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Preventing Partisan Commitment: Applying *Brady* Protection to the Civil Commitment of Sex Offenders

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— Note —

PREVENTING PARTISAN COMMITMENT: APPLYING *BRADY* PROTECTION TO THE CIVIL COMMITMENT OF SEX OFFENDERS

"*Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent . . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.*"*

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INTRODUCTION

On March 8, 2002, Joseph Aaron Edwards appeared before the United States District Court for the District of Arizona.[1] He was found guilty of committing "Sexual Abuse by Use of Force Against a Minor," and for this crime Edwards faced a prison sentence of eighty-four months with five years of supervised release.[2] Edwards served his punitive sentence as handed down by the federal court; however, less than a week before his release was scheduled, the Chairperson of the Bureau of Prison Certification Review Panel filed a certificate to civilly commit Edwards indefinitely under the federal

* Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

1. United States v. Edwards, 777 F. Supp. 2d 985, 987 (E.D.N.C. 2011).

2. *Id.*

sex offender commitment statute.[3] Had the government not stipulated to dismiss Edwards's case three years after his certification,[4] he may have faced the same fate as thousands of other individuals in the United States who have already served time for sexual offenses:[5] an indeterminate period of commitment, ending only after authorities determine that the individual is no longer a threat to society.[6] This practice of civilly committing convicted sex offenders has been upheld as constitutional by the United States Supreme Court and is currently implemented both by the federal government and a significant number of states.[7] What is unnerving, however, is that while Edwards's commitment proceeding may have resulted in an indefinite loss of liberty, the government prosecutors chose to withhold an expert report which concluded that Edwards did not meet the criteria necessary to be committed.[8] A convenient excuse for the government's action is that even with the possibility of a significant loss of liberty, Edwards's commitment was a civil action and thus did not require the same procedural protections as in a criminal trial.[9] Few courts or commentators have addressed whether the prosecution's use of selective disclosure is a valid practice, or if the same protection that

3. *Id.* at 987–88. *See infra* Part I.B for a deeper discussion of the federal sex offender commitment statute.

4. *Id.* at 989.

5. *Id.* at 995 (noting that "erroneous deprivations of liberty" could result without greater protection); *see also* Andrew J. Harris, *The Civil Commitment of Sexual Predators: A Policy Review*, *in* SEX OFFENDER LAWS: FAILED POLICIES, NEW DIRECTIONS 340 (Richard G. Wright ed., 2009) (noting that "[a]s of mid-2007 over 4,500 individuals had been committed under state statutes" aimed at the civil commitment of sexually violent predators).

6. *See* Harris, *supra* note 5, at 340 ("In most states, commitments are for an indeterminate period, with mental health authorities retaining custody until the individual is determined to no longer pose a threat to society.").

7. *See infra* Part I.B.

8. *Edwards,* 777 F. Supp. 2d at 989.

9. *See* Nora V. Demleitner, *Abusing State Power or Controlling Risk?: Sex Offender Treatment and* Sicherungverwahrung, 30 FORDHAM URB. L.J. 1621, 1632 (2003) ("Nevertheless, [the Supreme Court] has found commitment statutes for so-called 'sexual predators' civil, and therefore exempt from the protections that generally apply in criminal cases."); Meaghan Kelly, Note, *Lock Them Up—And Throw Away the Key: The Preventative Detention of Sex Offenders in the United States and Germany*, 39 GEO. J. INT'L L. 551, 557 (2008) (noting that fewer constitutional protections apply to commitment proceedings because the commitment statutes "are construed as civil and rehabilitative instead of criminal and punitive").

prohibits such strategy in the criminal context is required in sex offender commitment hearings.

In *Edwards*, the government argued that as a party to sex offender commitment hearings it had a "general right of broad discretion in designating experts" and a "right to ignore and not disclose any expert that produces reports favorable to the detainees."[10] Had the matter been a criminal trial, such a strategy by the government would constitute a clear violation of the procedural safeguards first established by *Brady v. Maryland*.[11] *Brady* introduced the well-known rule that in criminal cases the prosecution's suppression of exculpatory material evidence violates the defendant's constitutional right to due process.[12] Few courts have addressed the extension of these protections to civil commitment proceedings despite the distinct similarities between involuntary commitment and criminal prosecution. This Note posits that while the involuntary commitment of sexually violent predators is formalistically a civil procedure, its quasi-criminal nature and unique reliance upon expert testimony requires the heightened protection of the traditionally criminal *Brady* safeguard. Scholars have amassed a great amount of research regarding more general constitutional protections afforded to defendants in sexual predator commitment hearings,[13] but little, if any, academic work has discussed the specific application of *Brady* to

10. *Edwards*, 777 F. Supp. 2d at 989. While the government maintained that it had these general rights to withhold expert testimony, it conceded that in the *Edwards* case it was required to turn over the report in question based on a standing order both parties had previously agreed upon. The order required the government to disclose "all medical and psychological records in the possession of the Bureau of Prisons . . . or the government." *Id.* at 988 & n.8 (quoting *In re* Procedures for Commitments Under U.S.C. § 4248, 10-S0-01 (E.D.N.C. Aug. 4, 2010)). The court in *Edwards* expressed concern with the government's perception of its general right, and noted that there exists no information as to whether this lack of disclosure was an isolated event or whether the government has failed to disclose expert reports in similar commitment cases. *Id.* at 989.

11. 373 U.S. 83 (1963).

12. *Id.* at 87.

13. Specifically, after *United States v. Comstock*, 627 F.3d 513 (4th Cir. 2010), there has been work analyzing what burden of proof is required to commit convicted sex offenders. *See generally* Tamara Rice Lave, *Throwing Away the Key: Has the Adam Walsh Act Lowered the Threshold for Sexually Violent Predator Commitments Too Far?*, 14 U. PA. J. CONST. L. 391, 411–17 (2011) (noting that many states set a higher burden of proof requirement than U.S. Constitution requires); Alexander Tsesis, *Due Process in Civil Commitments*, 38 WASH & LEE L. REV. 253, 260–72 (2011) (arguing for a "beyond a reasonable doubt" standard).

commitment hearings.[14] This Note will demonstrate that despite its "civil" label, like a criminal proceeding, the involuntary commitment of sex offenders requires the heightened protection of *Brady*.

Part I will explore the development of civil commitment statutes in the United States. This discussion does not attempt to challenge whether the civil commitment of sex offenders is meritorious in theory but instead focuses on the policies that drove the enactment of such statutes and their practical implementation. The goals and objectives of sex offender commitment statutes lay a foundation for understanding why commitment defendants require the protection of the *Brady* Rule. Part II focuses on the development of the *Brady* Rule. While this procedural safeguard evolved through criminal cases, the discussion will explore the policies that drive *Brady*'s use in criminal hearings and posit that those same policies dually support the rule's application in sex offender commitment hearings.

Part III will then make a case for *Brady*'s application to sex offender commitment proceedings. First, the discussion will focus on the criminal-like aspects of sex offender commitment that trigger the need for heightened *Brady* protection. Specifically, this Note will propose that the State's role in the proceedings and the severe consequences of sexually violent predator commitment require that the prosecution disclose relevant exculpatory evidence under *Brady*. Moreover, this Note will explain how *Brady* is already applied in other quasi-criminal hearings, such as extradition hearings,[15] suggesting that its use in sex offender commitment is not as radical as it may initially seem.

Second, this Note will argue that the evidentiary realities common in civil commitment proceedings compel *Brady*'s application. The fact-finder's extraordinary reliance on expert testimony that varies considerably from expert to expert suggests that a fair and just decision cannot be made without full disclosure of exculpatory evidence.

Third, this Note posits that the application of the *Brady* Rule to sexual predator commitment proceedings will be much more straightforward than its current utilization in traditional criminal proceedings. Due to the fact-finder's heavy reliance on expert testimony, much less ambiguity will exist as to whether the evidence in the government's possession should be disclosed, ensuring a simpler method of compliance.

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14. Such little attention to the specific issue addressed in this Note may, in part, be due to the dearth of any legal decisions addressing this specific issue. *See Edwards*, 777 F. Supp. 2d at 989 (finding that the issue of *Brady* Rule application to the commitment of sexually violent predators was an issue of first impression).

15. *See infra* Part III.A.

I. DEVELOPMENT OF SEX OFFENDER COMMITMENT

A. History of Civil Commitment

Civil commitment generally refers to the government's involuntary hospitalization of individuals with mental disorders.[16] Traditionally the State commits these individuals both to provide treatment for their disorder and because the individuals pose a danger to themselves or to those around them.[17] This practice has been used in some form by governments since the ancient world.[18]

Civil commitment has been present through all of American history, with some form utilized by the first settlers in the early days of the American colonies, although the first hospitals for the exclusive care of the mentally disabled were not established until 1773.[19] Beginning in the late nineteenth century, reforms were put in place in an attempt to add more legitimacy to the commitment process.[20] However, this movement to create a more regulated process and to encourage more fruitful treatment was short lived. The early twentieth century again found a number of changes to the commitment laws; however, most of these modifications were put in place to facilitate an easier commitment process rather than to protect the rights of those committed.[21]

16. GARY B. MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS 325 (3d ed. 2007).

17. *See id.* (defining civil commitment as "the state-sanctioned involuntary hospitalization of individuals with mental disorders who require treatment, care, or incapacitation because of self-harming or dangerous tendencies").

18. *See id.* at 327. From ancient Rome through the Middle Ages, governments used similar methods to address individuals with mental disorders. For example, in thirteenth-century England, the King took control of the property of anyone designated an "idiot" and served as a guardian, using any profits from the guardianship to maintain the individual's personal care and household. *Id.* This process eventually included a procedure whereby a jury determined the classification of the mentally disabled—either an "idiot" or a "lunatic"—and, depending on the classification, the subject was confined to either public housing or to the care of friends or relatives who were paid for their service. *Id.*

19. *Id.*

20. *See id.* ("[R]eform efforts . . . stimulated cosmetic changes in commitment laws, some reformation of existing facilities, and the construction of new ones.").

21. *See id.* (noting that this move toward streamlining the commitment process was, in part, a result of medical advances that led to more optimistic feelings about the effectiveness of the treatment committed individuals were receiving).

This tide of streamlined commitment practices was briefly stemmed in the mid-twentieth century. Beginning in the 1970s, the legal community led a revitalized reform movement that addressed, among other things, the treatment received by those committed and the criteria reviewed during the commitment process.[22] This careful examination of the government's commitment practices provoked much needed judicial review, and beginning in the late 1970s, the Supreme Court issued a number of decisions that simultaneously shed light on the justifications for such an invasive practice and showcased the Court's enduring principle that civil commitment was a special procedure that required safeguards above and beyond normal civil protections.

In *O'Connor v. Donaldson*,[23] the Court narrowed the breadth of involuntary commitment and established the precedent that such an invasive action was only constitutional when applied narrowly enough to reach only specific dangerous individuals.[24] In *Donaldson* the Court reviewed the nearly fifteen-year civil commitment of an individual who was confined for suffering from paranoid schizophrenia.[25] The fifteen-year detention had continued based solely on his condition, despite testimony that he posed no threat to his or others' safety during his time of confinement or any other time during his life.[26] The ultimate holding in *Donaldson* articulated that "a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."[27] In reaching this narrow conclusion, the Court was influenced by the significant loss of liberty a commitment defendant faces and the difficulty in determining whether an individual has a mental illness.[28]

22. *Id.* at 328–30. This rebirth of the reform movement also examined the medical model implemented in commitment procedures, specifically questioning the credibility of the psychiatric profession and whether mental illness was truly definable. *Id.* at 329. Challenges to the consequences of commitment focused on the conditions of the facilities where the committed received their "treatment" and the loss of liberty that necessarily accompanied the commitment. *Id.* at 329–30. The challenge to the criteria used in commitment grew from the belief that "mental illness" was a term that could be easily manipulated and the process put many in danger of being committed without receiving appropriate due process protections. *Id.* at 330.

