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INTRODUCTION

On May 20, 2014, Miguel Gonzalez became eligible for conditional release from prison, having served over two years of his two-and-a-half-year sentence for statutory rape.[1] Instead of releasing Gonzalez, the New York Department of Corrections and Community Supervision (DOCCS) confined Gonzalez for an additional seven and a half months after his initial release date and over four months after his maximum sentence.[2] On February 4, 2015, DOCCS finally released Gonzalez from New York's Woodbourne Correctional Facility.[3] The sole reason for Gonzalez's additional confinement was his failure to secure housing that complied with the residency restrictions placed on individuals convicted of sex offenses.[4] Gonzalez, convicted of a sex offense against a person under eighteen years of age and having been designated a Level 2 Sex Offender subject to lifetime registration, was subject to the

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1 *See* Gonzalez v. Annucci, 117 N.E.3d 795, 797 (2018).

2 *See id.* Having been sentenced on April 3, 2012, the "maximum expiration date" of Gonzalez's sentence was September 30, 2014. *See id.*

3 *See Gonzalez*, 117 N.E.3d at 798.

4 *See id.* at 797.

residency restrictions under two New York State statutes which affect access to both public and private housing.[5]

All fifty states have some form of sex offense-related residency restriction.[6] These restrictions vary across states in the severity of the housing obstacles and the relative predictability of these obstacles prior to conviction.[7] Because states use slightly different criteria to determine what residency restrictions an individual will face, this Note will focus on New York law and makes recommendations to New York defense lawyers and courts. Given the nationwide ubiquity of these state residency restriction statutes, this Note also recommends the Supreme Court expand its ruling in *Padilla v. Kentucky*, requiring defense advisals on immigration consequences, to also constitutionally require defense advisals and judicial plea colloquies on sex offense-related housing consequences.[8]

In New York, these residency restrictions stem from the state's Sex Offender Registration Act (SORA)[9] and its Sexual Assault Reform Act (SARA).[10] Together these two statutes create a serious recurring problem where individuals convicted of sex offenses experience great difficulty in finding adequate housing.[11] Often, these individuals are unable to find housing at all.[12] As recently

5 *See id.*; *see also* Gonzalez v. Annucci, No. 6610-14 (N.Y. Sup. Ct. Albany Cty. July 9, 2015).

6 *See 50-State Comparison: Relief from Sex Offender Registration Obligations*, COLLATERAL CONSEQUENCES RESOURCE CTR., https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-relief-from-sex-offender-registration-obligations (last updated Nov. 14, 2019) [hereinafter *50-State Comparison*]; *see also* Joanne Savage & Casey Windsor, *Sex Offender Residence Restrictions and Sex Crimes Against Children: A Comprehensive Review*, 43 AGGRESSION & VIOLENT BEHAV. 13, 16 (2018) (finding that twenty-nine states have enacted some form of geographic limitation on where individuals convicted of sex offenses can live).

7 *See generally 50-State Comparison*, *supra* note 6.

8 *See* Padilla v. Kentucky, 559 U.S. 356, 374 (2010).

9 *See* Sex Offender Registration Act, N.Y. CORREC. LAW §§ 168-168-w (Consol. 1995). As discussed in Part I.A, the residency restriction arising from SORA is the creation of a lifetime registration requirement for some individuals convicted of sex offenses under SORA and the usage of the lifetime registration requirement in finding lifetime registrants ineligible for federally funded public housing. *See* 42 U.S.C. § 13663(a) (2018).

10 *See* Sexual Assault Reform Act, 2000 N.Y. S.N. 8238 §§ 7-9 (2000). As discussed in Part I.B, the residency restriction under SARA is triggered when an individual is convicted of a sex offense against a person under the age of eighteen at the time of the offense.

11 *See* Jie Jenny Zou & Roger Miller, *Housing the Unwanted*, PRISON LEGAL NEWS (Mar. 28, 2017), https://www.prisonlegalnews.org/news/2017/mar/28/housing-unwanted.

12 *See* FORTUNE SOC'Y, NOWHERE TO GO: NEW YORK'S HOUSING POLICY FOR INDIVIDUALS ON THE SEX OFFENDER REGISTRY AND RECOMMENDATIONS FOR CHANGE 4 (2019).The Fortune Society is a New York City-based organization providing reentry services for formerly incarcerated individuals.

as 2018, over one hundred individuals, like Gonzalez, were held in confinement beyond their release date due to a failure to find compliant housing.[13] Confinement beyond an individual's scheduled release date may be the most extreme housing consequence related to a sex offense conviction, but sex offense-related housing consequences touch on every conceivable type of housing. Individuals convicted of sex offenses are often locked out of public housing,[14] locked out of much of the private housing market,[15] locked out of homeless shelters,[16] and even locked out of nursing homes.[17] Other serious consequences include increased rates of housing insecurity and street homelessness.[18] Because housing instability and street homelessness are known factors for increased recidivism among previously incarcerated individuals, the residency restrictions in fact undermine their public safety rationale.[19] Furthermore, housing restrictions do nothing to prevent the vast majority of sex offenses against children, since ninety percent of such offenses are committed by family members or people whom they trust.[20]

SORA and SARA each independently create residency restrictions, although as evidenced by Miguel Gonzalez's experience, the two statutes can overlap. First, SORA requires that every person convicted of a sex offense must register as a sex offender with

13 *See* Joseph Goldstein, *Housing Restrictions Keep Sex Offenders in Prison Beyond Release Dates*, N.Y. TIMES (Aug. 21, 2014), https://www.nytimes.com/2014/08/22/nyregion/with-new-limits-on-where-they-can-go-sex-offenders-are-held-after-serving-sentences.html. In January of 2018, the Fortune Society found that 88 people were being confined beyond their release dates due to the failure to find adequate housing. *See* FORTUNE SOC'Y, *supra* note 12, at 4.

14 *See Permanent Exclusion*, N.Y.C. HOUS. AUTHORITY, https://www1.nyc.gov/site/nycha/residents/permanent-exclusion-faq.page (last visited Oct. 28, 2019).

15 *See infra* Part I.

16 *See* FORTUNE SOC'Y, *supra* note 12, at 4.

17 *See* Memorandum from Hinman Straub PC to LeadingAge N.Y. (Sept. 18, 2017). This memorandum was prepared by a law firm for LeadingAge New York, a nursing home in Suffolk County, New York. According to the memorandum, "there are no federal or state prohibitions on nursing homes making admission decisions based on a prospective resident's sex offender status or from refusing to admit prospective residents based solely on this designation." *Id.*

18 *See The Importance of Stable Housing for Formerly Incarcerated Individuals*, 40 HOUSING L. BULL. 60, 61 (Feb. 2010); *see also* LITTLE HOOVER COMM'N, BACK TO THE COMMUNITY: SAFE & SOUND PAROLE POLICIES 39 (2003).

19 *See* ASS'N FOR TREATMENT SEXUAL ABUSERS, SEXUAL OFFENDER RESIDENCE RESTRICTIONS 3 (2014).

20 *See* SARAH TOFTE & JAMIE FELLNER, HUMAN RIGHTS WATCH, NO EASY ANSWERS 4 (Jamie Fuller et al. eds., 2007).

the state.[21] Lifetime registrants are prohibited from accessing federally funded public housing.[22] This registry is also publicly available to and searchable by landlords, who can easily identify and refuse to rent to individuals convicted of sex offenses.[23] Second, SARA places onerous geographic limitations on where an individual convicted of a sex offense can live.[24] Under SARA, if the individual is convicted of a sex offense and the victim is under the age of eighteen, that individual is prohibited from living within 1,000 feet of a school or any other facility primarily used by people under the age of eighteen.[25] This 1,000-foot-rule excludes individuals from a significant portion of public and private housing stock.[26] In New York City, where a "right to shelter" exists, such individuals are also excluded from homeless shelters.[27]

Which housing consequences an individual will face post-conviction is contingent on the facts and circumstances of that individual's case. However, the housing consequences created by these New York statutes can be easily predicted for any one individual prior to conviction. Under SORA, the length of an individual's registration requirement is contingent on the risk level the individual poses for reoffending.[28] Determining an individual's risk level is computed after conviction by a Board of Examiners through a tool called the Risk Assessment Instrument (RAI), using fifteen factors, twelve of which are known prior to trial or entry of a guilty plea.[29] The housing consequences triggered by SARA are even

21 *See* Sex Offender Registration Act, N.Y. CORREC. LAW § 168-f(1) (Consol. 1995).

22 *See infra* Part I.A; *see also* 42 U.S.C. § 13663(a) (2018).

23 *See infra* Part I.A. The legality of discrimination by landlords against individuals convicted of sex offenses is unclear. Although landlords cannot discriminate based solely on an individual's prior conviction, a landlord who "excludes individuals with only certain types of convictions" can do so as long as its policy "distinguishes between criminal conduct that indicates a demonstrable risk to resident safety . . . and criminal conduct that does not." U.S. DEP'T OF HOUS. AND URBAN DEV., OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS (2016), at 6.

24 *See* FORTUNE SOC'Y, *supra* note 12, at 4.

25 *See id.* at 3.

26 *See infra* Part I.B.

27 *See infra* Part I.B; *see also The Callahan Consent Decree*, COALITION FOR THE HOMELESS, https://www.coalitionforthehomeless.org/wp-content/uploads/2014/08/CallahanConsentDecree.pdf (last visited July 30, 2020) (text of final judgment by consent issued in *Callahan v. Carey*, which first established a right to shelter in New York City).

28 *See* Sex Offender Registration Act, N.Y. CORREC. LAW § 168-h (Consol. 1995).

29 *See id.* § 168-l (5); *see also* N.Y. COURTS, SEX OFFENDER REGISTRATION ACT RISK ASSESSMENT GUIDELINES AND COMMENTARY (2006), http://www.nycourts.gov/reporter/06_SORAGuidelines.pdf [hereinafter SORA GUIDELINES].

more predictable since the charged offense and alleged victim's age are both known prior to trial or entry of a guilty plea.[30]

While these housing consequences are fairly predictable to those with legal expertise and the ability to apply SORA and SARA to specific facts, they may be wholly unknown to the individual during their criminal proceeding. The full consequence of an individual's guilty plea usually becomes apparent long after they have entered the plea, served their sentence, and attempted to access housing.[31] For instance, Miguel Gonzalez did not understand these consequences until he began looking for housing just prior to his conditional release date and then submitted a continuous stream of housing options to DOCCS throughout his extended confinement as each successive option was denied because of noncompliance.[32] Firstly, had Mr. Gonzalez understood the severity of these restrictions before pleading guilty, he may have chosen to go to trial and potentially avoided these housing consequences altogether with a verdict of not guilty. Secondly, had Mr. Gonzalez understood these housing consequences before pleading guilty, he could have accessed the necessary resources to find compliant housing sooner, thus avoiding his post-sentence confinement.

