" with respect to the process by which a sex offender is subject under SOMTA.[140] SOMTA clearly states that sex offenders are generally subject to SOMTA and also defines and outlines the procedures, circumstances, and standards under which a convicted defendant is subject to civil confinement or strict and intensive supervision.[141] Therefore, in applying a categorical approach to determine that SOMTA need not be disclosed to defendants, *Harnett* ignored the critical limitations in using such an approach emphasized by *Padilla*.[142]

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134. *Harnett*, 16 N.Y.3d at 208 (Ciparick, J., dissenting) (Though the dissent found that SOMTA was a collateral consequence, it stated: "I dissented in *Gravino* on the ground that because imposition of SORA registration is mandatory and known at the time of the plea, it ought to be considered a direct consequence of that plea. This rationale likewise applies to defendant's automatic eligibility for SOMTA review. All defendants convicted of sexual abuse in the first degree and sentenced to a prison term are 'detained sex offenders' under SOMTA. The statute requires that the Attorney General and Commissioner of Mental Health receive notice of a detained sex offender's scheduled release date and provides the authority to take further action towards civil management, if warranted." (citations omitted)); *See also* N.Y. Mental Hyg. Law §§ 10.01, 10.03(g) (McKinney 2011).

135. Mental Hyg. § 10.01(a).

136. *Padilla*, 130 S. Ct. at 1481 (citation omitted).

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

138. *Padilla*, 130 S. Ct. at 1483.

139. *Id*.

140. *Id*.

141. *See generally* N.Y. Mental Hyg. Law §§ 10.01, 10.05–10.07 (McKinney 2011).

142. Relying on *Padilla*, *Harnett* stated that had the defendant put forth on the record that he was not informed of SOMTA, there was a realistic likelihood he would have been confined under SOMTA,

Moreover, the U.S. Supreme Court's recognition of the significant consequences of deportation not only further supports the limitations of using a categorical approach for disclosure, but also raises important issues regarding an individual's constitutionally protected liberty at stake.[143] Like deportation, the potential consequences of SOMTA, including indefinite strict supervision or civil confinement, can be equally as devastating as deportation because an individual's liberty is being taken away without due process.[144]

Finally, in *Harrett* the Court of Appeals's reliance on *Padilla* in finding that a defendant who can put forth on the record that he did not know about SOMTA, that there was a "realistic" chance that he would be subject to confinement, and that such knowledge would have caused him to not enter a plea bargain is misplaced.[145] The court stated,

> But since SOMTA consequences can include extended confinement, a plea made in ignorance of such consequences may sometimes be proved involuntary—if 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. Of course, in such cases the defendant will have to prove that he did not know about SOMTA—i.e., that his lawyer did not tell him about it—before he pleaded guilty. Thus, the issue of whether the plea was voluntary may be closely linked to the question of whether a defendant received the effective assistance of counsel.[146]

This rationale not only overlooks *Padilla*'s observations about why the categorical approach is "ill-suited" in certain situations, but also puts convicted sex offenders subject to SOMTA in a paradoxical position: *after defendants have served their time*, they would need to establish that SOMTA was not disclosed to them, that "confinement was realistic enough" under SOMTA at the time of their conviction, and that they would have rejected the plea bargain.[147] This logic is flawed for several reasons. First, it creates inefficiencies within the judicial process because defendants would need to contend that their due process rights were violated after they have served their time. Second, the Court of Appeals does not define or elaborate on what "realistic enough" means, putting defendants, their attorneys, and the courts in the highly subjective position of having to make this determination on a case-by-case

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and this would have caused him to reject his guilty plea, he could have contended his right to due process was violated. *See Harnett*, 16 N.Y.3d at 207 (citing *Padilla*, 130 S. Ct. at 1473).

143. *Padilla*, 130 S. Ct. at 1483.

144. *See In re* Civil Commitment of D.L., 797 A.2d 166, 173 (N.J. Super. Ct. App. Div. 2002) ("Confinement . . . is theoretically without end. In that sense, it constitutes a greater liberty 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.").