23. 422 U.S. 563 (1975).

24. *Id.*

25. *Id.* at 564–66.

26. *Id.* at 568.

27. *Id.* at 576.

28. *See* Tsesis, *supra* note 13, at 262.

Donaldson demonstrates how, even from the earliest days, the Court viewed involuntary commitment as an amorphous breed of civil action. While this ruling curtailed the broad nature of civil commitment, the Court in *Donaldson* refrained from clearly articulating the constitutional limitations of commitment and "did not endorse explicitly any of the libertarian reforms adopted by the lower courts."[29] Thus, while the holding in *Donaldson* suggested that involuntary commitment requires special protection, the Court did not clearly define exactly what or how many protections were required.

The Court's next major commitment decision further outlined the heightened protections required of involuntary commitment and secured its place somewhere between the traditional civil and criminal realms. In *Addington v. Texas*,[30] the Court confirmed that a clear and convincing evidence standard of proof is suitable to satisfy due process requirements in civil commitment hearings.[31] In *Addington*, the defendant in a Texas commitment proceeding was found by a jury to be mentally ill and to require involuntary hospitalization.[32] The jury made this finding "[b]ased on clear, unequivocal, and convincing evidence" rather than the burden of proof ordinarily used in civil cases of a preponderance of the evidence or that traditionally required in criminal cases of beyond a reasonable doubt.[33] In affirming this standard, the Court acknowledged that while involuntary commitment was not formally a criminal procedure, "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."[34] In the Court's eyes this potential deprivation of liberty required stricter safeguards than traditional civil matters. Thus, defendants facing involuntary hospitalization could not be committed without "proof more substantial than a mere preponderance of evidence."[35]

29. MELTON ET AL., *supra* note 16, at 331.

30. 441 U.S. 418 (1979).

31. *Id.*

32. *Id.* at 421.

33. *Id.* The defendant in *Addington* argued that the nature of civil commitment required a burden of proof equal to the criminal standard and that any use of a lesser standard was a violation of his constitutional right of due process. *Id.* at 421–22.

34. *Id.* at 425.

35. *Id.* at 427. In making its determination that the beyond a reasonable doubt standard was not required, the Court noted that there is less chance of erroneous conviction in commitment proceedings due to the multiple levels of professional review and concern of friends and family. *Id.* at 428–29. Moreover, the Court questioned the certainty of psychiatric diagnosis and seriously questioned whether the state, relying

In both these early cases the Court made it clear that involuntary commitment involves a significant deprivation of liberty, which requires heightened protections, setting it apart from traditional civil proceedings. Thus, from day one, involuntary commitment was planted in uncharted territory—a unique proceeding that was formally civil, but with consequences too severe for normal civil protections.

B. Civil Commitment Statutes Applied to Sex Offenders

It was with this groundwork that states began to enact involuntary commitment statutes that exclusively targeted those individuals whom the state deemed to be "sexually violent." These contemporary sexually violent predator[36] ("SVP") statutes had their start as early as the mid-twentieth century, when sex offenders became the focus of general civil commitment procedures.[37] However, the first statute to include language directly aimed at the commitment of sex offenders did not appear until the Washington state legislature enacted the Community Protection Act in 1990.[38] The catalyst to Washington's statute was an overwhelming response to a particularly heinous sex crime that had been committed by a

on this somewhat fallible evidence, could ever prove an individual's mental illness and likelihood of dangerousness beyond a reasonable doubt. *Id.* at 429.

36. At least one commentator has suggested that the term "sexually violent predator" is an emotionally charged term that can sometimes be misleading or inaccurate. Adam Deming, *Sex Offender Civil Commitment Programs: Current Practices, Characteristics, and Resident Demographics*, 36 J. PSYCHIATRY & L. 439, 443 (2008). This designation is given to committed sex offenders in eleven states, while "sexually dangerous person" is given in Massachusetts and Wisconsin, "sexually dangerous individual" in North Dakota, and at times "sexually psychopathic personality" is used in Minnesota. *Id.* at 442–43. While acknowledging that the use of "sexually violent predator" may be a point of contention among some scholars, this Note will continually refer to "sexually violent predators" and "sexually violent predator statutes" for no reason other than the fact that a majority of states use this designation.

37. *See* Demleitner, *supra* note 9, at 1629 ("Starting in the 1950s, sexual psychopaths, however defined, were targeted for indefinite detention."). As early as the late 1930s, some states began enacting "sexual psychopath" laws. States such as Illinois created procedures that took the place of a criminal trial and resulted in the commitment of those who were found to be suffering from a mental illness and had "criminal propensities to the commission of sex offenses." Raquel Blacher, Comment, *Historical Perspective of the "Sex Psychopath" Statute: From the Revolutionary Era to the Present Federal Crime Bill*, 46 MERCER L. REV. 889, 897–900 (1995) (quoting Criminal Sexual Psychopathic Persons Act, ILL. REV. STAT. ch. 38, § 820 (1938)).

38. Harris, *supra* note 5, at 339; WASH REV. CODE § 71.09 (2014).

recently released sex offender.[39] Unsurprisingly, this type of sweeping social reaction is often the driving force behind many of the SVP laws enacted by states across the country.[40]

After the passage of Washington's groundbreaking law, a number of other states began implementing their own form of SVP commitment statutes, with increased legislative activity coming after New Jersey's enactment of Meghan's Law[41] in 1994.[42] Currently, twenty states have enacted some form of involuntary commitment for sex offenders.[43] The federal government joined the States in 2006 with the adoption of the Adam Walsh Child Protection and Safety Act[44]

39. *See* Harris, *supra* note 5, at 344 (noting that Washington's law was prompted by the 1989 abduction, rape, and mutilation of a seven-year-old boy by Earl Shriner, a convicted sex offender who had been released from prison only two years before, after serving a ten-year sentence for sexually assaulting two teenage girls).

40. *See id.* at 344 (finding that the connection of heinous sex crimes with the subsequent enactment of SVP commitment legislation "is not limited to Washington but rather represents a fairly pervasive theme across states"); *see also* Corey Rayburn Yung, *Sex Offender Exceptionalism and Preventive Detention*, 101 J. CRIM. L. & CRIMINOLOGY 969, 974–75 (2011) (noting that heinous, high-profile sex crimes sparked a general trend toward more restrictive sex offender laws, including SVP commitment statutes as well as registration and residency requirements); Blacher, *supra* note 37, at 899–900 (noting that even the initial sexual psychopath laws of the early twentieth century were driven by society's belief that it was "failing in its duty to protect the public" if it subjected women and children to sexual criminals after they had been released from their criminal sentences).

41. N.J. STAT. ANN. §§ 2C:7-1–7-11 (West 2014) (§ 2C:7-11 repealed 2014).

42. MICHAEL L. PERLIN, 1-2 MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 2A-3.3 (2013); *see also* Blacher, *supra* note 37, at 915–16 (discussing the circumstances that precipitated the enactment of Meghan's Law).

43. Harris, *supra* note 5, at 339. Most SVP commitment statutes were passed during the 1990s, immediately following the inaugural Washington statute. *Id.* However, some states have passed SVP legislation as recently as 2008. Krauss et al., *Dangerously Misunderstood: Representative Jurors' Reactions to Expert Testimony on Future Dangerousness in a Sexually Violent Predator Trial*, 18 PSYCHOL. PUB. POL'Y & L. 18, 19 (2011). As of 2008, the complete list of states with SVP commitment statutes consists of: Arizona, California, Florida, Illinois, Iowa, Kansas, Massachusetts, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, South Carolina, Texas, Virginia, Washington, and Wisconsin. Deming, *supra* note 36, at 441.

44. 18 U.S.C. § 4248 (2012).

("AWA"), which included a federal SVP civil commitment provision.[45] Recent estimates show the number of sex offenders committed under the federal and state statutes to be over 4,500.[46]

Though each state has its own statute, the process of SVP commitment follows the same general procedure. The government typically waits to begin the commitment process until the defendant is about to be released from prison.[47] Once the government has identified the defendant as a potential SVP, the Department of Health, guided by psychiatric professionals, determines whether the defendant is likely to be an SVP.[48] If the government affirms such a finding, the prosecutor then files a petition of commitment with the relevant court.[49] If the court finds probable cause that the inmate is an SVP, then the government can initiate a commitment proceeding in the form of a trial, where a factfinder must determine whether the defendant is truly an SVP and thus should be involuntarily committed.[50]

While the phrasing of each SVP commitment statute can be moderately distinctive, the SVP commitment process generally requires that the judge or jury find three elements during the commitment hearing: (1) The individual has previously engaged in harmful sexual conduct, (2) the individual suffers from a mental disorder, and (3) the individual is likely to engage in harmful sexual conduct in the future.[51] For most of these statutes, if the defendant is

45. *Id.*; *see also* Yung, *supra* note 40, at 978 (describing the enactment of the AWA and explaining its specific elements).

46. Melissa Hamilton, *Public Safety, Individual Liberty, and Suspect Science: Future Dangerousness Assessments and Sex Offender Laws*, 83 TEMP. L. REV. 697, 704 (2011); Harris, *supra* note 5, at 340.

47. Hamilton, *supra* note 46, at 704. The purpose of waiting this long to initiate the proceedings is to allow the defendant to serve his full sentence before they are committed for treatment, thus never allowing the individual to leave some form of custody. *Id.*; *see also* Jeslyn A. Miller, Comment, *Sex Offender Civil Commitment: The Treatment Paradox*, 98 CAL. L. REV. 2093, 2096–98 (2010) (noting that the contemporary SVP commitment statutes, beginning with Washington's 1990 statute, operated as an extension of previously served prison sentences in order for the government to keep sex offenders in custody for as long as they were considered threats to society).

48. John L. Schwab, Note, *Due Process and "The Worst of the Worst": Mental Competence in Sexually Violent Predator Civil Commitment Proceedings*, 112 COLUM. L. REV. 912, 917–18 (2012) (explaining the procedure used in California as an example of the commitment process).

49. *Id.*

50. *Id.*

51. Eric S. Janus & Paul E. Meehl, *Assessing the Legal Standard for Predictions of Dangerousness in Sex Offender Commitment Proceedings*, 3 PSYCHOL. PUB. POL'Y & L. 33, 34 (1997). These

found to be an SVP, he is confined indefinitely, undergoes yearly evaluations, and is not to be released until it can be shown that he is no longer a danger to society.[52]

Though SVP commitment statutes are closely related offshoots of traditional civil commitment statutes, these elements suggest a significant difference in objectives. Traditional civil commitment statutes focus on the danger that the individual poses to himself or others.[53] Through providing the individual with proper treatment, these laws aim for temporary confinement with the ultimate goal of enabling the committed individual to live a normal life after he is released.[54]

SVP commitment statutes focus on the individual's criminal history and the danger that the individual poses to those around him because of his mental disorder.[55] Unlike traditional involuntary commitment, the treatment objective of SVP commitment "seems to be distinctly subordinate to the public safety–oriented purpose of incapacitation."[56] Proponents admit such a policy and have long argued that the purpose of such commitment is "to protect society from a small but dangerous group of individuals who continue to pose

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elements are found in all SVP commitment statutes in some form despite each statute's unique language. For example, the AWA requires a finding that the subject of the commitment proceeding is "sexually dangerous," meaning he "has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others." Charles Doyle, *Adam Walsh Child Protection and Safety Act: A Legal Analysis*, *in* ADAM WALSH CHILD PROTECTION AND SAFETY ACT: ANALYSIS AND LAW 84 (Terrell G. Sandoval ed., 2010). "Sexually dangerous to others" means the individual "suffers from a serious mental illness, abnormality or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released." *Id.*; *see also* John Matthew Fabian, *To Catch a Predator, and Then Commit Him for Life: Sexual Offender Risk Assessment—Part Two*, THE CHAMPION, Mar. 2009, at 32, 32 (explaining the differences between the elements required in most state statutes and the those required under the AWA).