Therefore, this Note asks an important question: does the United States Constitution countenance the delayed disclosure of such serious and long-lasting housing restrictions, or does the Constitution require a defendant's awareness of these consequences before he or she enters a guilty plea?

The Supreme Court ruled in *Brady v. United States* in 1970 that guilty pleas must be made knowingly, voluntarily, and intelligently, and that a guilty plea is valid only when the individual fully comprehends the direct consequences of the conviction.[33] Post-*Brady*, on the federal and state level, a jurisprudence formed,

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30 *See infra* Part I.B.

31 *See* U.S. COMM'N ON C.R., COLLATERAL CONSEQUENCES: THE CROSSROADS OF PUNISHMENT, REDEMPTION, AND THE EFFECTS ON COMMUNITIES 133 (2019). "In addition, the general public, attorneys, and the courts often lack knowledge of what the totality of the collateral consequences are in their jurisdiction, how long they last, and whether they are discretionary or mandatory, or even if they are relevant to public safety or merely an extended punishment beyond a criminal sentence." *Id.*

32 *See* Gonzalez v. Annucci, 117 N.E.3d 795, 797 (N.Y. 2018).

33 *See* Brady v. United States, 397 U.S. 742, 748 (1970); *see also* Hill v. Lockhart, 474 U.S. 52, 56-57 (1985) (holding that a defendant may bring a Sixth Amendment claim of ineffective assistance of counsel where the involuntariness of the guilty plea was a result of defense counsel's erroneous advice).

analyzing which consequences of a conviction were "direct" and which were not; these non-direct consequences were deemed "collateral."[34] The Supreme Court has yet to explicitly rule on whether sex offense-related housing consequences are direct or collateral; however, in 2003 in *Smith v. Doe*, the Court implied that sex offender registration itself was a "minor and indirect" consequence, "unlikely to be punitive," and therefore, required no pre-plea advisal.[35]

Because of the general proliferation of collateral consequences of criminal convictions, the high courts of each state have weighed in on various specific consequences and whether they carry a duty to advise.[36] New York's Court of Appeals, interpreting the *Brady* mandate for valid guilty pleas, ruled that housing consequences are "nonpenal consequences that result from the fact of conviction for certain crimes" to the punishment administered in sentencing.[37] Thus, defense lawyers are under no legal duty to advise clients of the sex offense-related housing consequences they would invariably incur post-guilty plea.[38] Nor are judges legally required to advise defendants in a pre-guilty plea colloquy of these housing consequences.[39] In reaching its holding, the Court of Appeals relied on the intent of legislators to protect the public and found no intent to increase punishment.[40] Regardless of the intended public safety rationale for residency restrictions (tenuous as it is[41]),

34 *See* Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 132-33 (2009).

35 Smith v. Doe, 538 U.S. 84, 100 (2003). In *Smith*, the Court upheld Alaska's sex offender registry, which operates similarly to New York's, because the registry and the employment and housing consequences stemming from it were not an *ex post facto* punishment. Notably, *Smith* was decided in 2003, seven years before the Court's ruling in *Padilla* and its reassessment of the direct/collateral dichotomy. *See* Padilla v. Kentucky, 559 U.S. 356 (2010).

36 *See* Ross Wood, Note, *Black Robes Do Not Require Full Transparency: the Circular and Semantic Distinction Between Direct and Collateral Consequences of a Plea*, 33 WHITTIER L. R. 487, 510-11 (2012). The National Institute of Justice estimates that over "44,000 collateral consequences exist nationwide." *See* U.S. COMM'N ON C.R., *supra* note 31, at 1.

37 People v. Gravino, 928 N.E.2d 1048, 1054 (N.Y. 2010). *Gravino* addresses only the registration requirement, not the housing consequences that attach to the registration. Presumably, if a defendant is allowed to plead in ignorance of the registration requirement, they are also allowed to plead in ignorance of any consequence derived from registration.

38 *Cf.* People v. McDonald, 802 N.E.2d 131, 132 (N.Y. 2003). The court held that the attorney's "mere failure" to advise his client about the possibility of deportation was not ineffective assistance of counsel. *Id.* at 134.

39 *See Gravino*, 928 N.E.2d at 1054.

40 *See id.* (citing People v. Windham, 886 N.E.2d 179, 180 (2008)).

41 *See* Jill S. Levenson, *Restricting Sex Offender Residences: Policy Implication*, ABA

housing consequences do indeed operate as a punishment on individuals convicted of sex offenses.[42]

For the thirty-six years after *Brady*, the direct versus collateral categorization of consequences reigned in determining whether defense attorneys had a duty to advise clients of a specific, known consequence. However, in 2010, the Supreme Court in *Padilla* revisited mandatory advisals regarding collateral consequences; this time the question concerned advisals in the immigration context.[43] Defying expectations, the Court declined to delineate immigration consequences as either a collateral or direct consequence of a guilty plea.[44] Instead, the Court weighed the severity of deportation and the interrelatedness of deportation and the criminal process.[45] By treating the risk of deportation as a *sui generis* consequence of a conviction, the Court unshackled itself from its own precedents requiring advisals only of direct consequences.[46] In *Padilla,* the Court held that the Fifth and Sixth Amendments require defense attorneys to advise clients of any possible immigration consequences that could arise from the client's guilty plea,[47] because these advisals on immigration consequences are essential to an individual's right to effective assistance of counsel and due process.[48] A failure to advise of immigration consequences would constitute ineffectiveness of counsel and result in the invalidity of a guilty plea.[49]

The *Padilla* Court did not explicitly address the judge's role in the context of immigration consequences. However, judges are required under the Fifth Amendment guarantee of due process to certify the validity of a guilty plea and ensure that the defendant

(April 1, 2009), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol36_2009/spring2009/restriciting_sex_offender_residences_policy_implications.

42 *See infra* Part I.B.

43 *See* Padilla v. Kentucky, 559 U.S. 356, 366 (2010).

44 *See id.* at 365.

45 *See id.* at 365-66.

46 *See id.* at 365 ("We have long recognized that deportation is a particularly severe 'penalty'; but it is not, in a strict sense, a criminal sanction." (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893))).

47 *See id.* at 374.

48 *See id.* at 374-375 ("[W]e now hold that counsel must inform her client whether his plea carries a risk of deportation. Our 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.").

49 *See id.* at 374.

is making his plea knowingly, intelligently, and voluntarily.[50] Thus, *Padilla*, in concert with this judicial responsibility, requires judges to inform defendants of the existence of possible immigration consequences during the plea colloquy.[51]

The mandates stemming from *Padilla* that defense attorneys and courts advise defendants of immigration consequences should extend to housing consequences resulting from guilty pleas for sex offenses. Much like immigration, sex offense-related housing consequences transcend the traditional direct-versus-collateral consequence binary. Housing consequences are a severe and highly probable consequence of an individual's guilty plea to a sex offense.[52] Furthermore, housing consequences are statutorily entwined with the criminal process through statutes like SORA and SARA.[53] Without knowledge of these housing consequences, an individual's guilty plea to a sex offense cannot be knowingly or voluntarily made, and thus, pleas entered without proper advisals or colloquies are unconstitutional and invalid.[54]

Part I of this note discusses the New York statutory landscape giving rise to these housing restrictions, namely SORA's risk assessment and registration scheme and SARA's geographic restrictions based on the victim's age. Part II argues that the *Padilla* Court's characterization of immigration consequences also applies to sex offense-related housing consequences and that the due process obligations on defense counsel and judges to advise individuals of immigration consequences should therefore extend to sex offense-related housing consequences. Finally, Part III envisions how this extension of defense and judicial obligations can easily be put into practice, through the use of the already existing Risk Assessment Instrument and proposed plea colloquies.

50 *See* Brady v. United States, 397 U.S. 742, 747-48 (1970); *see also* Boykin v. Alabama, 395 U.S. 238, 242 (1969).

51 *See* NIKKI REISCH & SARA ROSELL, IMMIGRANT DEF. PROJECT & N.Y. UNIV. SCH. OF LAW IMMIGRANT RIGHTS CLINIC, JUDICIAL OBLIGATIONS AFTER *PADILLA V. KENTUCKY* 18-19 (2011) (analyzing the connection between effectiveness of counsel and the validity of guilty pleas).

52 *See* Jill Levenson et al., *Sex Offender Residence Restrictions: Sensible Crime Policy or Flawed Logic?*, 71 FED. PROB., 1, 4-7 (2007).

53 *See infra* Part I.

54 *See Boykin*, 395 U.S. at 242-44.

I. SORA AND SARA: THE STATUTORY LANDSCAPE IN NEW YORK

In 1993, the United States Congress passed the Wetterling Act, compelling states to create their own registries of individuals convicted of sex offenses.[55] In 1996, Congress passed "Megan's Law" to require states to make the information contained in these registries, heretofore available only to law enforcement, publicly available.[56] In 1995, New York's legislature authorized its own public registry through the Sex Offender Registration Act (SORA).[57] Along with the creation of the registration, SORA also regulates the length of time an individual must register—either for twenty years or for the rest of the individual's life depending on the individual's risk of reoffending.[58] In 2000, New York's legislature also passed the Sexual Assault Reform Act (SARA).[59] On its face, SARA amended the penal code sections related to sex offenses.[60] Inserted into these reforms was a section of the law prohibiting anyone convicted of a sex offense from living within 1,000 feet of a school or other facility primarily serving children under eighteen years of age.[61]

Although every state has a sex offender registry and most states enforce SARA-like geographic restrictions,[62] each state's law varies in important aspects. For instance, New York uses its own Risk Assessment Instrument in determining the risk of reoffending and

55 42 U.S.C.S. § 14071 (LexisNexis 1994) (repealed July 27, 2006, by Adam Walsh Child Protection and Safety Act of 2006, 120 Stat. 587). The Wetterling Act was named after Jacob Wetterling, an eleven-year-old boy who was abducted by a stranger in 1989 and later found murdered. *See* Mary Devine, *Danny Heinrich Explains How He Killed Jacob Wetterling in a Panic*, W. CENT. TRIB. (Sept. 6, 2016, 10:00 PM), https://www.wctrib.com/news/2874047-Sept.-6-2016-Danny-Heinrich-explains-how-he-killed-Jacob-Wetterling-in-a-panic#.X0xUp7YGNzU.link.