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

146. *Id.*

147. *Id.*

basis. Third, the court limits the scope of SOMTA consequences to confinement when, in fact, a defendant may consider strict and intensive supervision a severe enough consequence that it might change his decision to enter a plea bargain. Finally, as noted, SOMTA provides sex offenders treatment during the penal phase that can influence the outcome of the proceedings under SOMTA.[148] Thus, what may be "realistic enough" when a defendant enters his guilty plea, may change in or against his favor as he participates in sex treatment programs during the penal phase. Therefore, with respect to this argument, *Harnett*'s logic is flawed.

B. State v. Bellamy

Regardless of whether SOMTA is a direct or a collateral consequence of a guilty plea, *Harnett* also did not fully account for a further limitation on its holding: notions of fundamental fairness, which implicate the integrity of the plea bargain process and support the disclosure of civil consequences under SOMTA to criminal defendants.[149] Although *Harnett* presents a case of first impression for the New York courts, *State v. Bellamy* comports with *Padilla*'s non-categorical approach in analyzing the consequences of entering a plea agreement and therefore provides persuasive authority.[150]

In *Bellamy*, the Supreme Court of New Jersey considered fundamental fairness and the integrity of the plea bargain process in concluding that the potential consequences for a convicted sex offender under the New Jersey Sexually Violent Predator Act must be disclosed to defendants prior to their entry of a guilty plea.[151] The New Jersey Supreme Court reasoned that

> when the consequences 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 defendant of that possible consequence. 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 that defendant of information needed to make a knowing and voluntary plea.[152]

148. *DOCS Fact Sheet*, *supra* note 39.

149. *Harnett*, 16 N.Y.3d at 207–08.

150. *Compare* State v. Bellamy, 835 A.2d 1231 (N.J. 2003) ("[I]t matters little if the consequences are called indirect or collateral when in fact their impact is devastating." (alteration in original) (quoting New Jersey v. Heitzman, 527 A.2d 439, 441 (N.J. 1987) (Wilentz, C.J., dissenting)), *with* Padilla v. Kentucky, 130 S. Ct. 1473, 1482 (2010) ("Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction is thus ill-suited . . . ."). Also, the *Bellamy* court went even further than mandating disclosure of the statute; it also determined that the decision would be applied with limited retroactivity. Under a limited retroactive application, the new rule would apply to any cases under direct review at the time the rule was announced. *See Bellamy*, 835 A.2d at 1238–39.

151. *Bellamy*, 835 A.2d at 1234, 1238–39.

152. *Id.* at 1238–39.

Given the potential indefinite loss of liberty, *Harnett* underestimated the notions of fairness that should be factored into the plea bargain process. Though *Harnett* admittedly acknowledged that certain circumstances may exist where a collateral consequence of a plea may be of such significance that it could offend due process if not disclosed, it fell short of mandating the disclosure of SOMTA.

> [The New York Court of Appeals] said in *Gravino* that "[t]here may be cases in which a defendant can show that 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 made a different decision had that consequence been disclosed." We observed that such cases would be "rare," because "in the vast majority of plea bargains the overwhelming consideration for the defendant is whether he will be imprisoned and for how long."[153]

Rather, *Harnett* appeared to shift the burden onto the defendant to show the likelihood that SOMTA would apply. The Court of Appeals noted that "[i]t is not asserted that this defendant has been made the subject of a SOMTA proceeding, and we cannot tell on this record whether there is or ever was any significant likelihood that that would occur."[154] This establishes an impossible feat for any sex offender defendant who is disputing a plea agreement based on lack of disclosure of SOMTA. The defendant would not know his own "likelihood" of being subjected to the potentially severe consequences of SOMTA until *after* they have served their sentence and the case review team makes its determination that the defendant requires strict supervision or civil confinement.[155] Given that Harnett only recently entered his plea and has not yet fulfilled his prison sentence, and the case review team's determination has not been made with respect to him, the court holds him to an impossible task.[156] By creating an insurmountable burden, *Harnett* misses the significance and essence of the *Bellamy* holding—that is, when constitutional liberty is at stake, "fundamental fairness demands that the trial court" make such disclosures to a defendant.[157]

153. *Harnett*, 16 N.Y.3d at 206 (alteration in original) (citation omitted); People v. Gravino, 14 N.Y.3d 546 (2010).