52. *See* PERLIN, *supra* note 42, at § 2A-3.3 ("[R]elease is allowed when it is shown that the offender is no longer dangerous by reason of mental disorder."); Miller, *supra* note 47, at 2110 (explaining that in most states defendants are confined until "they are no longer considered dangerous to the community").

53. Demleitner, *supra* note 9, at 1628–29.

54. *See id.* at 1629 ("The goal of civil commitment statutes is to provide an effective therapy to persons committed, so as to enable them to live independently upon release.").

55. *Id.*

56. Prentky et al., *Sexually Violent Predators in the Courtroom: Science on Trial*, 12 PSYCHOL. PUB. POL'Y & L. 357, 380 (2006).

a threat to society following completion of their formal criminal sanctions."[57] This focus on the individual's potential harm to others and the concomitant lack of focus on the committed individuals' recovery leads to the conclusion that these laws are designed primarily to protect others by keeping the committed individuals in some form of custody rather than treating them for their illness.[58] However, even proponents agree that these laws are not meant to apply to every individual who has served a sentence for a sexually related crime but rather to address only a small, dangerous group. This limited application to those determined to be sexually violent is a lynchpin for upholding the statutes' constitutionality.[59] Thus amplifying the importance of committing only those with the requisite dangerous characteristics.

As one would expect, statutes requiring an individual to be committed indefinitely following a full criminal sentence were and continue to be highly controversial.[60] What naturally followed the initial legislation was a slew of constitutional challenges.[61] Like in the challenges to traditional commitment, the judiciary attempted to define what protections were required from this formalistically civil hearing.

The most influential of these challenges came after Kansas enacted its Sexually Violent Predator Act in 1994.[62] In *Kansas v. Hendricks*,[63] the Court made it clear that in SVP commitment hearings, heightened safeguards are necessary to ensure due process.[64] Leroy Hendricks, an inmate with a long history of molesting children, challenged his commitment, which came just before his release date in

57. Harris, *supra* note 5, at 340.

58. *See* Demleitner, *supra* note 9, at 1629 (arguing that SVP commitment statutes are "aimed primarily at incapacitation rather than treatment").

59. *See* Janus & Meehl, *supra* note 51, at 34 (arguing that this narrow target range "is necessary if the State's interest in protecting its citizenry from sexual attack is to be sufficiently compelling to warrant the confinements"); *see also* Fabian, *supra* note 51, at 47 ("There is no question that the goal of these civil commitment statutes is to identify a small but extremely dangerous group of sexual predators who do not have a traditional mental disease or defect that renders them appropriate candidates for involuntary commitment.").

60. Harris, *supra* note 5, at 340.

61. *See id.* at 351 (noting that the initial constitutional challenges can be broken down into "two major categories—those related to the allegedly punitive intent of the laws, and those related to the state's civil power to exert custody over the individuals").

62. KAN. STAT. ANN. § 59-29a (1994).

63. 521 U.S. 346 (1997).

64. *Id.*

September 1994.[65] Hendricks argued that the Kansas SVP act was unconstitutional on substantive due process, double jeopardy, and *ex post facto* grounds.[66] The Court, in a 5–4 decision, upheld the Kansas statute, noting that, like traditional involuntary commitment, SVP commitment statutes are in fact civil and not punitive in nature.[67] In making this determination, the Court again stressed the unique position of involuntary commitment laws in that the SVP commitment defendant must still be afforded "strict procedural safeguards" due to the significant loss of liberty they face.[68] In response to Hendricks's argument that the use of criminal procedural safeguards rendered the statute criminal in nature, the Court found that the safeguards were simply a product of the State's imposition of requisite protections; dutifully "confin[ing] only a narrow class of particularly dangerous individuals" after meeting "the strictest procedural safeguards."[69]

Subsequently, in *United States v. Comstock*,[70] the Supreme Court upheld the first-ever constitutional challenge to the federally enacted SVP commitment statute.[71] On remand, the United States Court of Appeals for the Fourth Circuit addressed the defendant's procedural due process claim, and relying heavily on *Addington*, the court upheld a clear and convincing evidence standard of proof.[72] The Fourth Circuit explained the direct relationship between the procedural safeguards required in SVP commitment statutes and the dire consequences of such laws, specifically noting that "[t]he procedures required before the government acts often depend on the nature and extent of the burden or the deprivation to be imposed . . . ."[73]

Some important points emerge from these cases. First, it is apparent that these contemporary SVP commitment statutes have grown out of traditional civil commitment statutes, but they are distinctly aimed at a unique problem. Like traditional civil commitment, SVP commitment seeks to rehabilitate, but the central objective is to protect society from a specific group of dangerous

65. *Id.* at 353–56.

66. *Id.* at 350.

67. *Id.* at 368–69.

68. *Id.* at 357 (finding that the Court has "consistently upheld such involuntary commitment statutes provided the confinement takes place pursuant to proper procedures and evidentiary standards").

69. *Id.* at 364.

70. 560 U.S. 126 (2010).

71. *Id.* at 149 (upholding the federal statute under the Necessary and Proper Clause).

72. United States v. Comstock, 627 F.3d 513, 519–24 (4th Cir. 2010).

73. *Id.* at 524 (citing Heller v. Doe, 509 U.S. 312, 325 (1993)).

individuals. Consequently, the goals of SVP commitment are served only when the commitment proceedings provide accurate classification that, to the greatest extent possible, precisely identifies an individual as sufficiently dangerous to meet the threshold for commitment. As Part III will show, the current state of psychological analysis and the government's ability to withhold exculpatory evidence prevents this vital accuracy.

Second, while these contemporary SVP commitment statutes are not punitive, the Supreme Court continues to recognize that they do result in a significant deprivation of liberty[74] and thus require heightened safeguards. At the same time, the Court has not concretely defined the parameters of these protections. Rather, the language suggests that the protections must be proportional to the consequences the defendant may suffer if convicted. In response, many states have already incorporated certain criminal procedural safeguards within their SVP commitment statutes, such as the right to an attorney, the right to present expert witnesses, and the right to a trial by jury.[75] Part III will submit that, given the striking similarities between a criminal sentence and SVP commitment, the Court's call for adequate safeguards cannot be fully answered without implementation of the *Brady* Rule.

II. DEVELOPMENT OF THE *BRADY* RULE

The *Brady* Rule originated from the 1963 case of *Brady v. Maryland*.[76] The central point of contention arose after Brady and his co-defendant were found guilty of murder. Before trial, Brady's counsel requested that the prosecution turn over the co-defendant's statements for examination.[77] The prosecution disclosed a number of the co-defendant's statements but chose to withhold one specific

74. Tsesis, *supra* note 13, at 260–61 (noting that the court firmly acknowledged this significant curtailment of freedom even as early as the 1960s). In fact, even before the Supreme Court's ruling in *Addington*, lower courts acknowledged civil commitment's monumental threat to liberty. The highest court in Oklahoma noted that "[i]nvoluntary commitment to a mental hospital involves a massive curtailment of an individual's liberty, and in many ways resembles a criminal arrest because the individual is taken into custody by the police and, eventually, involuntarily confined in a state institution." *Id.* at 277 (quoting *In re* Mental Health of D.B.W., 616 P.2d 1149, 1152 (Okla. 1980)).

75. Schwab, *supra* note 48, at 914.

76. 373 U.S. 83 (1963).

77. *Id.* at 84. Brady had admitted during trial that he had contributed to the murder but consistently claimed that his co-defendant had done the actual killing and asked the jury not to return a capital verdict. *Id.*

statement in which the co-defendant admitted to the homicide.[78] Brady was given no notice of this evidence until after he had been tried, convicted, and sentenced to death.[79] The Supreme Court found that this suppression was a violation of Brady's due process rights under the Fourteenth Amendment and laid down the foundation of the contemporary *Brady* Rule: "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[80]

Since day one there has been a special relationship between the *Brady* Rule and the defendant facing a deprivation of liberty. While it would seem that the protection was established to reprimand prosecutors, *Brady* and its progeny suggest the rule was created with an eye toward the protection of the defendant rather than the punishment of prosecutors.[81] The Court's opinion in *Brady* suggests that, at the most basic level, the motivation behind the rule was to ensure that a defendant is not deprived of his or her liberty without the benefit of a fair and just trial.[82] While criminal trials are

78. *Id.*

79. *Id.*

80. *Id.* at 87.

81. *See* Michael Avery, *Paying for Silence: The Liability of Police Officers Under Section 1983 for Suppressing Exculpatory Evidence*, 13 TEMP. POL. & CIV. RTS. L. REV. 1, 19 ("*Brady*, and the cases that preceded it and followed it, did not focus on the culpability of government actors . . . . Rather the focus of these decisions was on the impact on an accused person when exculpatory information is not furnished, that is, on whether the government had given the defendant a fair opportunity to defend himself.").

82. The Court agreed with the ruling of the Maryland Court of Appeals, explaining that:

> This ruling was an extension of *Mooney v. Holohan*, where the Court ruled on what nondisclosure by a prosecutor violates due process: "It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure a conviction of imprisonment of a defendant is as inconsistent with rudimentary demands of justice as is the obtaining of a like result by intimidation."

Brady, 373 U.S. at 86 (citations omitted) (quoting Mooney v. Holohan, 294 U.S. 103, 112 (1935)); *see also* James R. Acker & Catherine L. Bonventre, *Protecting the Innocent in New York: Moving Beyond Changing Only Their Names*, 73 ALB. L. REV. 1245, 1275 (2010)

inherently adversarial, the Court maintained that the government's goal is "not to achieve victory, but to establish justice"[83] and that "'[t]he United States wins its point whenever justice is done its citizens in the courts.'"[84] The Court went on to stress that this interest of justice requires that the prosecutor not act as an "architect" of the proceeding, shaping the outcome of the trial by choosing whether to disclose certain evidence.[85] In the fifty years following this seminal holding, the *Brady* Rule has been reworked extensively. However, *Brady*'s progeny has continually echoed the same justifications for this evidentiary safeguard: that fairness and justice are not served by allowing the government to drastically influence a trial's outcome through its decision to disclose or withhold evidence.

The first major adjustment to the *Brady* Rule came in the 1976 case of *United States v. Agurs*,[86] where the Court determined whether a defendant's request was a prerequisite to the disclosure required under *Brady*.[87] The government argued that it was not required to turn over the relevant exculpatory evidence because it had never received a request from Agurs and therefore had no duty to disclose.[88] In response, the Court held that even if no request had been made, justice requires the government to disclose material evidence of the defendant's innocence.[89] The Court grounded its decision in the idea that, regardless of request, the government cannot unjustly deprive a defendant of his liberty, noting that while "the attorney for the sovereign must prosecute the accused with earnestness and vigor, he

(noting that *Brady* embodies the principle that the prosecutor should be "'the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer'") (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

83. Brady, 373 U.S. at 87 n.2 (quoting Judge Simon E. Sobeloff as Solicitor General in an address before the Judicial Conference of the Fourth Circuit on June 29, 1954).