56 H.R. Con. Res. 2137, 104th Cong. (1996) (enacted).

57 *See* Sex Offender Registration Act, N.Y. CORREC. LAW §§ 168-168-w (Consol. 1995). Every state has its own public sex offender registry through the passage of Megan's Law. *See Megan's Law Resources by State*, FINDLAW, https://criminal.findlaw.com/criminal-charges/megan-s-law-resources-by-state.html (last updated Feb. 4, 2019).

58 *See* N.Y. CORREC. LAW § 168-h.

59 *See* Sexual Assault Reform Act, 2000 N.Y. S.N. 8238 §§ 7-9 (LexisNexis 2000).

60 *See id.*

61 *See id.*

62 Thirty-eight states have passed some form of geographical restriction, ranging from 2,000 feet to 500 feet. *See* Savage & Windsor, *supra* note 6, at 14. Some municipalities have passed their own more restrictive laws, such as Miami-Dade County's 2,500-foot limit. *See id.* at 13.

registration length, while the most commonly used risk estimation tool in other states is the Static-99.[63] Also, those states with geographic restrictions vary in the distance they use for the exclusion zone, from 500 to 2,000.[64]

The driving force behind the passage of these federal and state sex offense registry laws is the belief that individuals convicted of sex offenses are more likely to re-offend than individuals convicted of non-sex offenses.[65] The hope is that tracking individuals convicted of sex offenses and making public specific information about the individuals' names, addresses, and convictions would prevent recidivism and protect communities from sexual crimes.[66] However, research studies undercut both the idea of a greater risk of recidivism and the hopes that residency restrictions actually protect communities.[67] In fact, individuals convicted of sex offenses "have among the lowest rates of same-crime recidivism of any category of offender."[68]

Despite these growing criticisms of the rationale behind residency restrictions and of sex offender registries in general, SORA and SARA have not changed since their initial passage. They are likely to remain, and thus, understanding the statutes and the processes and residency restrictions therein is essential to understanding how deeply they impact the housing availability for individuals convicted of sex offenses. The details of each statute are discussed separately and in further detail below.

63 *See* Leslie Helmus et al., *Absolute Recidivism Rates Predicted by Static-99R and Static-2002R Sex Offender Risk Assessment Tools Vary Across Samples: A Meta-Analysis*, 39 CRIM. JUST. & BEHAV. 1148, 1149-50 (2012).

64 *See* Savage & Windsor, *supra* note 6, at 16.

65 *See* S.N. 11 § 1 1995 Reg. Sess. (N.Y. 1995) ("The legislature finds that the danger of recidivism posed by sex offenders . . . and that protection of the public from these offenders is of paramount concern or interest to government.").

66 *See id.*

67 *See* David Feige, *When Junk Science About Sex Offenders Infects the Supreme Court*, THE N.Y. TIMES (Sept. 12, 2017), https://www.nytimes.com/2017/09/12/opinion/when-junk-science-about-sex-offenders-infects-the-supreme-court.html.

68 *Id.*

A. SORA & Risk Level Determinations

SORA authorizes the creation and administration of a statewide registry of individuals convicted of sex offenses[69] and makes publicly available the information of certain individuals found in the registry.[70] SORA also creates a three-tier system of classifying individuals convicted of sex offenses based on their risk of recommitting sex offenses.[71] Level 1 offenders are deemed a "low-risk;" Level 2 offenders are a "moderate-risk;" and Level 3 offenders are deemed a "high-risk."[72] Each of these levels may also carry an additional designation of "sexual predator," "sexually violent offender," or "predicate offender."[73]

SORA then sets guidelines on how long individuals are required to register.[74] The length of an individual's required registration is based on the individual's risk of re-offence.[75] Level 1 offenders who are also deemed "sexual predators," "sexually violent offenders," and "predicate offenders," and all Level 2 and Level 3 offenders must register for life in a publicly available database.[76] Level 1 designees without the additional classification are the only group not required to register for life; instead, these designees must register for twenty years.[77] Level 1 designees are also the only class whose residence, place of employment, and criminal history are not readily publicly available.[78] The duty to register begins ten days prior to release from criminal or civil confinement or at the

69 *See* Sex Offender Registration Act, N.Y. CORREC. LAW § 168-b(1) (Consol. 1995).

70 *See id.* § 168-b(2)(a).

71 *See id.* §§ 168-f(2)(b-1)-(b-3).

72 *Id.* § 168-l(6)(a)-(c).

73 *Id.* § 168-l(6). "Sexual predators" are individuals convicted of a sex offense who suffer "from a mental abnormality or personality disorder that makes him or her likely to engage in predatory sexually violent offenses." *Id.* § 168-a(7)(a). "Sexually violent offenders" are those individuals who have been convicted of a statutorily defined "sexually violent offense." *Id.* § 168-a(7)(b). "Predicate sex offenders" are those individuals who have been convicted of more than one sex offense. *Id.* § 168-a(7)(c).

74 *See id.* § 168-h.

75 *See id.*

76 *Id.* § 168-h(2).

77 *See id.* § 168-h(1).

78 *See id.* § 168-b(1)(e); *see also Search Public Registry of Sex Offenders*, DIV. OF CRIM. JUST. SERV., https://www.criminaljustice.ny.gov/SomsSUBDirectory/search_index.jsp (last visited Sept. 5, 2020) (demonstrating that in any search, only Level 1 registrants with an additional designation, Level 2, and Level 3 registrants appear in searches).

time sentence is imposed for those individuals not facing confinement.[79]

To assign these levels and the additional designations in individual cases, SORA also creates a para-judicial panel called the Board of Examiners.[80] The Board of Examiners wields considerable power since its recommendation for an individual's assigned level is "presumptive."[81] In determining the individual's risk of reoffence, the Board of Examiners uses a tool called the Risk Assessment Instrument (RAI).[82] The RAI currently in use was developed in 2006 and is described as an "objective instrument" that assigns risk levels based on two elements: "the [offender's] likelihood of reoffence" and "the harm that would be inflicted if he did re-offend."[83] To determine these two elements, the RAI assigns scores to fifteen factors.[84] A person with a score from zero to seventy is a presumptive Level 1 offender; a score of seventy-one to 109 is a presumptive Level 2 offender; and a score from 110 to 300 is a Level 3 offender.[85]

Notably, most of the information used in the factors is known at the time of or even before an offender's guilty plea.[86] Factors One through Seven relate to the current offense and include factors like the use of violence, the type and duration of the offending contact,

79 *See* CORREC. § 168-f(1).

80 *See id.* § 168-l(1).

81 *See* SORA GUIDELINES , *supra* note 29, at 4. The Board or court may depart from the recommendation and either assign a higher- or lower-level than the one provided by the application of the Risk Assessment Instrument (RAI). *See id.* at 4-5. The Board or court may also override the RAI result in four instances that would result in a Level 3 classification: (1) when the individual convicted of the current sex offense has a prior felony sex offense conviction; (2) when the offense includes the "infliction of serious physical injury" or death; (3) if the individual has made a recent threat to commit a "sexual or violent crime"; and (4) if a the individual, through a "clinical assessment," has been found to have a "psychological, physical, or organic abnormality that decreases his ability to control impulsive behavior." *Id.* at 3-4.

82 *See id.* at 3, 5. A PDF of a scoring sheet is available online through various law offices specializing in representing clients at SORA Risk Assessment hearings. Though the scoring sheet follows the Risk Assessment Guidelines set forth in the statute and in the commentary provided by the New York Courts, the provenance of this particular scoring sheet is unknown to the author. The sheet is appended to this note as a more easily navigable reference to the RAI factors.

83 *Id.* at 2, 4.

84 *See id.* at 7-18. The document provides a section called "Specific Guidelines," which describes the rationale and research behind each factor and why it is included in the assessment. Guidance is also provided about what facts and which circumstances would cause the score to increase. *Id.* at 7, 9, 11, 13-17.

85 *See id.* at 3.

86 *See id.* at 3, 7-16.

and characteristics of the victim like age, mental or physical incapacities, and relationship to the offender.[87] Factors Eight through Eleven relate to the individual's prior criminal and substance abuse history.[88] Factor Twelve weighs whether the individual acknowledges responsibility for the offense.[89] Factor Thirteen weighs the individual's conduct in confinement thus far.[90] Factor Fourteen weighs whether the individual will be supervised, and if so what type of supervision he will be under.[91] Factor Fifteen weighs the appropriateness of the individual's living situation or employment.[92]

Of these fifteen factors, only Factors Thirteen, Fourteen, and Fifteen are weighed using facts not already in existence at the plea hearing.[93] The other twelve factors could reasonably be scored before a guilty plea is entered by using facts already known to the court. Therefore, the level for any one individual is fairly predictable before the defendant even reaches the sentencing stage.[94] Any person with knowledge of the facts of the case and of the defendant, such as defense lawyers and judges, can reasonably predict within a degree of certainty the risk level an individual will be assigned before the entering of a guilty plea. By predicting this level before a plea, a defendant could then understand the likely residency restrictions he would face post-release.

With the risk level predicted, the housing consequences to a defendant are then also easily determined. For example, if the individual is a Level 2 or 3 offender, one certain consequence would be the public availability of his sex offender status, as any private landlord can search the registry and find the defendant when vetting potential renters.[95] Whether landlords can legally

87 *See id.* at 7-12.
88 *See id.* at 13-15.
89 *See id.* at 15-16.
90 *See id.* at 16-17.
91 *See id.* at 17.
92 *See id.* at 17-18.
93 *See id.* at 16-17.
94 *See id.* at 7-16.
95 *See Search Public Registry of Sex Offenders*, *supra* note 78. Not only is the searchable database publicly available, when a person types "sex offender registry" into Google, one of the first hits is New York's official Sex Offender Registry search page. Google Search Results for Sex Offender Registry, GOOGLE, https://www.google.com/search?q=sex+offender+registry&rlz=1C1CHBF_enUS794US795&oq=sex+offe&aqs=chrome.1.0l2j69i57j0l2j69i60j69i61l2.4253j0j7&sourceid=chrome&ie=UTF-8 (last visited Sept. 5, 2020).

discriminate against sex offenders is a murky issue.[96] Although landlords are not allowed to discriminate based on a person's status as a felon,[97] the rules are not clear for decision-making based on status as a sex offender. For example, the Department of Justice published a guideline on its Fair Housing Act website stating, "[S]ex offenders . . . are not considered disabled under the Fair Housing Act, by virtue of that status. The Fair Housing Act affords no protections to individuals with or without disabilities who present a direct threat to the person or property of others."[98] Discrimination in private housing is of course dependent on the individual landlord.