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

155. As previously noted, New York State does not track statistics on the *type of sex offense* relative to strict supervision or civil confinement for sex offenders; therefore, it would be impossible for a defendant to know whether or not he faces a greater likelihood of being subject to SOMTA when he enters his plea. *See supra* note 123; *see also* N.Y. Mental Hyg. Law § 10.01(a) (McKinney 2011).

156. *See supra* note 155.

157. *Bellamy*, 835 A.2d at 1238; *see also* People v. Parker, 711 N.Y.S.2d 656, 661 (4th Dep't 2000) ("[I]mposition and enforcement of sentencing conditions must satisfy the requirements of due process and 'must not . . . amount to overreaching or a denial of a defendant's entitlement to fundamental fairness'" (citations omitted) (internal quotation marks omitted)).

VI. CONCLUSION

The plain text and clear purpose of SOMTA illustrate that the legislature intended SOMTA to be inextricably intertwined with the criminal process.[158] The Court of Appeals in *Harnett*, however, did not carefully examine the language or purpose of SOMTA, which notes that the "[c]ivil and criminal processes . . . both should be part of an integrated approach," in reaching its conclusion that SOMTA is a collateral consequence, and, therefore, need not be disclosed.[159] *Harnett* also failed to adequately account for the interrelationship between the criminal and civil proceedings and, therefore, underestimated the importance of statistical data regarding the possibility of civil confinement or strict and intensive supervision. Further, the *Harnett* court's reliance on *Gravino* in concluding that SOMTA was a direct consequence is misplaced.

Padilla challenges the *Harnett* court's categorical approach and highlights the constitutional rights at stake in the context of mandating disclosures.[160] By questioning the efficacy of applying a categorical analysis to disclosures, the Court in *Padilla* inherently challenges whether *Harnett*'s reliance on such a classification is, in fact, valid.[161] Consequences that are categorically similar to deportation under *Padilla*'s rationale must be disclosed to defendants as part of the plea bargain process—SOMTA certainly falls into such a category.[162] The *Padilla* holding also raises important constitutional issues regarding an individual's liberty at stake in relation to disclosures.

Furthermore, *State v. Bellamy* reinforces the limitations of using a categorical approach by bringing into light the importance that fundamental fairness should play in the court's decision. *Bellamy* notably observed that the severity of consequences, such as civil confinement, demand courts to provide such disclosures.[163]

The plea bargain process is a fundamental aspect of the criminal judicial system.[164] Plea bargains provide courts with the essential opportunity to customize sentences to each defendant, expedite a defendant's ability to begin the rehabilitation process, reduce the expenses associated with clogged court dockets, and provide law enforcement with an opportunity to barter leniency in exchange for valuable information.[165] Among all of its benefits, the plea bargain process most importantly "serves an end to justice."[166] It is essential to plea bargains that notions of fairness are inherent to the process to ensure that a defendant is not misinformed about the

158. *See generally* Mental Hyg. § 10.01.

159. *Id.* § 10.01(a); *Harnett*, 16 N.Y.3d at 204–05.

160. Padilla v. Kentucky, 130 S. Ct. 1473 (2010).

161. *Id.*

162. *Id.*

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

164. People v. Selikoff, 35 N.Y.2d 227, 229 (1974).

165. *Id.*

166. *Id.*

agreement in which he is entering.[167] The Court of Appeals's holding in *Harnett* establishes that defendants who enter guilty pleas are not required to know about SOMTA, a statute that involves proceedings that could result in severe and devastating consequences for a sex offender.[168] Without such knowledge, defendants are not able to accurately perform the calculus of weighing the certainty of consequences in entering a guilty plea against the chances of going to trial. Such a degree of certainty relies on the essential due process requirements of knowingly, intelligently, and voluntarily entering a guilty plea.[169] The *Harnett* decision offends this notion of justice because justice truly cannot be obtained when critical constitutional protections are compromised.[170]

167. *Bellamy*, 835 A.2d at 1235.

168. People v. Harnett, 16 N.Y.3d 200, 207–08 (2011); Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010).

169. N.Y. Crim. Prac. § 12.07(5) (2d ed. 2010).

170. *Selikoff*, 35 N.Y.2d at 233–34.