84. *Id.* at 87 (quoting an inscription on the walls of the Department of Justice).

85. *Id.* at 87–88.

86. 427 U.S. 97 (1976).

87. In *Agurs*, the named female defendant was convicted of murder for stabbing her husband, James Sewell, in the chest. Agurs's main argument was that Sewell had attacked her and she was acting in self-defense. While the prosecution had evidence of Sewell's prior criminal record, including proof of his violent tendencies, Agurs was not made aware of the evidence until after her conviction and thus could never request it. *Id.* at 98–100.

88. *Id.*

89. *Id.* at 110.

must always be faithful to his client's overriding interest that 'justice be done.'"[90]

Following *Agurs*, *United States v. Bagley*[91] and *Kyles v. Whitley*[92] both addressed what evidence is considered material under *Brady*.[93] First, in *Bagley*, the Court determined that the defendant's due process protections required finding a *Brady* violation if "'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'"[94] *Kyles* further clarified that the duty of determining materiality is wholly on the government. The prosecution alone can know whether certain information must be disclosed and has the responsibility to determine whether the effect of that information reaches the "reasonable probability" threshold set forth in *Bagley*.[95] This imposes an affirmative duty on the prosecution to discover any evidence known by any governmental party, analyze it for materiality, and determine whether disclosure is required.[96]

The modern-day formulation of the *Brady* Rule is articulated in *Strickler v. Greene*.[97] In *Strickler*, the Court summarized a *Brady* violation as consisting of three main components. "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued."[98] Again, in articulating this modern

90. *Id.* at 110–11 (quoting Berger v. United States, 295 U.S. 78, 88 (1935)). Further quoting *Berger*, the Court explained that the government's attorney "is the 'servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.'" *Id.* at 111.

91. 473 U.S. 667 (1985).

92. 514 U.S. 419 (1995).

93. The materiality prong of *Brady* is integral to this discussion as it is the most difficult aspect of *Brady*'s practical application. Part III.C will elaborate on this difficulty and posit that similar difficulty will be infrequent—if not fully absent—in *Brady*'s application to SVP commitment proceedings.

94. *Bagley*, 473 U.S. at 682.

95. *Kyles*, 514 U.S. at 437.

96. *Id.*

97. 527 U.S. 263 (1999).

98. *Id.* at 281–82. While it is easy to see the *Brady* Rule as a mandate that the state turn over all evidence that would be material to the defendant's case, that is not technically accurate. Rather, the *Brady* Rule provides for a standard of judicial review when the defendant brings a claim that his due process protection was violated because the prosecution did not disclose certain evidence. Laurie L. Levensen, *Discovery from the Trenches: The Future of* Brady, 60 UCLA L. REV. DISCOURSE 74, 77 (2013). In an attempt to avoid *Brady* Rule review, a

definition more than thirty-five years after *Brady v. Maryland*, the Court cited its fundamental justification that the sovereign's "obligation to govern impartially is as compelling as its obligation to govern at all" and that the prosecution's interest "is not that it shall win a case, but that justice shall be done."[99]

While it has been fifty years since *Brady*, and many feel that the appropriate application of the *Brady* Rule in the criminal context is anything but clear,[100] it is important to keep in mind that the *Brady* Rule was the Court's attempt at guaranteeing that when the defendant's liberty is on the line, "prosecutors would place fairness over obtaining convictions."[101] The same need for protection against unjust deprivation of liberty inherent in the foundation of the *Brady* Rule is equally present in SVP commitment proceedings. *Brady* was meant to ensure a fair and just result through preventing the government from unilaterally determining whether a defendant is deprived of his or her freedom through the manipulation of evidence. As Part III will demonstrate, nowhere is unilateral evidence manipulation more possible than in the SVP commitment process.

III. A CASE FOR *BRADY* RULE PROTECTION IN SVP COMMITMENT PROCEEDINGS

With the goals and polices behind both SVP commitment and the *Brady* Rule in mind, this Note will now illustrate why *Brady* should and can be applied successfully to SVP commitment proceedings. First, Part III.A will emphasize the quasi-criminal nature of SVP commitment proceedings, including how *Brady* has been applied in other quasi-criminal proceedings despite their "civil" classification. Second, Part III.B will explore the evidence presented in an SVP commitment proceeding and how the hearing's result may be

prudent prosecutor aware of the potential consequences will likely take proactive steps to provide the evidence to the defendant. *Id.* at 89.

99. *Strickler,* 527 U.S. at 281–82 (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

100. For a deeper discussion of the problems with *Brady* protection in the criminal context, see *infra* Part III.C. That discussion will address these difficulties and posit that such issues will be alleviated when *Brady* is applied to SVP civil commitment—meaning that the SVP civil commitment process will actually foster a simpler bright-line application.

101. Michael J. Benza, Brady, Brady, *Wherefore Art Thou* Brady*?*, 57 CASE W. RES. L. REV. 567, 567 (2007); *see also* Bennett L. Gershman, *Litigating* Brady v. Maryland: *Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 531 (2007) (claiming that *Brady* "embodies, more powerfully than any other constitutional rule, the core of the prosecutor's ethical duty to seek justice rather than victory").

significantly influenced without the implementation of the *Brady* Rule. Lastly, in Part III.C, this Note will discuss the problems inherent in *Brady*'s current application in the criminal context. Because of the difference in the evidence presented in a typical criminal trial and SVP commitment proceedings, this Note will contend that *Brady*'s application to the latter will avoid the complications often found in its criminal application.

A. The Quasi-Criminal Nature of SVP Commitment Proceedings

One of the most obvious arguments against using *Brady* in the SVP commitment context is the formalistic contention that the *Brady* Rule was constructed in the criminal context and thus is inapplicable in civil proceedings. The Supreme Court has consistently stood by its determination that both SVP and traditional commitment are not punitive and has continuously rebuffed double-jeopardy attacks on the basis that SVP commitment is civil rather than criminal in nature.[102] This distinction is based largely on the goals of criminal and civil statutes: the objective of criminal statutes being retribution and deterrence, and the objective of a civil statute being to prevent future harm through rehabilitative treatment.[103] This perception becomes far less concrete in the face of pragmatic concerns associated with SVP commitment. Reality finds prosecutors acting without proper oversight in place to prevent evidence manipulation, while aiming to have individuals confined indefinitely. Furthermore, the characteristics of SVP confinement, including the lack of any realistic treatment, undermine the supposed goals of these SVP statutes and suggest that while not formally criminal, SVP commitment has a substantial resemblance to criminal imprisonment. The relevant similarities between commitment proceedings and criminal proceedings indicate that the *Brady* safeguard need be instituted to provide adequate protection to those being committed.[104]

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102. *See supra* Part I.

103. *See* Todd M. Grossman, Comment, Kansas v. Hendricks*: The Diminishing Role of Treatment in the Involuntary Civil Confinement of Sexually Dangerous Persons*, 33 NEW ENG. L. REV. 475, 477–78 (1999) (contrasting the goals of civil and criminal statutes); Miller, *supra* note 47, at 2105 (explaining the different purposes of criminal and civil laws).

104. *See* Tsesis, *supra* note 13, at 269 ("Involuntary commitments are most closely related to criminal punishments because both adjudicate whether respondents whom society has found to be too dangerous should be at liberty."). While outside the scope of this Note, it is worthwhile to acknowledge that some courts have posited that *Brady* may apply to even more traditional civil matters, such as any civil matter where a government agency is a party. *See generally* Sperry & Hutchinson Co. v. FTC, 256 F. Supp. 136, 142 (S.D.N.Y. 1966) ("In civil actions, also, the ultimate objective is not that the Government 'shall win a case, but

The first and most glaring similarity between SVP commitment and a traditional criminal proceeding is the nature of the government's involvement. While the government can be, and regularly is, a party to civil lawsuits, the government's position in an SVP commitment proceeding is much more akin to a prosecutor's than a civil litigator's. As an agent of the sovereign, the criminal prosecutor "effectively decides whether a person should live, die, be incarcerated for life, or receive special benefits and immunities."[105] While the state's attorney in an SVP commitment proceeding does not have the opportunity to choose whether his adversary lives or dies, he does, in most cases, attempt to deprive that person of his liberty indefinitely.

The fact that the prosecutor is in such a position of power suggests that the system should not tolerate the same amount of "gamesmanship" as is found in civil litigation.[106] Allowing attorneys more leeway for gamesmanship in typical civil litigation makes some logical sense. Traditionally, such circumstances often involve a disagreement over a sum of money, where one party's gain is the other party's loss. In such circumstances, it is natural to have an adversarial atmosphere and for attorneys to enable their client to recover or retain the maximum benefit possible. Rather than a party to a typical "zero-sum-game" civil matter, the State's action in an SVP commitment proceeding is much more comparable to an act of police power. Like a criminal trial, the government and society gain no benefit if the prosecution "wins" the proceeding by unjustly committing an individual through withholding exculpatory evidence. As in a criminal trial, the state is meant to determine whether the defendant's action or condition presents such a danger that he cannot safely function within the parameters of normal society and requires confinement.[107] The result of an inaccurate commitment is not that the state gains at the committed party's expense; rather the outcome is an unnecessary deprivation of liberty and a systematic delegitimization of the SVP commitment process.

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that justice shall be done.'") (quoting Campbell v. United States, 365 U.S. 85, 96 (1961)).

105. Gershman, *supra* note 101, at 532; *cf.* Heckler v. Chaney, 470 U.S. 821, 831 (1985) (finding that a governmental agency's decision not to enforce is presumptively not subject to judicial review, in part because the decision to enforce is analogous to the decision to criminally prosecute).

106. *See* Gershman, *supra* note 101, at 532 (arguing that while "U.S. litigation tolerates a certain amount of gamesmanship—especially in civil litigation," there is no room for such tactics in criminal prosecution).

107. *See supra* Part I.B.

In addition to this obvious social cost of unnecessarily depriving an individual of his personal liberty, the government suffers a significant economic harm by unnecessarily committing individuals. When the first SVP commitment statutes were enacted in the mid-1990s, the country was going through a time of economic growth, and states were much more willing to make significant investments in the institutions needed to carry out these laws.[108] However, while the economy has since declined, the cost of commitment has not. In 2006, even before the significant economic downturn, states spent a total of $454 million on housing and treating civilly committed individuals.[109] On average, each state spent $94,000 per resident, which is four to five times higher than the costs associated with housing a prison inmate in those states.[110] Such a drain on public resources may well be a worthwhile expenditure if it means that sexually violent predators are being treated and kept in a secure environment. However, it is economically disadvantageous to provide a committed defendant with expensive, needless treatment because he was illegitimately confined. Such waste is magnified by the fact that the fundamental reason for the extraordinary amount of government money spent on SVP commitment is the belief that the resources are being expended efficiently—going toward keeping only the most dangerous offenders confined.[111] While these economic consequences may seem trivial compared to the clear social cost of wrongfully detaining an individual, it only emphasizes the state's prosecutorial-like position in SVP commitment proceedings.