However, when the government is the landlord, the housing consequences arising from an individual's risk level are all but assured. Federal statute requires public housing providers receiving Section 8 funding to prohibit admission to "any household that includes any individual who is subject to a lifetime registration requirement."[99] At the federal level and in many other states, only Level 3 offenders are required to register for life.[100] Recall that New York's registration regime is more punitive in that it requires Level 1 offenders with an additional designation, Level 2, and Level 3 offenders to register for life.[101] Thus, New York's registration requirements bar significantly more people from public housing than do other states.[102] Of the almost 42,000 total individuals

96 *See* U.S. DEP'T OF HOUS. AND URBAN DEV., *supra* note 23.

97 *See id.* at 2, 8.

98 *The Fair Housing Act*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/fair-housing-act-1 (last updated Dec. 21, 2017).

99 42 U.S.C. § 13663(a) (2018). It is important to note that the statute does not terminate public housing; the statute only explicitly prohibits admission. However, public housing providers may terminate housing if the offender engages in "criminal activity that threatens the health, safety, or right to peaceful enjoyment of other residents and persons residing in the immediate vicinity of the premises." *State Registered Lifetime Sex Offenders in the Housing Choice Voucher and Public Housing Programs FAQ*, U.S. DEP'T OF HOUSING & URB. DEV. (June 11, 2012), https://www.hud.gov/sites/documents/12-28PIHN-ATCH.PDF. This language leaves unclear whether individuals who were in public housing prior to their conviction will still have rights to the unit afterward.

100 *See* 34 U.S.C. § 20915 (2018).

101 *See Sex Offender Risk Level Determination*, DIV. OF CRIM. JUST. SERV., https://www.criminaljustice.ny.gov/nsor/risk_levels.htm (last visited Sept. 6, 2020).

102 For instance, in Ohio, where only Tier 3 offenders must register for life, there are 6,786 number of individuals on the sex offender registry, about 1,000 of whom must register for life and are barred from public housing, meaning 14.7% of Ohio's sex offenders are barred from public housing. For comparison, New York has 42,150 total registrations, over 25,000 of whom must register for life, meaning 60% of New York's sex offenders are barred from public housing. *Compare* Ohio Criminal Sentencing Comm'n, *Ad Hoc Committee on Sex Offenders Registration*, THE SUPREME COURT OF OHIO (Apr. 2016),

in the registry, "more than 25,000 New Yorkers are barred from almost all federally funded housing programs."[103]

These housing vulnerabilities and consequences can get even worse. The federal prohibition on lifetime registrants also extends to all members of the household.[104] For families who do not want to lose or who cannot lose their housing, this restriction leads to an imposed separation of family members, including separation between spouses, between a parent and his children, or between a family member and the rest of his household.[105] For families who refuse to separate, often the only other option is homelessness for the entire family, because of landlord discrimination or a financial inability to pay market rate rents in the private housing market.[106]

B. SARA & The 1,000-Foot Rule

In 2000, New York's legislature passed the Sexual Assault Reform Act.[107] Section seven of SARA places geographic restrictions on the housing of individuals convicted of sex offenses.[108] For an individual convicted of a sex offense against a victim under the age of eighteen, a mandatory condition of their probation, parole, or post-release supervision is that they may not live within 1,000 feet of "any school grounds . . . or [] facility or institution primarily

https://www.supremecourt.ohio.gov/Boards/Sentencing/resources/sentencingRecs/AdHocCommSexOffenderReg.pdf, *with* Registered Sex Offenders by Cnty. as of September 1, 2020, DIV. OF CRIM. JUST. SERVICES, https://www.criminaljustice.ny.gov/nsor/stats_by_county.htm.

103 FORTUNE SOC'Y, *supra* note 12, at 5.

104 *See* Barbara Mulé & Michael Yavinsky, *Saving One's Home: Collateral Consequences for Innocent Family Members*, N.Y. STATE UNIFIED CT. SYS., https://www.nycourts.gov/ip/partnersinjustice/Saving-Home.pdf.

105 *See id.*

106 *See id.*; *see also* Rachel Bell, *Finding a Place To Live as a Registered Sex Offender*, FLIP (May 11, 2018), https://flip.lease/blog/finding-a-place-to-live-as-a-registered-sex-offender.

107 *See* N.Y. CITY BAR ASS'N, THE IMPACT AND LEGALITY OF SEX OFFENDER RESIDENCY RESTRICTIONS 2 (2016). The rationale to pass geographical restrictions comes from the belief that sex offenders are more likely to recidivate if they are "allowed unrestricted access to potential targets." *See* BETH M. HUEBNER ET AL., AN EVALUATION OF SEX OFFENDER RESIDENCY RESTRICTIONS IN MICHIGAN AND MISSOURI 16 (2013), https://www.ncjrs.gov/pdffiles1/nij/grants/242952.pdf. However, research does not support that these geographical restrictions do anything to prevent an individual from recommitting a sex offense. *See id.* at 17.

108 *See* Sexual Assault Reform Act, 2000 N.Y. S.N. 8238 (2000).

used for the care or treatment of persons under the age of eighteen."[109] This includes schools, playgrounds, and daycares.[110] SARA also adopts the New York Penal Code definition of "school grounds."[111] Adoption of this definition has the practical effect of measuring this 1,000 feet not from the building itself but from the property line.[112] This geographic limitation applies regardless of the individual's assessed risk level.[113]

The overlapping radii of these school exclusion areas combine to keep individuals out of large swaths of New York State.[114] For instance, individuals are barred from living almost anywhere on the island of Manhattan.[115] A few blocks bordering the Hudson River, and a few blocks bordering the East River are the only areas in the borough where compliant housing can be found.[116] In the Bronx, housing in all but the most northern and eastern parts of the borough is prohibited to individuals convicted of sex offenses.[117] In 2013, in Suffolk County on Long Island, *Newsday* reported that almost seven hundred Level 2 and 3 offenders were "concentrated in just a handful of . . . communities."[118] These communities tended to be "less-affluent areas" because those communities had "less political clout."[119]

Limited to so few compliant housing options, many individuals are not able to afford housing costs, or face very limited housing inventory and end up homeless.[120] As of 2017, 275 registrants self-reported as homeless.[121] This figure does not contemplate the

109 *Id.*

110 *See* People v. Diack, 26 N.E.3d 1151, 1156 (N.Y. 2015).

111 *See* N.Y. PENAL LAW § 220.14 (McKinney 1973).

112 *See id.*

113 *See* Sexual Assault Reform Act, 2000 N.Y. S.N. 8238 §§ 7-9,14 (2000). SARA does not address SORA registrants by their levels. The only reference to SORA made in SARA is to include internet aliases in the registry and to stipulate that certain notices must be given to callers of the registry's 1-900 telephone number. *See id.* §§ 15-17.

114 *See* FORTUNE SOC'Y, *supra* note 12, at 3-5.

115 *See id.* at 3-4.

116 *See id.*

117 *See id.*

118 Denise M. Bonilla & Emily Ngo, *700 Registered Sex Offenders Concentrated in Few LI Communities*, NEWSDAY, https://www.newsday.com/long-island/towns/700-registered-sex-offenders-concentrated-in-few-li-communities-1.6496539 (last updated Nov. 25, 2013, 10:17 PM).

119 *Id.*

120 *See* FORTUNE SOC'Y , *supra* note 12, at 4.

121 *See* Pei-Sze Cheng & Dave Manney, *I-Team: Tracking Sex Offenders in NY Complicated by 'Homeless' Listings*, WNBC, https://www.nbcnewyork.com/news/local/homeless-sex-offender-new-york-city-investigation-megan-law-i-team/351358 (last updated Feb.

potential for a much higher number of individuals who are homeless but may instead report the address of a loved one or friend simply to have a legally compliant address.[122] When homeless, these individuals have a difficult time finding shelter, since only four of New York City's six hundred-plus homeless shelters are SARA-compliant.[123] In Suffolk County, officials began placing homeless sex offenders in compliant motels due to a lack of compliant shelters.[124] After protests that homeless sex offenders were being placed in motels, Suffolk County officials placed the men in compliant temporary trailer parks in two communities, Riverhead and Westhampton.[125] When residents in those two communities protested, the officials shuttled the men back to motels, illustrating that even when individuals find compliant housing, the forces of Not-In-My-Backyard may still take the roof from over their heads.[126]

II. DUE PROCESS REQUIREMENTS IN THE GUILTY PLEA CONTEXT

The housing consequences incurred by individuals convicted of sex offenses are grave. As previously discussed, convictions can bar individuals from public and private housing, block them from homeless shelters, and prohibit them entirely from living in many communities and sometimes whole counties. Convictions can even separate or cause the homelessness of families.[127] What do these dire sex offense-related consequences mean for a defendant's rights in a criminal proceeding under the federal Constitution? This next part explores two important sources of rights, the

6, 2017, 7:23 PM). The article discusses the difficulty in tracking homeless registrants, which registry proponents say undercuts the purpose of the registry. This article then describes a cycle where the residency restrictions caused by the laws impair the ostensible public safety function of the laws.

122 *See id.* The article discusses how New York does not verify a registrant's living situation. This raises the possibility that many registrants provide addresses but are nonetheless homeless.

123 *See* Gonzalez v. Annucci, 117 N.E.3d 795, 799 (N.Y. 2018); *see also* FORTUNE SOC'Y, *supra* note 12, at 4.

124 *See* Bonilla & Ngo, *supra* note 118.

125 *See id.*

126 *See id.*

127 *See supra*, Part I.

Sixth[128] and Fifth Amendments,[129] and what they require of defense counsel and judges. As a threshold matter, the *Brady* Court held that guilty pleas are valid only if they are knowingly, intelligently, and voluntarily made.[130] This then requires that the defendant have "sufficient awareness of the relevant circumstances and likely consequences" of his plea.[131] Until recently, the rights and obligations under both amendments turned on the distinction between direct and collateral consequences.[132] However, with its 2010 decision in *Padilla v. Kentucky*, the Supreme Court introduced a new analysis of immigration consequences, freeing them from the direct/collateral binary, an analysis that could equally apply to sex offense-related housing consequences.[133]

A. The Sixth Amendment and Effective Assistance of Counsel

The Sixth Amendment guarantees criminal defendants the right to defense counsel.[134] This right applies not only to trial proceedings but also to the plea-bargaining stage.[135] Implicit in this language is the defendant's need for and right to *effective* assistance of defense counsel.[136] An individual can challenge his conviction on the basis of the ineffective assistance he received.[137] The

128 *See* U.S. CONST. amend. VI ("[T]he accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").

129 *See* U.S. CONST. amend. V ("No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . .").