The second aspect of SVP commitment proceedings that demonstrates their quasi-criminal nature is the custodial characteristics of the confinement that can, and often does, follow. In most states, individuals who are committed under SVP commitment statutes remain committed indeterminately, until mental health

108. *See* ANDREW J. HARRIS, CIVIL COMMITMENT OF SEXUAL PREDATORS: A STUDY IN POLICY IMPLEMENTATION 124 (2005) ("During that period, states appeared willing to make considerable investments in programming and facilities, and in so doing bolstered the policies' organizational and legal foundations.").

109. Harris, *supra* note 5, at 363.

110. *See id.* (noting that while $94,000 was the average, seven states spent over $100,000 per resident). These extraordinary costs continue to be one of the reasons why so many states have not adopted similar SVP commitment laws of their own. John Matthew Fabian, *To Catch a Predator, and Then Commit Him for Life: Analyzing the Adam Walsh Act's Civil Commitment Scheme Under 18 U.S.C. § 4248—Part One*, THE CHAMPION, Feb. 2009, at 44, 45.

111. *See* Prentky et al., *supra* note 56, at 371 ("Public policy is not well served if . . . extraordinary resources are squandered on those who pose low risk to public safety.").

authorities conclude that the individual no longer poses a threat to society.[112] Historically, traditional civil commitment statutes have been applied only to "individuals with the most serious psychiatric disorders," and even then patients are usually "stabilized and released after approximately thirty days."[113] If a thirty-day treatment is common practice for traditional civil commitment, the indefinite time period used in SVP commitment statutes suggests the confinement is much more akin to a criminal sentence imposed to remove the individual from society rather than to treat and release him.

This argument is strengthened by the lack of treatment options available to those who are committed as sexually violent. Many treatment regimens in SVP commitment facilities are often untried, and there is no way to ensure patient cooperation.[114] Those patients who do choose to participate typically spend fewer than ten hours a week in treatment[115] and are often at odds with the staff.[116] Even when treatment is provided, the SVP statutes themselves can hamper the treatment's rehabilitative value. The goal of a sexual offense therapist is to treat their patient by making "pro-social changes in their thoughts, feelings and behaviors, and thus reduce their risk of re-offending."[117] However, therapists' ability to treat their patients successfully is hamstrung by requirements and treatment goals that are put in place—not by the therapist and patient, but by institutional policies implemented to achieve statutory objectives.[118]

112. *Id.* at 380. For more discussion see *supra* Part I.B.

113. Demleitner, *supra* note 9, at 1631–32.

114. Monica Davey & Abby Goodnough, *Doubts Rise as States Hold Sex Offenders After Prison*, N.Y. TIMES, Mar. 4, 2007, at A20; *see also* Deming, *supra* note 36, at 447 (noting that, according to a May 2006 study, the total number of committed sex offenders receiving sex offender treatment was only approximately 53%).

115. Davey & Goodnough, *supra* note 114, at 21 (noting that while ten hours is the average, the actual number of hours and structure of the therapy differs significantly depending on the state).

116. Prentky et al., *supra* note 56, at 380–81 ("Even if a relatively few, selected individuals are motivated to participate, the programs are often dominated by angry, litigious individuals who are in constant direct and indirect conflict with the staff.").

117. Rebecca L. Jackson & Christmas N. Covell, *Sex Offender Civil Commitment: Legal and Ethical Issues*, *in* THE WILEY-BLACKWELL HANDBOOK OF LEGAL AND ETHICAL ASPECTS OF SEX OFFENDER TREATMENT AND MANAGEMENT 406, 418 (Karen Harrison & Bernadette Rainey eds., 2013).

118. *See id.* ("[C]linicians in these settings may often be in the position of enforcing policies and facilitating institutional or system rules and practices that are punitive rather than rehabilitative or therapeutic, or that serve the function of justice under the guise of 'treatment.'").

For example, for certain patients only limited rehabilitation can be accomplished through in-house treatment, but SVP statutes require clinicians to continue spinning their wheels within the treatment facility long after such treatment is fruitful.[119] While further rehabilitation could be achieved through limited release, the patient is prevented from this opportunity as legal restrictions typically prohibit any type of community release program, even though such a program is often necessary for continued treatment.[120]

Essentially, the SVP commitment statutes impose a ceiling on treatment by both requiring and preventing full treatment. These practical barriers can turn SVP commitment into a perpetual cycle of continual commitment where the individual has no chance to be fully rehabilitated and discharged because some form of release is necessary to achieve full rehabilitation.[121]

Regularly, even more fundamental treatment roadblocks occur, such as role confusion amongst staff therapists.[122] Often, staff members are unsure whether their roles are as traditional therapists trying to rehabilitate their patients as effectively as possible in hopes of eventual release, or as agents of the government in place to help keep these ultra-dangerous individuals committed and away from society.[123] This confusion is perpetuated by the fact that therapists are often asked to disclose the treatment record of committed individuals.[124] Prosecutors, experts, and fact finders can then use these treatment records during all stages of the defendant's subsequent commitment process.[125] Such practices create an obvious conflict

119. *Id.*

120. *Id.*

121. *See* Prentky et al., *supra* note 56, at 381 ("In this catch-22 world that is absent of specific concrete goals and objectives leading inexorably to program completion, as long as an individual is committed, his treatment team will prepare a treatment plan for the coming year, and for as long as the individual has recommended tasks listed on his treatment plan, he has not completed treatment."); *see also* Miller, *supra* note 47, at 2095–96 ("This Catch-22 has larger, systematic implications. At the point that treatment is 'mere pretext,' serving more to propagate evidence for prosecution than to provide a legitimate opportunity for rehabilitation, civil commitment becomes constitutionally problematic.").

122. Prentky et al., *supra* note 56, at 381.

123. *See id.* (explaining the problem with role confusion among treatment facility staff).

124. *See* Miller, *supra* note 47, at 2108. Some courts require this disclosure under rules, which provide that such divulgence is not a violation of the defendant's right to privacy. *Id.*

125. *Id.* at 2109.

between the patient and the therapist, and leave the latter wondering where her loyalties lie.

The environment of SVP commitment facilities also suggests SVP commitment is more criminal than civil. Generally, these designated locations are either specialized facilities created for the express purpose of civil commitment, facilities located within a working prison, or facilities within a secured psychiatric hospital.[126] In any case, the setting of the commitment program is often "correctional in nature, where facilities, personnel and practices have a primary goal of community safety and security, rather than the well-being or therapeutic management of its residents."[127]

Additionally "[m]ost of the centers tend to look and feel like prisons, with clanking double doors, guard stations, fluorescent lighting, cinder-block walls, overcrowded conditions and tall fences with razor wire around the perimeters."[128] Moreover, most states place their centers in isolated areas.[129] Perhaps most extreme is Washington State's facility, which houses its committed sex offenders in a veritable leper's colony on an island three miles off the coast in Puget Sound.[130] Again, while these precautions may be necessary for those legitimately committed, such conditions exemplify the severe consequences facing a defendant in an SVP commitment procedure.

The state's position in the commitment proceedings, the indefinite span of commitment due to lack of sufficient treatment, and the conditions in which the committed patients are held suggest that SVP commitment proceedings are unlike any traditional civil matter and are akin to quasi-criminal hearings.[131] Unlike in a typical civil proceeding, evidence manipulation in the SVP commitment setting would result in an unnecessary loss of liberty while not providing any benefit to the state. Overarching application of *Brady* at the federal and state level would not deprive the state of any advantage, and, considering the high cost of such gamesmanship, its implementation is

126. Deming, *supra* note 36, at 444–45.

127. Jackson & Covell, *supra* note 117, at 418.

128. Davey & Goodnough, *supra* note 114, at 20–21. Unlike prisons, civil commitment centers receive very little independent oversight, which can lead to sex among offenders or between offenders and guards. *Id.*

129. *Id.*; *see also* Deming, *supra* note 36, at 444 (noting that, as of 2008, every state—with the exception of Texas—that civilly committed sex offenders housed the committed offenders in a secured facility).

130. Davey & Goodnough, *supra* note 114, at 21.

131. *See* Deming, *supra* note 36, at 445 (suggesting that when individuals are committed to environments that appear to be correctional, they are likely to understand their situation as being punitive rather than rehabilitative, and this perception can change the way in which they participate in treatment).

necessary in the SVP commitment context. Moreover, it would provide much-needed unanimity amongst jurisdictions. A major obstacle inherent in SVP commitment's precarious position between traditional civil and criminal jurisprudence is procedural uncertainty.[132] Due to the patchwork nature of SVP commitment statutes in some states and even at the federal level, it is unclear whether civil or criminal discovery rules apply.[133] Confusion breeds inconsistency, which is unacceptable when personal liberty is at stake. Blanket *Brady* protection would eliminate this confusion. While civil discovery practices could provide some level of protection, the quasi-criminal nature of SVP commitment demands an unambiguous safeguard that cannot be forgone due to the inaction of counsel.[134] As the preceding discussion has shown, the consequences of SVP commitment hearings are severe and, as such, require protections that are triggered automatically and unequivocally—based solely on the fact that the defendant faces a criminal-like deprivation of liberty.[135]

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132. *See supra* Part I for a discussion regarding the Supreme Court's failure to precisely define the breadth of the protections required for civil commitment hearings.

133. *See* Yung, *supra* note 40, at 979 (explaining that one of the many rights not guaranteed by the AWA is the right to discovery); Fabian, *supra* note 110, at 46 (noting that the AWA does not specify discovery procedures); *see also* J. Harper Cook, Note, *Civil Commitment of Sex Offenders: South Carolina's Sexually Violent Predator Act*, 50 S.C. L. REV. 543, 562 (1999) (noting that one of the questions left open by the language of the South Carolinian SVP commitment statute is whether civil or criminal discovery rules apply).

134. The disclosure requirements under the Federal Rules of Civil Procedure only require that initial disclosure be made of tangible items that the party may use to support its claims or of experts that the party may use at trial to present evidence. Fed. R. Civ. P. 26(a)(1)(A)(ii). Any exculpatory evidence is likely to be expert testimony or reports that do not support the government's position. *See infra* Part III.B. Such evidence will be of no use to prosecutors at trial, and, therefore, they will not be required to disclose. Thus, if civil discovery protections applied, the onus would fall on the defense attorney to uncover the information through appropriate and timely use of discovery methods.

135. While this unambiguous application of procedural protections is primarily required because of the criminal-like consequences of the SVP commitment hearing, of ancillary concern are the difficulties defense attorneys face in representing their clients in civil commitment matters. For a discussion regarding the information asymmetry, role confusion, and judicial influence that accompanies civil commitment defense, see Joseph Frueh, Note, *The* Anders *Brief in Appeals from Civil Commitment*, 118 YALE L.J. 272, 300–08 (2008); Phyllis Coleman & Ronald A. Shellow, *Ineffective Assistance of Counsel: A Call for a Stricter Test in Civil Commitments*, 27 J. LEGAL PROF. 37, 55–60 (2003).