130 *See* Brady v. United States, 397 U.S. 742, 748 (1970). The requirement of a knowing, intelligent, and voluntary plea derives from the Fifth Amendment in that a guilty plea "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 . . . ." *Id.*

131 *Id.*

132 *See id.* at 755.

133 *See* Padilla v. Kentucky, 559 U.S. 356, 387-88 (2010).

134 *See* U.S. CONST. amend. VI.

135 *See* Argersinger v. Hamlin, 407 U.S. 25, 63 (1971) (holding that the Sixth Amendment right to effective assistance of counsel applies to the entering of a guilty plea); *see also* Missouri v. Frye, 566 U.S. 134, 144 (2011) (holding that the Sixth Amendment right to effective assistance of counsel applies to the plea negotiation itself).

136 *See* McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970) (finding that a challenge after a conviction is valid due to ineffective assistance to counsel because "the right to counsel is the right to the effective assistance of counsel").

137 *See* Strickland v. Washington, 466 U.S. 668, 669 (1984).

Supreme Court in *Strickland v. Washington* laid out a two-part test for proving ineffective assistance of counsel in a trial context.[138] First, the defendant must show that his attorney committed "errors so serious" that the attorney's representation violated the concept of "counsel."[139] This part of the test analyzes the competency of the defense counsel's representation.[140] After establishing the first part of the test, the individual must then show that his lack of effective counsel at the plea or trial stage "prejudiced" or hindered his defense.[141] In *Hill v. Lockhart*, the Court extended the *Strickland* test to the guilty plea context, holding that, as in *Strickland*, an individual "must show . . . a reasonable probability" that the ineffectiveness of his defense counsel caused the individual to forego trial and plead guilty.[142]

The competency of defense counsel's representation naturally touches on the various duties that a defense lawyer has and also his ability to perform them. But which duties are constitutionally required, and which duties were or should have been fulfilled in a given case are often contingent on the specific facts of that case. These duties are thus challenging to codify jurisprudentially.[143]

The *Brady* Court requires only that defense counsel advise defendants of "direct consequences" and not collateral ones.[144] However, which consequences are direct, and which consequences are collateral?[145] In other words, what consequences do defense lawyers have to explain to defendants, and what consequences can go unsaid before a guilty plea is entered? Prison terms, probation,

138 *See id.* at 687.

139 *Id.*

140 *See id.*

141 *Id.*

142 *Id.* at 669.

143 *See, e.g.,* McMann v. Richardson, 397 U.S. 759, 771 (1970) "On the one hand, uncertainty is inherent in predicting court decisions; but, on the other hand, defendants facing felony charges are entitled to the effective assistance of competent counsel. Beyond this, we think the matter, for the most part, should be left to the good sense and discretion of the trial courts, with the admonition that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts." *Id.*

144 *See* Brady v. United States, 397 U.S. 742, 755 (1970) (quoting Shelton v. United States, 246 F.2d 571, 572 n. 2 (5th Cir. 1957)).

145 The Supreme Court's first mention of some consequences being "collateral" comes in 1957, in *Pollard v. United States.* The Court held that defendant's habeas petition was not mooted simply because he had been released from prison, because "[t]he possibility of consequences collateral to the imposition of sentence is sufficiently substantial to justify our dealing with the merits." Pollard v. United States, 352 U.S. 354, 358 (1957).

and fines are classic direct consequences.[146] Until the Court's decision in *Padilla*, discussed below, every other consequence was collateral.

Because both direct and collateral consequences arising from a conviction continue to proliferate as a result of state legislation, state high courts must determine which consequences require a constitutionally mandated advisal.[147] In New York, the Court of Appeals has explicitly stated that consequences other than prison sentences, post-release supervision, and fines arising from a sex offense conviction are collateral and therefore require no pre-plea advisal.[148] In *People v. Gravino,* the Court of Appeals explained that collateral consequences "are peculiar to the individual and generally result from the actions taken by agencies the court does not control."[149] The *Gravino* court defined a direct consequence as "one which has a definite, immediate and largely automatic effect on defendant's punishment."[150]

Housing consequences arising from a sex offense conviction fit these named criteria for a direct consequence.[151] Housing consequences are "definite" and "largely automatic."[152] If an individual is convicted of a sex offense and assigned a risk level of Level 1 with an additional classification, Level 2 or Level 3, the individual will be barred from public housing.[153] If an individual is convicted of a sex offense and the victim was less than eighteen years old,

146 *See* Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators*," 93 Minn. L.R. 670, 672 (2008). In New York, "[t]he direct consequences of a plea . . . are essentially the core components of a defendant's sentence: a term of probation or imprisonment, a term of post-release supervision, a fine. Our cases have identified no others." People v. Harnett, 16 N.Y.3d 200, 205 (2011).

147 *See* Roberts, *supra* note 146, at 679, n. 38.

148 *See* People v. Kidd, 932 N.Y.2d 762, 762 (2011) (holding that defense counsel is under no duty to advise clients of sex offender registration); *see also Harnett* 16 N.Y.3d at 200, 205; People v. Gravino, 928 N.E.2d 1048, 1049 (N.Y. 2010) (holding that courts have no duty to advise defendants of sex offender registration because of the collateral nature of that consequences).

149 *Gravino,* 928 N.E.2d at 1052 (quoting People v. Ford, 86 N.Y.2d 397, 403 (N.Y. 1995)). The *Gravino* court held that sex offender registration was a collateral consequence of a criminal conviction. By implication, housing consequences related to registration would also be collateral under the *Gravino* court's holding. However, the *Gravino* court relies heavily on the factors described in its holding in *Ford* fifteen years earlier. The *Ford* decision held that there was no constitutional requirement to advise defendants of immigration consequences. *See Ford*, 86 N.Y.2d at 403.

150 *Gravino,* 928 N.E.2d at 1052.

151 *See id.*

152 *Id.*

153 *See supra* Part I.A.

the individual will be barred from living within 1,000 feet of a school or other facility primarily used by minors.[154] These housing consequences are also not peculiar to the individual; these housing consequences are statutorily defined, akin to a mandatory minimum sentence handed down at sentencing.[155]

In contrast to this analysis, the *Gravino* court held that registration was a collateral consequence.[156] But the legal precedent on which the *Gravino* court relied is no longer constitutionally valid, leaving the validity of *Gravino*'s holding in doubt.[157] The factors for classifying direct and collateral consequences given in *Gravino* derive from the 1995 Court of Appeals holding in *People v. Ford*.[158] In *Ford*, the court held that immigration consequences were collateral and thus required no advisal or colloquy before the entering of a guilty plea.[159] The *Gravino* Court, reliant on the precedent in *Ford*, rendered its decision on May 11, 2010.[160] Yet, just a month and a half prior to that on March 30, 2010, the Supreme Court had invalidated the factors and the holding in *Ford* with its decision in *Padilla v. Kentucky*.[161] After *Padilla* and without *Ford*, can the *Gravino* classification of sex offense-related consequences as collateral still stand? Looking to *Padilla* for guidance, the answer is no.

The facts in *Padilla* involved a lawful permanent resident who was charged with felony drug offenses after he was discovered driving a semi-truck containing over 1,000 pounds of marijuana.[162] Padilla pleaded guilty to the charges, having been advised by his attorney that there would be no immigration consequences.[163] The Supreme Court determined that Padilla pleaded guilty after ineffective assistance of counsel.[164] In reversing Padilla's conviction, the Court established a duty not just to refrain from misadvising clients, but to affirmatively advise them of

154 *See supra* Part I.B.
155 *See id.*
156 *Gravino*, 928 N.E.2d at 1049.
157 *See generally* People v. Ford, 86 N.Y.2d 397, 403 (N.Y. 1995) (*abrogated by* Padilla v. Kentucky, 559 U.S. 356 (2010)).
158 *See Gravino*, 928 N.E.2d at 1052.
159 *See Ford*, 86 N.Y.2d at 401.
160 *See Gravino*, 928 N.E.2d at 1048, 1052.
161 *See Padilla*, 559 U.S. at 356-57, 365, 374.
162 *See id,* at 359.
163 *See id.* at 359, 368-69.
164 *See id.* at 360, 368-69, 374.

immigration consequences.[165]

The *Padilla* decision is remarkable because the Court upended over thirty years of jurisprudence based strictly on the direct-versus-collateral distinction.[166] Instead of classifying immigration as either a direct or a collateral consequence, the Court declined to classify it as either.[167] Since the distinction between the two was "ill-suited to evaluating" the question of the effectiveness of counsel's assistance, the Court put immigration in its own category.[168] While limiting this third category to immigration, the Court, in describing the factors that made immigration "ill-suited" to a direct-collateral distinction, opened the door to applying these new factors to other consequences that heretofore had been deemed collateral.[169]

First, the Court defined immigration as a "particularly severe 'penalty,'" and distinguished it from a "criminal sanction."[170] Second, the Court recognized that although immigration consequences are "civil in nature," immigration proceedings are "nevertheless intimately related to the criminal process."[171] Third, the Court highlighted the "automatic result" of immigration consequences for multiple criminal offenses.[172] In doing so, the Court enumerated the ways in which immigration law evolved to make deportation "practically inevitable" for these offenses, as there is "limited . . . discretion" to cancel deportation and thus void the consequence.[173] Based on these three factors, the Court then held that defense counsel must advise clients of immigration consequences prior to a defendant entering a guilty plea.[174]

Sex offense-related housing consequences satisfy the same three factors. First, being barred from both public and private housing options is indeed a severe penalty. Sex offense-related housing

165 *See id.* at 373-75.

166 *See id.* at 365-66, 375-76; *see also Brady*, 397 U.S. at 755 (showing that the change in direct-versus-collateral came after over thirty years of precedent).

167 *See Padilla,* 559 U.S. at 366.

168 *Id.*

169 *See* McGregor Smyth, *From "Collateral" to "Integral": The Seismic Evolution of Padilla v. Kentucky and Its Impact on Penalties Beyond Deportation,* 54 HOW. L.J. 795, 800-01 (2011).

170 *Padilla*, 559 U.S. at 365 (citation omitted).

171 *Id.*

172 *Id.* at 366.

173 *Id.* at 363-64.

174 *See id.* at 373-74.

consequences can result in post-sentence confinement or homelessness for individuals.[175] In many cases, this results in the separation of families who must choose between staying in their home or remaining with the family member who has a sex-offense conviction.[176] Second, the designation of SORA risk levels is a civil process conducted by the Board of Examiners.[177] However, SORA is "intimately related" to the criminal process through the enumeration of offenses, which trigger these risk level assessments through the calculation of the assessment factors using the facts of the offense and the individual's prior criminal history.[178] Regarding the SARA-based geographical limitations on housing, the consequence is undeniably the result of the criminal proceeding: if the defendant is convicted of a sex offense and the victim is under the age of eighteen, then the geographic limitation kicks in.[179] Finally, like deportation, sex offense-related housing consequences are automatic.[180] The assessment itself is automatic for all individuals convicted of sex offenses.[181] For lifetime registrants, the automatic effect is that they are prohibited from all public housing.[182] For sex offenders whose victims are under the age of eighteen, an additional automatic effect is that they are prohibited from living within 1,000 feet of a school or other facility primarily used by children.[183]

Thus, sex offense-related housing consequences, while difficult to define using traditional direct and collateral distinctions, fit well within the factors used by the Supreme Court to remove immigration consequences from that legal quandary.[184] Because sex offense-related housing consequences are like the immigration consequences considered in *Padilla*, the logical and just extension of the Sixth Amendment is for defense counsel to treat sex offense-

175 *See* FORTUNE SOC'Y, *supra* note 12, at 4-5.

176 *See* Mulé & Yavinsky, *supra* note 104, at 10.

177 *See, e.g.,* Sex Offender Registration Act, N.Y. CORREC. LAW §168 (Consol. 1995).

178 *Padilla*, 559 U.S. at 365; *see also* § 168-2(a). The definition of "sex offense" lists all the sex offenses under the New York Penal Law, but it also makes kidnapping a sex offense when the victim is less than seventeen years old and the individual charged is not the parent. *Id.*

179 *See* Sexual Assault Reform Act, 2000 N.Y. S.N. 8238 §§ 7-9 (2000).

180 *See id.*

181 *See id.*

182 *See generally* 42 U.S.C. § 13663 (2018).

183 *See* SARA, §§ 7-9.

184 *See Padilla*, 559 U.S. at 363-66.

related housing consequences like immigration consequences.[185]

Moreover, the Court said that the first question under *Strickland*'s test of effective assistance of counsel is whether "counsel's representation 'fell below an objective standard of reasonableness.'"[186] The Court recognized that reasonable defense counsel had already been guided for at least the fifteen years preceding its decision by American Bar Association standards of what advice an attorney must provide his client, and those standards included immigration consequences.[187] In fact, the Court highlighted that the ABA was not alone in recognizing immigration consequence advisals as a professional norm; the National Legal Aid and Defender Association (NLADA), the Department of Justice, and numerous scholars had all done the same.[188] In citing to these numerous sources for professional standards on immigration consequence advisals, the Court in dicta hinted that the duty to advise clients of collateral consequences like immigration is a professional and constitutional duty of defense counsel.[189]

McGregor Smyth, Executive Director of New York Lawyers for the Public Interest, argues that "[t]he very same professional standards the Court cites in *Padilla* also require advice on a wide range of enmeshed penalties beyond deportation."[190] In support of this, Smyth cites to ten pages of *Effective Assistance of Counsel and the Consequences of Guilty Pleas,* an article written by Gabriel J. Chin & Richard W. Holmes, also cited by the Supreme Court in *Padilla*, and cited frequently in other discussions of court and counsel's duties surrounding collateral consequences.[191] According to Chin and Holmes, the history of the ABA's standard to advise clients of collateral consequences goes back to the 1980 version of

185 *See id.*

186 *Id.* at 366 (quoting Strickland v. Washington, 466 U.S. 688, 688 (1994)).

187 *See id.*

188 *See id.* at 367-68. While NLADA does not provide professional norms, it does address the need to advise clients through all stages of the criminal proceeding on collateral consequences. *See also Performances Guidelines for Criminal Defense Representation, Guideline 8.2 Sentencing Options, Consequences and Procedures*, NAT'L LEGAL AID & DEF. ASS'N (2006), http://www.nlada.org/defender-standards/performance-guidelines/black-letter.

189 *See Padilla*, 559 U.S. at 367-68. The Court uses the ABA Standards for professionalism to buttress its holding on what the Sixth Amendment requires of effective defense counsel. *See id.*

190 Smyth, *supra* note 170, at 810. Smyth is also the former Director of The Bronx Defenders' Civil Action Practice and Director of its Reentry Net Unit. *See id.* at 795.

191 *See id.* at 803, 803 n. 31.

its *Criminal Justice Standards for the Defense Function*.[192] The ABA makes consideration of collateral consequences prior to entering a guilty plea a duty on defense counsel.[193] The ABA spells out that these advisals should include the "details of relevant collateral consequences" and that "such advice should be provided sufficiently in advance that it may be fairly considered in a decision to pursue trial, plea, or other dispositions."[194]

These professional standards simply state what already exists in the Fifth and Sixth Amendments. Although unstated by a court so far, the constitutional rights to due process and to effective assistance of counsel require nothing less than defense counsel advisals to clients of sex offense-related housing consequences.

B. The Fifth Amendment and Judicial Obligations

Though a defense attorney may be the court officer in most immediate contact with the defendant, the court plays an integral part in protecting the defendant's right to due process throughout criminal proceedings.[195] For example, the court is the arbiter of whether a guilty plea is made knowingly, intelligently, and voluntarily.[196] Because over ninety-seven percent of convictions are the result of a guilty plea, the court's role in the plea context is essential to the integrity of our criminal justice system.[197] Since a guilty plea precludes the defendant's proceeding to trial, a guilty plea waives the rights associated with trial, including the right to a

192 *See* Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 714 (2002).

193 *See* ABA, CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, STANDARDS 4-5.4 (4th ed. 2017), https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/.

194 *Id.*

195 *See* Brady v. United States, 397 U.S. 742, 748 (1970); *see also* Boykin v. Alabama, 395 U.S. 238, 243-44 (1969). Though the *Padilla* decision addresses defense counsel's role in advising a defendant of immigration consequences before entering a plea, Lang argues that defense counsel and courts work in tandem to ensure a defendant's due process rights. *See* Danielle M. Lang, *Padilla v. Kentucky*: *The Effect of Plea Colloquy Warnings on Defendant's Ability to Bring Successful Padilla Claims*, 121 YALE L.J. 944, 949-55 (2012).

196 *See Brady*, 397 U.S. at 743-44.

197 *See* NAT'L ASS'N OF CRIM. DEF. LAWYERS, THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 14 (2018), https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf.

trial by jury, the right against self-incrimination, the right to confront a defendant's accusers, and in most cases, the right to appeal the conviction.[198] A guilty plea also represents an agreement to the facts as allocated by the court, and precludes any litigation of those facts at trial.[199]

These trial rights derive from the Fifth Amendment.[200] Waiver of those rights thus implicates a defendant's Fifth Amendment right to due process.[201] Therefore, the court is constitutionally required to ensure that a defendant's waiver is valid.[202] The court must ensure that a defendant understands that by pleading guilty, he is relinquishing those rights and that the relinquishment of those rights was the defendant's own decision.[203] When a guilty plea is made in the absence of knowledge and voluntariness, the plea is constitutionally invalid.[204]

To achieve a knowing and voluntary plea, the court must inform the defendant of the consequences of his plea.[205] A plea colloquy is a discussion between the court and the defendant, before the guilty plea is entered, in which the court informs the defendant of the offense to which he is pleading guilty, the facts giving rise to the charge, the rights he is waiving by pleading guilty, and the consequences that the defendant will incur because of the plea.[206] As with defense counsel, the court has a duty only to advise the defendant of direct consequences like prison sentences.[207] During the plea colloquy, the court also asks the defendant whether he feels

198 *See Brady*, 397 U.S. at 748; *see also* NAT'L ASS'N OF CRIM. DEF. LAWYERS, *supra* note 197, at 14-15.

199 *See Brady*, 397 U.S. at 748; *see also Boykin*, 395 U.S. at 242.

200 *See Brady*, 397 U.S. at 748; *see also Boykin* v. Alabama, 395 U.S. at 243 ("Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial."). The *Boykin* Court then went on to list the Fifth Amendment rights against self-incrimination, trial by jury, and right to confront one's accusers. *See id.*

201 *See Brady,* 397 U.S. at 748.

202 *See id.*

203 *See id.*

204 *See id.*; *see also Boykin*, 395 U.S. at 242.

205 *See Boykin*, 395 U.S. at 242.

206 *See id.* ("Admissibility of a confession must be based on a 'reliable determination on the voluntariness issue which satisfies the constitutional rights of the defendant' . . . Presuming waiver from a silent record is impermissible." (citing Jackson v. Denno, 378 U.S. 368, 387 (1964)).

207 Colloquy, N.Y. Unified Court System, *Guilty Plea Model Colloquy*, August 2016, at 9 [Hereinafter *Plea of Guilty*].

he was well-represented by his attorney.[208] Thus, the court's plea colloquy protects not only a defendant's Fifth Amendment rights but also his Sixth Amendment right to effective assistance of counsel.[209]

Interpreting these federal constitutional mandates, the New York Court of Appeals has held that courts must advise defendants of direct consequences: prison terms, fines, and post-release supervision.[210] Courts must even advise a defendant of minor consequences like the loss of his driver's license.[211] The New York Unified Court Model Colloquy Committee drafted suggested scripts to judges for immigration consequences, revocable sentences like conditional discharge, civil commitment, and the registration requirement on people convicted of sex offenses.[212] However, the sex offense registration script is preceded by a note to judges that "[a] court may, but is not normally required to, advise the defendant of sex offense registration requirements."[213]

The legal authority for this note giving judges discretion in reading the colloquy comes from *People v. Gravino*.[214] In explaning "not normally required," the note states that there "may [be] a rare case" which would "warrant permitting withdrawal of the plea."[215] As of this writing, this "rare case" has not made it to the Court of Appeals; however, the colloquy guidelines' acknowledgment of a potential "rare case" is at least a recognition by New York's courts that due process might demand a defendant receive notice of sex offense-related consequences, including housing consequences.

In this optional plea colloquy script for sex offense registration, the only consequence that is even communicated to the defendant is that he "will be required to register as a sex offender."[216] The script references the registration periods but does not advise the

208 *See id.* at 3.

209 *See Boykin*, 395 U.S. at 242 ("The record must show . . . that an accused was offered counsel but intelligently and understandingly rejected the offer.").

210 *See* People v. Harnett, 16 N.Y.3d 200, 205 (2011); People v. Catu, 4 N.Y.3d 242, 244-45 (2005); *see also Plea of Guilty*, *supra* note 207, at 24.

211 *See* People v. Castellini, 884 N.Y.S.2d 550, 551 (1st Dep't 2009); *see also Plea of Guilty*, *supra* note 207, at 14.

212 *See id.* at 11, 14, 18, 21.