This argument is bolstered by the fact that the *Brady* Rule has already been applied to other quasi-criminal proceedings, such as extradition proceedings. In *Demjanjuk v. Petrovsky*,[136] the United States Court of Appeals for the Sixth Circuit applied *Brady* when the government withheld evidence during an extradition proceeding. Demjanjuk's denaturalization, deportation, and extradition orders were based on the district court's finding in a denaturalization hearing that Demjanjuk was "Ivan the Terrible," a former Nazi guard at the concentration camp in Treblinka.[137] A special master was appointed to determine the validity of Demjanjuk's allegations that the government failed to disclose information that pointed to another guard as being "Ivan the Terrible," thus exculpating him of the charges.[138] The government argued that no such review was required since all the proceedings against Demjanjuk had been civil actions.[139] The Sixth Circuit, however, held that *Brady* should be extended to cover denaturalization and extradition cases, where the government's case for denaturalization or extradition is based on the proof of alleged criminal activities.[140]

More than an example of *Brady*'s use in a civil context, there are relevant similarities between *Demjanjuk*-like denaturalization and extradition cases and SVP commitment proceedings. The reasoning in *Demjanjuk* was that, due to the defendant's alleged criminal activity, the consequences of the "civil" denaturalization and extradition were equal to that of a criminal conviction.[141] The previous discussion has shown that, similarly, the consequences of SVP commitment, while not formally "punitive," are custodial in all but the label. In both matters, the subject of the proceeding faces a significant deprivation of liberty: one party may be banished from his resident country to face potential incapacitation, and the other faces an indefinite

136. 10 F.3d 338 (6th Cir. 1993).

137. *Id.* at 339.

138. *Id.* at 340.

139. *Id.* at 353.

140. *Id.* (noting that if the government had sought denaturalization solely on the basis of Demjanjuk's misrepresentations when he sought admission to the United States, the proceeding would only be civil in nature and *Brady* would not apply); *see also* John Apol & Paul J. Komives, *Criminal Procedure*, 1995 Detroit C. L. Rev. 475, 537 (1995) ("The court of appeals was of the opinion that the *Brady* rule should be extended to denaturalization and extradition cases if the government bases its case on alleged criminal activities by the party against whom the government is proceeding.").

141. *See* Apol & Komives, *supra* note 140, at 537 (noting that the Sixth Circuit believed that the "consequences of denaturalization and extradition are equal to or exceed the consequences of most criminal convictions").

commitment. Additionally, part of the grounds for each proceeding is a showing of former criminal activity: the alleged war crimes in *Demjanjuk* and the prior sexually violent conduct required in SVP commitment statutes.[142] In both cases the government's role is much closer to prosecutorial than civil in nature, and the subject of the proceeding faces a significant loss of liberty. Because of these similarly heightened circumstances, it logically follows that the heightened safeguard required by the Sixth Circuit for certain cases of extradition and denaturalization should also be required in SVP commitment.

B. Evidentiary Realities in SVP Commitment Hearings

Proponents of SVP commitment admit that its goal is to protect society from a particular group of dangerous individuals[143]—not simply to prevent convicted sex offenders from returning to society. In fact, this limitation is what makes the state's interest in confinement compelling enough for SVP statutes to be upheld as constitutional.[144] Thus, the government's ability to confine someone who does not meet the required elements undermines the objective of SVP commitment and also its constitutionality. This problem is exacerbated by the evidentiary realities of the SVP commitment process that effectively allow the government to control the outcome of the proceeding through manipulative suppression of expert testimony. This section will discuss the almost outcome-determinative nature of expert testimony in SVP commitment hearings, which amplifies the importance of *Brady*'s evidentiary disclosure.

1. The Enormous Influence of Expert Testimony

As noted earlier, there are three elements of SVP commitment: (1) prior sexually harmful conduct, (2) a qualifying mental condition, and (3) a finding of future dangerousness.[145] While some SVP commitment statutes lack a criminal conviction requirement, in most circumstances the commitment process targets individuals who have

142. As will be discussed *infra* in Part III.B, most SVP commitment proceedings concern individuals who already have been convicted of a sexually violent crime. The obvious difference here is that SVP defendants have already served their sentence and *Demjanjuk*-like defendants face subsequent criminal prosecution.

143. *See* Harris, *supra* note 5, at 340 ("Proponents of the laws have maintained that civil commitment represents a necessary stop-gap measure to protect society from a small but dangerous group of individuals who continue to pose a threat to society following completion of their formal criminal sanctions.").

144. *See supra* note 59 and accompanying text.

145. *See supra* note 51 and accompanying text.

served prison sentences for sexually based crimes.[146] With this previous sex crime conviction, the government faces little or no difficulty in proving that the individual has previously engaged in harmful sexual conduct. For the latter two elements—qualifying condition and future dangerousness—the government relies heavily on the testimony of experts to make its case.

Since the defendant in an SVP commitment hearing cannot be committed without a positive finding of both a qualifying condition and future dangerousness, the testimony of clinicians has become a critical element in these commitment proceedings.[147] In presenting their opinions, these clinicians assume the role of experts.[148] While this moniker is dubious in light of a clinician's limited ability to predict these elements accurately,[149] fact finders in civil commitment proceedings have traditionally relied heavily on clinician testimony.[150] In fact, this testimony is more or less determinative, with studies showing that "in general, clinicians' opinions as to committability are dispositive."[151]

There are several reasons why judges give so much deference to this psychiatric testimony. First, most judges feel that they do not possess the ability to make an independent determination about whether the defendant meets the requisite elements.[152] This is, at least in part, because judges rarely are given any training regarding

146. Demleitner, *supra* note 9, at 1628; *see also* Grant H. Morris, *Mental Disorder and the Civil/Criminal Distinction*, 41 SAN DIEGO L. REV. 1177, 1192 (2004) (noting that SVP commitment is limited only to those "about to be released from confinement: sentence-expiring convicts, persons found mentally incompetent to stand trial, and insanity aquittees").

147. Shoba Sreenivasan et al., *Expert Testimony in Sexually Violent Predator Commitments: Conceptualizing Legal Standards of "Mental Disorder" and "Likely to Reoffend,"* 31 J. AM. ACAD. PSYCHIATRY & L. 471, 472 (2003).

148. William M. Brooks, *The Tail Still Wags the Dog: The Pervasive and Inappropriate Influence by the Psychiatric Profession on the Civil Commitment Process*, 86 N.D. L. REV. 259, 284 (2010).

149. The accuracy, or lack thereof, of this "expert" testimony will be discussed at length in Part III.B.2 *infra*.

150. Brooks, *supra* note 148, at 284–85.

151. MELTON ET AL., *supra* note 16, at 349 ("Studies indicate an agreement rate between clinicians' conclusions and factfinders' decisions of between 90% and 100%."); *see also* Yung, *supra* note 40, at 971–72 (noting an environment where courts are "largely rubberstamping the federal civil commitment of sex offenders allowed under the Adam Walsh Child Protection and Safety Act").

152. Brooks, *supra* note 148, at 285–86.

psychiatric diagnosis or treatment.[153] Additionally, judges do not want to stand in the way of treatment for those who need care.[154] The desire not to interfere with vital treatment results in judges taking a hands-off approach to reviewing psychiatric testimony.[155] A third reason relates to the policies that often drive the enactment of SVP commitment laws. The judge, afraid that a wrong decision will result in a dangerous individual going free, will err strongly on the side of the clinician's testimony because the consequences of letting a dangerous individual go seem much more alarming than the harm of committing a sex offender who does not legally qualify as sexually dangerous.[156]

This expert testimony becomes no less influential when the defendant requests a jury in lieu of a judicial fact finder. Though many in the legal system have grave concerns that psychiatric expert testimony in general is beyond the scope of a normal juror's understanding,[157] these laypeople are still trusted to accurately assess this complicated, technical evidence that even experienced judges continually struggle with.[158] Predictably, jury members side with expert testimony a significant amount of the time. One study, using a representative jury sample, found that after expert testimony was presented by the government, the number of jurors voting for commitment jumped from 57 percent to 82 percent.[159] In addition to the weight given to this evidence is the natural distrust inherent in society's perception of sex offenders. Generally, society views committed sex offenders as mentally unsound and considers their

153. *Id.* at 285.

154. *Id.* at 286.

155. *Id.*

156. *Id.*

157. *See* Ellen Byers, *Mentally Ill Criminal Offenders and the Strict Liability Effect: Is There Hope for a Just Jurisprudence in an Era of Responsibility/Consequences Talk?*, 57 ARK. L. REV. 447, 499–500 (2004) (discussing how "courts are ambivalent about jurors' intellectual capacities to evaluate evidence of mental disorder").

158. *See id.* at 498–99 (noting that, despite questions of jurors' ability to interpret the evidence, states rely on predictions of future dangerousness to civilly commit sex offenders).

159. Krauss et al., *supra* note 43, at 29. The study was conducted using 156 jurors in Southern California who had been called for jury duty but were not ultimately selected to serve. *Id.* at 24. These jurors were shown a reenactment of an Arizona SVP commitment trial, with certain groups being presented with clinical expert testimony and others with actuarial expert testimony. *Id.* at 24–27. In both cases the expert testified for the state. *Id.* at 27. The relevant findings were determined by polling the jurors for their verdict once after opening statements and once after expert testimony, cross-examination, and judicial instructions. *Id.* at 29.

release risky due to an exaggerated belief that their recidivism is inordinately high.[160] This predisposition, coupled with the difficulty in handling expert evidence, suggests that juries as well as judges will agree with the conclusions reached by the testifying expert.

Perhaps these same concerns are responsible for the considerably lower threshold of admissibility for expert testimony in SVP commitment proceedings.[161] Typically courts have applied one of two standards in determining the admissibility of expert testimony.[162] The first comes from the 1923 case of *Frye v. United States*,[163] which held that expert testimony is acceptable if it has "gained general acceptance in the particular field in which it belongs."[164] The second standard comes from *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[165] which focused on whether the evidence in question can be tested, whether it has been subjected to peer review, and whether it has a known rate of error, among other factors.[166] However, in SVP commitment proceedings, courts tend not to adopt either of these well-known standards.[167] Instead, courts tend to take any concerns

160. *See* Yung, *supra* note 40, at 973–74 (discussing statistics compiled by the Department of Justice and Bureau of Justice Statistics that contradict the public perception that sex offenders have an extraordinarily high rate of recidivism); *cf.* Nicholas Scurich & Daniel A. Krauss, *The Effect of Adjusted Actuarial Risk Assessment on Mock-Jurors' Decisions in a Sexual Predator Commitment Proceeding*, 53 JURIMETRICS J. 395, 407–08 (conducting a study to determine the effect of adjusted actuarial risk assessment on mock-jurors decision making in SVP commitment proceedings and positing that one reason for the lack of effect is that jurors were simply "seek[ing] out information that is congenial to their preferred outcome").

161. *See* Harris, *supra* note 5, at 356 ("[I]t appears that the threshold for admissibility of expert predictions of future violence in SVP proceedings is quite low . . . .").

162. *Id.*

163. 293 F. 1013 (D.C. Cir. 1923).

164. *Id.* at 1014.

165. 509 U.S. 579 (1993).

166. *Id.* at 593–95.

167. *See* Harris, *supra* note 5, at 357 (noting that in SVP commitment proceedings courts have rarely applied *Frye* or *Daubert* admissibility rules with any real force); Fabian, *supra* note 51, at 38–39 (noting that while *Daubert* may be the applicable standard "state courts hearing sexually violent predator (SVP) cases have consistently admitted clinical judgment testimony establishing low levels of reliability in the courtroom"). Courts generally do not analyze any actuarial risk/future dangerousness assessments under *Daubert*, and there has been minimal critique of the quality of actuarial assessments. The only such critiques typically come in the form of lone dissents or concurrences. Hamilton, *supra* note 46, at 738.

they may have about the reliability of the evidence into consideration when calculating the weight of the evidence as a whole.[168]

This extraordinary deference, coupled with the low admissibility standards, demonstrates the shocking level of control experts may have on the outcome of SVP commitment procedures. With the first prong of the three-prong proof requirement being fulfilled by prior convictions or sexually criminal activity, the remainder of the proof is left in the hands of experts to whom the fact finder consistently defers. Without full disclosure of exculpatory expert testimony, the fact finder will be guided to his decision by an expert whom the prosecution can handpick based on his advantageous conclusion. The extraordinary amount of power this allows the state to wield cannot be overstated and dwarfs any formalistic "civil vs. criminal" argument. When expert testimony essentially decides whether an individual is deprived of his liberty indefinitely, the need for a disclosure requirement becomes even more vital than in the criminal context, where one piece of evidence rarely has such impact. If so little evidence can determine so much, at minimum all available evidence must be heard and considered.

2. Variations in Expert Assessment

Even though these clinical determinations are rarely challenged in court, there are still major questions concerning their reliability. In SVP commitment hearings, clinical experts must make two separate determinations: (1) whether the individual being assessed has a qualifying mental condition, and (2) whether that mental condition will keep the individual from refraining from dangerous sexual activity in the future.[169] It is far from clear that clinicians can accurately assess either criterion.[170]

One of the most basic problems with the qualifying condition determination is the lack of a well-defined standard.[171] Based on the variation between legal and medical standards, there is confusion regarding what specific mental conditions are actually qualifying mental disorders for the purposes of SVP commitment, despite the fact that mental illness as a threshold for commitment is considered a

168. Harris, *supra* note 5, at 357.

169. *See supra* note 51 and accompanying text.

170. *See* Tsesis, *supra* note 13, at 282–83 ("The ambiguities of the two criteria the Supreme Court relie[s] on . . . for involuntary institutionalization—dangerousness and mental illness—are well documented in the psychiatric literature.").

171. *See* Sreenivasan et al., *supra* note 147, at 473 (noting that as of 2003, thirteen states defined the necessary mental condition in similar language, while four other states used different, more comprehensive standards).

constitutional requirement for involuntary commitment statutes.[172] A main point of contention stems from the use of legal definitions that do not necessarily correspond with clinical assessments. In fact, the authors of the Diagnostic and Statistical Manual of Mental Disorders (DSM)—which forms the basis of the criteria most often used by psychiatric professionals in making their assessments—recognized that using its criteria in legal matters could lead to the misuse of diagnoses that do not truly meet the requisite legal threshold for mental disorders.[173]

This issue was addressed by the Court in *Hendricks*, where the committed defendant argued that a committed individual must suffer from a "mental illness," a term coined by the psychiatric community, rather than simply a "mental abnormality" or "personality disorder," which were legal terms coined by the Kansas legislature.[174] He argued that setting the bar below the scientific standard of "mental illness" did not satisfy his substantive due process rights, and specifically that his diagnosed pedophilia should not be included as a qualifying mental condition.[175]

The *Hendricks* Court elected not to restrict the requisite qualifying condition to the more narrow "mental illness," particularly noting that psychiatrists themselves "disagree widely and frequently on what constitutes mental illness."[176] The Court found that legal terms used to define mental health concepts often "do not fit precisely with the definitions employed by the medical community," such as in cases of insanity and competency.[177] Thus, the legal threshold set forth by Kansas was satisfactory as it considered the same criteria as other approved civil commitment statutes, such as "criteria relating to an individual's inability to control his dangerousness."[178] This inability to control one's impulses (volitional impairment), however, has become a highly debated criterion. Psychiatric professionals argue that this concept cannot be analyzed successfully as even professional medical experts cannot reliably distinguish between an "irresistible

172. *See* Prentky et al., *supra* note 56, at 362 ([D]angerousness alone cannot support civil commitment. In some way . . . it is the additional presence of a mental disorder that transforms the deprivation of liberty from unconstitutional preventive detention to constitutional civil commitment.").

173. Tsesis, *supra* note 13, at 258.

174. Kansas v. Hendricks, 521 U.S. 346, 358–59 (1997); *see also* Sreenivasan et al., *supra* note 147, at 474.

175. Sreenivasan et al., *supra* note 147, at 474.

176. *Hendricks*, 521 U.S. at 359 (quoting Ake v. Oklahoma, 470 U.S. 68, 81 (1985)).

177. *Id.*

178. *Id.* at 360.

impulse" and an "impulse not resisted."[179] The American Psychiatric Association (APA) feels so strongly that volitional impairment is impossible to reliably assess that the organization made a joint recommendation that the volitional prong of the American Law Institute's 1962 insanity defense standard be dropped.[180]

The inability to diagnose volitional impairment was the focus of the 2002 case of *Kansas v. Crane*,[181] which again challenged the Kansas SVP commitment laws. The Supreme Court reviewed how much control must be lacking for a person's mental abnormality to be considered a qualifying condition under the SVP commitment statute. The *Crane* Court, like the *Hendricks* Court, did not lay down a precise standard for how much "inability to control" must be present but found that it does not need to be a *complete* lack of control.[182] The Court went on to suggest that it would be enough if there was proof the individual had a "serious" difficulty controlling his actions, since inability to control one's impulses will never be able to be demonstrated "with mathematical precision."[183]

This ambiguous language, as one would expect, did not provide much guidance for the lower courts. Many responded to the broad language by giving volitional impairment a wide scope, applying the language with considerable flexibility.[184] The loose requirement that a mental abnormality include some volitional impairment essentially allows the past actions of the individual to dictate the diagnosis as, under these terms, past sexual crimes themselves suggest an inability to control.[185] This could permit any number of mental conditions to qualify an individual for commitment if coupled with a prior crime suggesting volitional impairment. Such liberal interpretation becomes most dangerous with borderline conditions, such as antisocial personality disorder, where some of those diagnosed would meet

179. Harris, *supra* note 5, at 354.

180. Prentky et al., *supra* note 56, at 363.

181. 534 U.S. 407 (2002).

182. *Id.* at 411.

183. *Id.* at 413.

184. *See* Harris, *supra* note 5, at 355 (noting that "the *Crane* ruling effectively relegated volitional impairment to a rhetorical concept with little substantive bearing on the commitment process"); Fabian, *supra* note 110, at 50 (noting that a sex offender with any type of mental illness, disorder or abnormality can be involuntarily committed under the AWA "if they have volitional impairments and serious difficulties in controlling behavior that ultimately lead to sexually violent acts").

185. *See* Harris, *supra* note 5, at 355 ("Just as the concept of mental abnormality may be driven largely by the nature of the individuals' prior behaviors, the volitional impairment criterion may in turn be viewed as similarly circular in its logic and application.").

"inability to control" criterion while others would not.[186] Thus, its inclusion as a qualifying condition may ensnare individuals who may not actually meet the requisite criteria. This comes along with even more fundamental issues, such as concerns that the classification system used by clinicians focuses on criteria that can be discussed only in the abstract and are not applicable to the real world.[187]

Even more alarming than the broad standards for determining an individual's qualifying condition is the difficulty experts face in determining an individual's future dangerousness. There are two methods by which experts develop their opinions regarding an individual's risk of future dangerousness. The first method consists of the expert performing an unstructured analysis of the specific factors of an individual's situation and testifying to his or her own clinical judgment.[188] The second is to rely on an actuarial instrument that weighs a number of different variables unique to each commitment subject to generate a percentage of risk for that person.[189]

Experts who rely solely on clinical judgment are often criticized as inaccurate because many believe that empirical data are essential to a reliable finding.[190] These clinical judgments may result in such unreliable outcomes because, rather than gathering information in a systematic manner, experts who use clinical judgment alone often refrain from any type of structured methods and instead rely on their

186. *See* Sreenivasan et al., *supra* note 147, at 476 ("[W]hile some individuals with Antisocial Personality Disorder meet the requisite mental criteria under SVP/SDP Acts, it could be argued that not all sex offenders with such a diagnosis should be committed as an SVP/SDP."); *see also* Fabian, *supra* note 51, at 34 ("The question remains whether a personality disorder diagnosis alone or the presence of psychopathy qualifies a sex offender to have a serious difficulty refraining from future sexual conduct.").

187. *See* Jackson & Covell, *supra* note 117, at 413 (noting that there has been much debate regarding the reliability of the Diagnostic and Statistical Manual of Mental Disorders).

188. Sreenivasan et al., *supra* note 147, at 479; *see also* Fredrick E. Vars, *Rethinking the Indefinite Detention of Sex Offenders*, 44 CONN. L. REV. 161, 164 (2011) ("The two primary methods of determining the likelihood of recidivism are clinical judgment and so-called actuarial risk assessment instruments."); Fabian, *supra* note 51, at 38 (characterizing the clinical judgment method as "unstructured clinical decision making").

189. Sreenivasan et al., *supra* note 147, at 478.

190. *See* Brooks, *supra* note 148, at 271–72 (noting that "statistical studies have demonstrated that assessments of risk based on empirical data are more accurate than the clinical method" and that "statistical predictions yielded relatively lower false positive rates [than clinical predictions]").

instincts as professionals.[191] Additionally, there is some concern that clinicians have a relatively narrow view of what characteristics should be taken into consideration.[192] This idiosyncratic method is bolstered somewhat when experts use guided assessments, which base clinical assessments on a review of risk factors that have been determined from more empirical research.[193] Surprisingly, however, whether guided or unguided, clinical opinions are generally accepted by the court,[194] allowing the defendant's fate to be decided by "judgments that ultimately rest on the arbitrary opinion of a mental health professional."[195]

Even conclusions made by utilizing actuarial instruments—the method generally accepted as the more reliable—are hardly regarded as the epitome of accuracy. These tools consist of scales created using prior analyses, which identify variables that best differentiate between those sex offenders who will reoffend and those who will not.[196] Based on how strongly each variable predicts the likelihood of recidivism, these variables are given weighted values, and the values are then turned into probabilities.[197] Clinicians can then use these scales to assess the probability that a specific defendant with a certain number of these characteristics will reoffend.

Most of the concern with this method revolves around the accuracy of actuarial tools themselves.[198] First, the application of the typical actuarial factors may result in an analysis that is both too broad and too narrow. In the design process, the actuarial risk levels may have been determined using generic behaviors that the

191. *See id.* at 272 ("[T]he exercise of clinical judgment related to an assessment of risk may well depend on murky and ambiguous clinical hunches."); Prentky et al., *supra* note 56, at 371 (referring to clinical risk assessments as "an exercise in human judgment").

192. *See* Harris, *supra* note 5, at 356 (voicing concern that the mental health field fails to rely on important characteristics such as "responses to treatment, situational stressors, availability of social supports, and employment or housing status").

193. Sreenivasan et al., *supra* note 147, at 481.

194. A recent study has found that jurors, in fact, "favor[] less scientifically valid unstructured clinical expert testimony over more accurate actuarial assessment in a realistic mock SVP hearing." Krauss et al., *supra* note 43, at 33.

195. Prentky et al., supra note 56, at 370; *see also* Sreenivasan et al., *supra* note 147, at 481 ("Those critical of clinical judgment have argued that such opinions represent 'unguided' efforts that are frequently inaccurate.").