213 *Id.* at 21.

214 *See id.* As discussed previously in Part II.A, *Gravino* may no longer be good law given the *Padilla* decision's abrogation of *Ford*, on which *Gravino* relied.

215 *Id.*

216 *Id.*

defendant whether the period will be twenty years or life.[217] The script makes no mention of any loss of housing that would result either from the length of registration, which would trigger SORA-related consequences or from the offense and the age of the victim, which would trigger SARA-related consequences.[218] After highlighting the variability of the registration requirement and omitting any reference to almost-certain housing consequences, the script ends with the question, "Do you understand?"[219]

As discussed previously in Part II.A, *Gravino,* from which this optional colloquy derives its legal authority, may no longer be good law.[220] The Supreme Court's decision in *Padilla* abrogated the New York Court of Appeals' holding in *Ford*, precedent on which the *Gravino* court relied.[221] Along with the reassessment of the direct-versus-collateral distinction and of defense counsel's constitutional duties, the Supreme Court's decision in *Padilla* also opened the door to a reassessment of the court's role in advising defendants of consequences beyond those traditionally defined as "direct."[222] The duty on courts derives not from *Padilla* alone, but from a long line of Fifth and Sixth Amendment jurisprudence tying effective assistance of counsel, as addressed in *Padilla,* to the court's duty to ensure a knowing, intelligent, and voluntary plea.[223]

Even in their procedural rules and suggested colloquies, both federal and state criminal justice systems have codified this mandate on judges to advise criminal defendants of immigration consequences.[224] Rule 11 of the Federal Rules of Criminal Procedure lays out a checklist for informing the defendant of consequences and then making sure he understands them.[225] Rule 11 requires the court to inform a defendant of "any maximum possible penalty" and "any mandatory minimum penalty" and also to verify that the defendant understands these penalties.[226] Rule 11 enumerates the

217 *See id.*
218 *See id.*
219 *Id.*
220 *See supra* Part II.A; *Gravino*, 928 N.E.2d at 1048.
221 *See Padilla*, 559 U.S. at 356; *Gravino*, 928 N.E.2d at 1052.
222 *See Padilla*, 559 U.S. at 365-66.
223 *See supra* Part II.B.
224 *See Plea of Guilty, supra* note 207, at 20.
225 *See* FED. R. CRIM. P. 11(b).
226 FED. R. CRIM. P. 11(b)(1)(H) & (I). Rule 11(b)(1)(H) states "any maximum penalty,

court's duty to advise of immigration consequences, a subsection added after the *Padilla* decision came down.[227] In New York, Criminal Procedure Law Section 220.50 requires courts to advise defendants of potential immigration consequences.[228] The suggested plea colloquy references *Padilla* and adapts the language from § 220.50 into a script that judges must read before a plea is accepted.[229]

Like immigration consequences, housing consequences are indeed a severe penalty. The "maximum possible" and "mandatory minimum" housing consequences are, in the case of SORA-related consequences, reasonably foreseeable using the Risk Assessment Instrument or, in the case of SARA-related consequences, known outright because of the sex offense itself and the age of the victim. Because housing consequences are penalties akin to immigration consequences and because these penalties are known before disposition, the duty on courts to inform defendants of these housing consequences naturally extends from the *Padilla* decision.

III. RECOMMENDATIONS

Because sex offense-related housing consequences act as a penalty, both defense counsel and judges should advise defendants of these consequences before they plead guilty.[230] Anything less is unconstitutional.[231] Furthermore, making this recommended change is an easier task than the change counsel and courts underwent after *Padilla*. The intersection of a criminal conviction and immigration consequences is complicated.[232] However, at least in New York, sex offense-related housing consequences are

including imprisonment, fine, and term of supervised release." The use of the word "including" indicates that this is not an exhaustive list of "maximum penalties" of which a court must give notice.

227 *See* FED. R. CRIM. P. 11(b)(1)(O).

228 *See* N.Y. CRIM. PROC. LAW § 220.50(7) (McKinney 2019).

229 *See Plea of Guilty, supra* note 207, at 20.

230 *See* FED. R. CRIM. P. 11(b)(1)(H) & (I).

231 *See Boykin*, 395 U.S. at 238.

232 *See Immigration Consequences of Crimes Summary Checklist*, IMMIGRANT DEFENSE PROJECT, https://www.immigrantdefenseproject.org/wp-content/uploads/Imm-Consq-checklist-2017-v3.pdf (last updated June 16, 2017). This two-page checklist summarizes criminal offenses that may have immigration consequences for immigrant defendants.

highly predictable: counsel and the courts do not have to make a best guess, because the consequences are either calculated using the facts-based scoring system under SORA or are explicitly written in the statute as with SARA.[233] The following sections make simple, easily adopted proposals for defense counsel and courts regarding both types of housing consequences.

A. Defense Counsel Advisals

Defense counsel has the most integral and most extensive contact with the individual charged with a sex offense. For that reason, defense counsel's advice on sex offense-related housing consequences should be in-depth and precise.

i. Using the RAI

Using the publicly available Risk Assessment Instrument developed and used by the Board of Examiners to make their own determination of risk level,[234] defense counsel can reasonably predict the score the client would receive and whether that score would result in a lifetime registration requirement. Of the three hundred possible points an individual might score under the RAI, only fifty relate to factors using facts unknown to counsel at the time when a plea is being contemplated.[235] All facts, except those needed for Factor 13 which scores "conduct while confined/supervised" and Factor 14 which scores court-ordered supervision, are known to defense counsel at the time when the client is weighing whether to enter a guilty plea or go to trial.[236] Defense counsel can score Factors 1 through 12 and Factor 15 using information contained in the complaint (use of violence, sexual contact with the victim, number of victims, duration of offensive contact, age of victim),[237] information from the client (relationship with the victim, drug or

233 *See* Sexual Assault Reform Act, 2000 N.Y. S.N. 8238 § 7 (2000).
234 *See* SORA Guidelines, *supra* note 29, at 6.
235 *See id.* at 4.
236 *Id.*
237 *See id.* at 2.

alcohol abuse, acceptance of responsibility, living/employment situation),[238] and information in the client's prior criminal history (age at first sex crime, number and nature of prior crimes, recency of prior felony or sex crime).[239]

Though defense counsel may not be able to give an actual score on Factors 13 and 14, she can still offer helpful advice about them. Counsel can advise the client that his behavior while confined is used to assess his risk of re-offence. Counsel can advise the client that the specifics of his release, whether he is released with specialized supervision, or no supervision, is also used to assess his risk.[240] Knowing the approximate RAI score and also the facts that would be used to determine it allows the client to determine whether he wants to agree to the facts as the court will allocate them in the plea colloquy or try to litigate his guilt or innocence at trial.

Finally, using the approximate score, defense counsel is also able to advise her client of the housing consequences that would invariably arise as a result. For instance, if a client's score is above seventy-five, counsel knows with certainty that the client will be required to register for life, pursuant to SORA.[241] Counsel also knows with certainty that a lifetime registrant will be barred from any public housing options.[242] If counsel knows that her client has a family then counsel knows with certainty that there will be housing consequences for the family, and that the client and the family must begin considering their options now, before they must choose between losing their public housing and experiencing the exclusion of one of their members from the family home.[243]

For instance, suppose a defendant, charged with sexual misconduct, tells his lawyer he had sexual intercourse with his thirty-year-old coworker. The coworker does not allege anything constituting forcible compulsion. She alleges that she did not give her consent. The defendant contests the lack of consent. Suppose further that about five years ago, the defendant received two DUI convictions and completed an alcohol abuse program. The

238 *See id.* at 3-4
239 *See id.* at 3.
240 *See* SORA GUIDELINES, *supra* note 29, at 22.
241 *See* Sex Offender Registration Act, N.Y. CORREC. LAW § 168-h (2) (Consol. 1995).
242 *See* 42 U.S.C. § 13663(a) (2018).
243 *See* FORTUNE SOC'Y, *supra* note 12 at 5.

defendant has lived for nine years with his elderly mother in public housing. With these facts, defense counsel knows the following points for each factor:

1. There was no physical injury or use of a dangerous instrument (0 points)
2. The act was sexual intercourse (25 points)
3. There was only one alleged victim (0 points)
4. The alleged incident occurred only once (0 points)
5. The alleged victim was thirty years old (0 points)
6. The alleged victim was not incapable of consent due to mental or physical disability (0 points)
7. The alleged victim was his coworker (20 points)
8. The defendant's DUI convictions are from his mid-twenties (0 points)
9. The defendant's DUIs were misdemeanors, not felonies (5 points)
10. The defendant's DUIs occurred over three years ago (0 points)
11. The defendant has a history of alcohol abuse (15 points)
12. The defendant does not accept responsibility (10 points)
13. The defendant currently lives in public housing in northern Manhattan with his elderly mother, whom he cares for (10 points)

Given these potential scores, the defendant has a presumptive total score of 85. This total does not account for the Factors 13 and 14 scores, which can only be tabulated after conviction. With this total, defense counsel can now advise his client that with a score of at least 85, he will likely have to register for life and that both he and his mother will face the loss of their public housing.[244] In

244 *See* 42 U.S.C. § 13663(a) (2018).

this case, going to trial may be more advisable than entering a guilty plea, because questions exist as to consent. Whether the defendant pleads guilty or chooses to go to trial, the defendant at least has a better sense of the consequences that he will face if he is found or pleads guilty to sexual misconduct. He can now make a more informed decision about whether he wants to waive his trial rights and enter a guilty plea.

ii. Advising Clients of the 1,000-Foot Rule

Defense counsel should also advise clients of housing consequences that would result from the sex offense itself and the age of the victim. Under SARA, these two elements are the only triggers needed to exclude an individual from housing located within 1,000 feet of a school or other facility used primarily by children.[245] The advice related to SARA is even more precise than given for SORA-related consequences. Defense counsel knows from the start of her representation the sex offense charged and the age of the victim. Using those two pieces of information, counsel can advise her client that, as a condition of the defendant's mandatory ten-year probation, he will not be able to live within 1,000 feet of a school or other facility used primarily by children. Defense counsel knows the location of her client's current living situation and, looking at maps, can advise her client about whether that particular residence will be precluded as a post-release housing option. Defense counsel can also advise her client that without a post-release housing option, DOCCS will keep the client confined until an appropriate housing option is found.[246]

For instance, take the facts in the previous section, but instead of a coworker, suppose the alleged victim is the seventeen-year-old daughter of the defendant's coworker. With just those facts—a sexual misconduct charge and a seventeen-year-old victim—defense counsel can advise the defendant that if he pleads guilty he

245 *See* Sexual Assault Reform Act, 2000 N.Y. S.N. 8238 § 7 (2000); ALAN ROSENTHAL, DEFENDING AGAINST THE SCARLET LETTER: A DEFENSE ATTORNEY'S GUIDE TO SORA PROCEEDINGS 198 (2019).

246 See Matter of Gonzalez v. Annucci, 117 N.E.3d 795, 797-98, 803 (2018) (finding that it is appropriate to keep client confined in a residential treatment facility (RTF) while the agency seeks adequate housing assistance).

will be prohibited from living in his current apartment in northern Manhattan because it is located within 1,000 feet of an elementary school.

B. Judicial Plea Colloquies

To ensure that a defendant's guilty plea is being entered voluntarily with full knowledge of the penalties he will face, the court should also give advisals on sex offense-related housing consequences during the plea colloquy.

i. Requiring Plea Colloquies on Lifetime Registration and Ensuing Housing Consequences

The court should advise the defendant of any consequences that might result from the defendant's eventual requirement to register as a sex offender for life. New York judges have a suggested script for sex offense-related registration consequences.[247] This script is merely suggested and not required to be read by the court at the plea colloquy.[248] In this optional plea colloquy script for sex offense registration, the only consequence that might be communicated to the defendant is that he "will be required to register as a sex offender."[249] The script references the registration periods, but does not advise the defendant whether the period will be twenty years or life.[250] The script makes no mention of any loss of housing that would result either from the length of registration, which would trigger SORA-related consequences, or from the offense and the age of the victim, which would trigger SARA-related consequences.[251] After highlighting the variability of the registration requirement and omitting any reference to almost-certain housing consequences, the script ends with the question, "Do you

247 *See Plea of Guilty*, *supra* note 207, at 21.
248 *See id.*
249 *Id.*
250 *See id.*
251 *See id.; see also* Sex Offender Registration Act, N.Y. CORREC. LAW § 168-h (Consol. 1995); SARA, §§ 7–9.

understand?"[252]

This script should be required. This script should also be amended to include the presumptive RAI score based on Factors 1-12 and 15.[253] Because the script only addresses the possibility of a lifetime registration requirement and is silent on the housing consequences of lifetime registration, including exclusion from all public housing, additional language related to definite housing consequences should be added. Appended to this note is a suggested plea colloquy script for SORA-related housing consequences.

ii. Advising the Defendant that the Offense and Victim's Age Will Subject Him to the 1,000-Foot Exclusion Rule

As with defense counsel, the court is aware prior to the entering of a plea that the nature of the offense and the age of the victim will automatically trigger SARA's 1,000-foot exclusion condition on a defendant's housing options.[254] Therefore, in cases where the defendant is charged with a sex offense and the age of the victim, as indicated in the facts giving rise to the complaint, is under eighteen years, the court should ensure in the plea colloquy that the defendant's attorney has discussed the nature of this automatic exclusion and that the client is aware and understands it. If the client is to be sentenced to a period of confinement, the court should also add that a condition of his release will be the requirement that he have adequate housing and that if he does not secure adequate housing, that he may be confined beyond his release date. Again, the script should include those three necessary words – "Do you understand?" – to ensure that the defendant is aware of this penalty before entering his guilty plea. Appended to this note is a suggested plea colloquy script for SARA-related housing consequences.

252 *Plea of Guilty, supra* note 207, at 21.
253 *See* SORA GUIDELINES, *supra* note 29, at i–iii.
254 *See* SARA §§ 7-9 (2000).; N.Y. PENAL LAW § 220.00(14).

CONCLUSION

Housing consequences are a steep penalty paid by individuals convicted of sex offenses. These consequences can take the form of automatic exclusions from public housing as the result of an individual's requirement under SORA to register as a sex offender for life.[255] Under SARA, the sex offense and the age of the victim may automatically exclude individuals from living within 1,000 feet of schools or other facilities primarily used by children.[256] Given the high frequency of overlapping exclusion zones, individuals are sometimes prohibited from living within entire counties.[257] The effect of both SORA and SARA is to create an environment where individuals are forced into homelessness. The effect of both SORA and SARA is to create an environment where families are forced to choose between living in their current housing and separating from a family member or living with their family member and losing their housing. The Sixth Amendment demands effective assistance of counsel for all criminal defendants, including advisals, not just on traditionally "direct" consequences but for automatic and punitive consequences.[258] The gravity of this penalty should impel defense counsel to advise their clients of the housing consequences that will likely or definitely occur due to a guilty plea. The Fifth Amendment and its promise of due process demands that judges ensure the validity of guilty pleas.[259] To ensure the validity of guilty pleas to sex offenses, courts must first ensure that this attorney-client conversation has taken place and second that the defendant understands these severe housing consequences.[260] These consequences are predictable, based on a

255 *See* 42 U.S.C. § 13663(a) (2018).; CORREC. § 168-h(2); *see also* FORTUNE SOC'Y, *supra* note 12, at 5.

256 *See* SARA §§ 7–9; PENAL § 220.00(14); *see also* FORTUNE SOC'Y, *supra* note 12, at 3–4.

257 *See* FORTUNE SOC'Y, *supra* note 12, at 4.

258 *See* U.S. CONST. amend VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence."); McMann v. Richardson, 397 U.S. 759, 771, 771 n. 14 (1970) (stating that defendants are required to have "effective assistance of competent counsel" and courts shall ensure these standards are met); *see also* Lang, *supra* note 196, at 949.

259 *See* Brady v. United States, 397 U.S. 742, 748 (1970) (explaining that a guilty plea must be a "knowing [and] intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences."); *see also* Lang, *supra* note 195, at 947, 949, 951.

260 *See Brady*, 397 U.S. at 758 (stating that it is expected of courts to ensure that

presumptive risk assessment score or the sex offense itself and the age of the victim. Because sex offense-related housing consequences are grave, automatic, and predictable, the proposal that counsel and courts advise clients and defendants of housing consequences is both necessary and easily adoptable. An individual should know before entering a plea whether he is signing up for a lifetime struggle to find shelter. As the law demands sanction for these crimes, so too does justice require this degree of due process for the accused.

Appendix A
(*Sex Offender Registration Act Risk Assessment Instrument)

RISK FACTOR	RISK FACTOR VALUE	RISK FACTOR SCORE
I. CURRENT OFFENSES		
1. Use of Violence	**(circle one)**	
Used forcible compulsion	+10	
Inflicted physical injury	+15	
Armed with dangerous instrument	+30	
2. Sexual Contact With Victim	**(circle one)**	
Contact over clothing	+5	
Contact under clothing	+10	
Sexual intercourse, deviate intercourse, or	+25	

defendants who plead guilty are adequately advised by their attorneys prior to doing so); People v. Fontville, 291 Mich.App. 363, 391-92, 394 (2011) (holding that defendant's counsel had a duty to adequately advise the defendant of all consequences of a guilty plea, including the requirement to register as a sex offender); Roberts, *supra* note 146, at 681, 715.

aggravated sexual abuse		
3. Number of Victims	**(circle one)**	
Two	+20	
Three or More	+30	
4. Duration of Offense Contact with Victim	**(circle one)**	
Continuing course of sexual misconduct	+20	
5. Age of Victim	**(circle one)**	
11 through 16	+20	
10 or less, 63 or more	+30	
6. Other Victim Characteristics	**(circle one)**	
Victim suffered from mental defect or incapacity or from physical helplessness	+20	
7. Relationship with Victim	**(circle one)**	
Stranger or established for purpose of victimizing or professional relationship	+20	
II. CRIMINAL HISTORY		
8. Age at First Sex Crime	**(circle one)**	
20 or less	+10	
9. Number and Nature of Prior Crimes	**(circle one)**	
Prior history / no	+5	

sex crimes or felonies		
Prior non-violent felony	+15	
Prior violent felony, misdemeanor sex crime, or endangering the welfare of a child	+30	
10. Recency of prior felony or sex crimes	**(circle one)**	
Less than three years	+10	
11. Drug or alcohol abuse	**(circle one)**	
History of abuse	+15	
COLUMN A SUBTOTAL		

RISK FACTOR	RISK FACTOR VALUE	RISK FACTOR SCORE
III. POST-OFFENSE BEHAVIOR		
12. Acceptance of Responsibility	**(circle one)**	
Not accepted responsibility	+10	
Not accepted responsibility and refused or expelled treatment	+15	
13. Conduct While Confined/Supervised	**(circle one)**	
Unsatisfactory	+10	
Unsatisfactory with sexual	+20	

misconduct		
III. RELEASE ENVIRONMENT		
14. Supervision	**(circle one)**	
Release with special supervision	0	
Release with supervision	+5	
Release without supervision	+15	
15. Living / Employment Situation	**(circle one)**	
Living or employment inappropriate	+10	
COLUMN A SUBTOTAL		
COLUMN B SUBTOTAL		
TOTAL RISK FACTOR SCORE (add columns A and B)		
PRESUMPTIVE RISK LEVEL 1 2 3		

LEVEL 1 (low) = 0 to +70

LEVEL 2 (moderate) = +75 to +105

LEVEL 3 (high) = +110 to +300

Note: the Sex Offender Registration Act requires the court or Board of Examiners of Sex Offenders to consider any victim impact statement in determining the sex offender's level of risk.

A. Overrides (If any override is circled, Offender is presumpively Level 3)

1. Offender has a prior felony conviction for a sex crime
2. Offender inflicted serious physical injury or caused death
3. The offender has made a recent threat that he will reoffend by committing a sexual or violent crime
4. There has been a clinical assessment that the offender has a psychlogical, physical, or organic abnormality that decreases the ability to control impulsive sexual behavior

B. Departure

1. A departure from the presumptive risk level is warranted: Yes/No
2. If yes, then circle the appropriate risk level: 1 2 3
3. If yes, explain the basis for departure

Offender Name (Print Name) NYSID# Docket# Risk Level Assessor's Signature Assessor (Print Name)

Proposed SORA-Related Colloquy

By virtue of this conviction, you will be required to register as a sex offender, and the period of registration will be at least twenty years and, depending on what level or type of offender you are determined to be, the period may be life. Given the facts of this case and your prior history, you will likely be required to register for life. This lifetime registration requirement means you will be prohibited from receiving public housing benefits in the future. Do you understand?

Proposed SARA-Related Colloquy

By virtue of this conviction and because the victim is under the age of eighteen, you will be prohibited from living within 1,000 feet of a school, playground, or any other facility used primarily by anyone under the age of eighteen. If your post-release housing does not comply with this restriction you may be held in confinement until compliant housing is found. Your conviction may also prevent you from living in your current residence after your release. Do you understand?