196. Prentky et al., *supra* note 56, at 373.

197. *Id.*

198. Jackson & Covell, *supra* note 117, at 415.

evaluating clinician does not wish to incorporate into his analysis[199] and thus encompass factors the practicing clinician does not feel belong in the diagnosis. Relatedly, these actuarial tools cover only the probability of future dangerousness for a general category of person, based on the variables or behaviors measured by the tool.[200] Thus, its results may be overbroad and categorize defendants too generically rather than assessing the individual's actual risk based on other personal variables. In addition to this overbreadth, an antithetical difficulty with this one-size-fits all design is that the tools may not be inclusive enough to incorporate all the factors relevant to determining the future risk of a specific SVP commitment subject.[201] In fact, research suggests a great number of risk factors that are not currently included in such actuarial measurements could potentially improve the tool's diagnostic capability.[202] A recent study suggests that the Static-99, "the most thoroughly researched tool for predicting sexual recidivism," does not, on its own, predict recidivism well enough to reach the standard required for SVP commitment.[203]

So what does this analysis of the expert's role in SVP commitment proceedings indicate? First, the great weight given to expert testimony suggests that the *Brady* Rule should be applied to SVP commitment proceedings. When expert testimony essentially acts as dispositive evidence, the government can drastically shape the

199. *See id.* For example, the tool may suggest a particular probability of dangerousness but when that probability was determined, non-contact offenses were included in the assessment even though the diagnosing clinician does not believe those behaviors should be included in the risk assessment.

200. *See id.* (explaining that these determinations "rely on comparisons of an individual to a reference group").

201. *Id.* The current ten-factor diagnostic for the STATIC-99 actuarial tool consists of: (1) aged twenty-five or older; (2) ever lived with lover for at least two years; (3) index non-sexual violence—any convictions; (4) prior non-sexual violence—any convictions; (5) prior sex offenses; (6) prior sentencing data; (7) any convictions for non-contact sex offenses; (8) any unrelated victims; (9) any stranger victims; (10) any male victims. Yung, *supra* note 40, at 981.

202. Jackson & Covell, *supra* note 117, at 416. These include regularly considered factors such as treatment participation or completion as well as relatively untested, dynamic factors such as intimacy, self-regulation, and social influences. *Id.*; *see also* Fabian, *supra* note 51, at 33 (claiming that actuarial tools "overlook the clinically complex elements of assessing volitional abilities in relationship to the offender's mental abnormality").

203. *See* Vars, *supra* note 188, at 193 (suggesting, after a lengthy empirical study, that the answer to whether the STATIC-99 can predict recidivism at the level required to meet the legal standard was "mixed and qualified, but largely negative").

outcome of the proceeding by selecting an ideal expert who best supports its claim and presenting only that testimony.[204] Moreover, when judges do not set a threshold admissibility standard for this expert testimony and instead rely upon a totality of the evidence determination, each piece of adverse evidence becomes integral in establishing a realistic context. The importance of disclosure is amplified further by the relatively unreliable nature of the evidence being presented. Without disclosure, fact finders base their determinations on the opinions of experts handpicked by the government, even though one expert's methods and conclusions may be wildly different from another's. The extreme prejudice created by the current use of expert testimony has led some to call for sweeping reforms. At least one commentator has suggested that expert testimony based solely on clinical judgment should be banned from the prosecution's case in chief altogether.[205]

Rather than excluding certain forms of expert testimony, application of *Brady* protection would simply require that all available expert testimony be shared. When such varied expert analysis carries so much weight, the only way to add proper context is to present the entire range of analyses and conclusions. Otherwise, the one or two experts chosen by the government to testify may look far more convincing than is accurate.[206] This reasoning is supported by a recent study that set out to determine the significance of actuarial risk scoring on jurors.[207] While its results suggested that the specific risk measures did not matter to the jurors, the findings underscore the

204. This is the exact discretion the government argued it possessed in United States v. Edwards, 777 F. Supp. 2d 985, 989 (E.D.N.C. 2011); *see supra* notes 1–10 and accompanying text.

205. CHRISTOPHER SLOBOGIN, PROVING THE UNPROVABLE: THE ROLE OF LAW, SCIENCE, AND SPECULATION IN ADJUDICATING CULPABILITY AND DANGEROUSNESS 124 (2007). Rather, the author suggests a "Subject-First Regime" where the prosecution's use of clinical prediction expert testimony is contingent on the defendant's own use of that evidence. *Id.* at 125–28. Like the character evidence rule, if the defendant opens the door through his own use of clinical prediction expert testimony, then the state may answer with its own. *Id.* at 127.

206. For example, a portion of expert testimony may seem perfectly reasonable when it is accompanied only by evidence that supports the government's position. In the context of exculpatory evaluations withheld by the government, however, the unreliable nature of this seemingly reasonable evidence is likely to emerge and the fact-finder can give it the amount of evidentiary weight it deserves.

207. Marcus T Boccaccini et al., *Do Scores from Risk Measures Matter to Jurors?*, 19 PSYCHOL. PUB. POL'Y & L. 259 (2013). The study was conducted using actual jurors from twenty-six SVP commitment hearings who were asked questions immediately following their deliberation and verdict. *Id.* at 260–62.

importance of context in SVP expert testimony.[208] According to the authors, "our jurors were more skeptical of experts' (no side specified) ability to predict recidivism when they heard testimony from opposing experts as opposed to a state expert only."[209] These findings exemplify the importance of full disclosure. Presenting contradictory expert testimony allows the fact finder to give the government's expert evidence the amount of weight it deserves, which is especially important considering the unreliability of certain methods of analysis. Unfortunately, fact finders often are not allowed this perspective.[210] Application of *Brady* would facilitate this vital context, as the government would not be able to keep any exculpatory reports from defendants, who would then be able to present them at trial.

C. Bright-Line Application of Brady *in SVP Commitment*

The final argument for *Brady*'s application to SVP commitment proceedings is the relative ease in which it could be applied. *Brady*'s application to SVP commitment proceedings would be implemented with significantly less confusion or exploitation than currently accompanies its use in criminal proceedings. Since the *Brady* Rule applies only when the state has withheld *material* evidence,[211] the most critical determination made by the government is whether the evidence it wishes to withhold is significant enough to change the outcome of the proceeding.[212] This condition basically requires the prosecution to look at each piece of evidence and determine whether that item could make a difference to the defendant's argument without having personal knowledge of that argument.

The diverse nature and sheer amount of evidence introduced in a criminal trial makes it difficult for prosecutors to be sure when to disclose and has led to inconsistencies in disclosures amongst prosecutors.[213] Some interpret *Brady* liberally and try to deduce

208. *See id.* at 266 (discussing the importance of testimony presented on behalf of the commitment defendant).

209. *Id.* Specifically, there were seven of the twenty-six hearings in which an expert testified on the defendant's behalf, and in those hearings jurors indicated that they saw the defendant as less likely to reoffend than the defendants in the other nineteen hearings. *Id.*

210. In the Boccaccini et al. study, there were at least two government experts in twenty-five out of the twenty-six hearings, and only seven hearings included any expert testimony on behalf of the defendant. *Id.*

211. *See supra* Part II.

212. *See* Levenson, *supra* note 98, at 77 ("An essential aspect of *Brady* has always been the determination of whether the undisclosed evidence really would have made a significant difference in the case.").

213. *See* Peter A. Joy, Brady *and Jailhouse Informants: Responding to Injustice*, 57 CASE W. RES. L. REV. 619, 630 (2007) (noting that, in the traditional criminal context, prosecutorial discretion "to determine

whether the specific piece of evidence could potentially have an effect on the outcome, while others read the rule narrowly and only disclose when a party other than the defendant has confessed to the alleged crime.[214] Moreover, prosecutors are aware and take advantage of the lack of oversight mechanisms and the absence of any real professional discipline.[215] The result has been "a hodgepodge of judgments about the nature and extent of favorable information to be disclosed to defendants."[216] Such confusion has led to a number of subsequent adjustments to *Brady*'s application by the lower courts.

In an attempt to combat the materiality problem, courts have suggested modifications to *Brady* that take the onus off the prosecution. One example is the adoption of a due diligence rule. While there are three general variations, the rule essentially removes the burden imposed on the state by *Brady* when the defendant knew or should have known of the evidence himself.[217] The basis for this rule at least partially stems from the idea that the defendant knows better than the prosecution whether certain evidence will be material to his defense.[218] This method has been criticized for creating a new prong of *Brady* and overstating the defendant's ability to know what is material to his own trial.[219]

On the other end of the spectrum, courts have begun using "open-file" polices under which the government is required to provide the defendant with everything in its possession.[220] Sharing all of the prosecutorial files serves two benefits. First, it leaves no doubt that the government prosecutor is following *Brady*, as all the evidence will

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what constitutes exculpatory evidence and *when* to disclose it . . . has led to inconsistent decisions").

214. *See* Robert W. Tarun, Am. Coll. of Trial Lawyers, Proposal, *Proposed Codification of Disclosure of Favorable Information Under Federal Rules of Criminal Procedure 11 and 16*, 41 AM. CRIM. L. REV. 93, 103–04 (2004) (discussing the different interpretations of what is considered "exculpatory" under *Brady*).

215. *See* Joy, *supra* note 213, at 631 (discussing the ways in which prosecutors can exploit *Brady* loopholes).

216. Tarun, *supra* note 214, at 115.

217. *See* Kate Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of* Brady *Through the Defendant Due Diligence Rule*, 60 UCLA L. REV. 138, 154–56 (2012) (explaining the three variations of the due diligence rule in greater detail).

218. *See id.* at 167–74 (discussing the "myth" that defendants are in a better position to determine whether evidence is exculpatory).

219. *See id.* (explaining misconceptions inherent in the foundation of the due diligence rule).

220. Levensen, *supra* note 98, at 84.

be disclosed.[221] Second, it eliminates the difficult task prosecutors face in attempting to determine what evidence is material, instead allowing the defendant to make the decision personally.[222] However, this method has been criticized for authorizing prosecutors to send hundreds of documents to the defense without identifying the important information, effectively hiding the exculpatory information in plain sight.[223]

These potential solutions, while obviously imperfect, are attempts to respond to the difficulty in *Brady*'s application. Practitioners in the criminal context desire a comprehensible definition of *Brady* materiality in order to remedy these interpretive difficulties and to facilitate order and justice.[224] Such ambiguity will not be a problem in *Brady*'s application to SVP commitment, however, as determining the material nature of exculpatory evidence will not be difficult. As was discussed at length, in most SVP commitment proceedings, the ultimate question comes down to whether the subject has a qualifying condition and whether there is a risk of future dangerousness.[225] These questions are almost wholly resolved by expert testimony or reports. With such little evidence being presented, very little evidence needs to be analyzed. Moreover, this Note has further demonstrated that fact finders make their decisions in line with the clinical expert testimony almost exclusively.[226] Thus, unlike in the criminal context, there would be no question about the materiality of such evidence. Since such expert testimony is likely to be outcome determinative, there can be no argument that it will not influence the outcome of the case. Essentially, the *Brady* Rule could have bright-line applicability. If the government employs a clinical expert to review the defendant, that report must be disclosed due to its highly material nature. Any suppression would result in an automatic *Brady* violation. Rules that are easily understood are easily applied, and since SVP commitment decisions are determined using such little evidence that is so highly material, the requirements of the *Brady* Rule can be easily interpreted

221. Joy, *supra* note 213, at 641–42.

222. *Id.*

223. *See* Levensen, *supra* note 98, at 85 (explaining that, with such a "discovery dump," prosecutors can hide critical evidence like a needle in a haystack).

224. *See, e.g.*, Tarun, *supra* note 214, at 115 ("A clear definition of favorable information will help eliminate disparate interpretations of the Brady obligation by both prosecutors and defense counsel and give prosecutors clear guidance, thereby promoting equal treatment of similarly situated defendants under the law.").

225. *See supra* Part III.B.2.

226. *See supra* Part III.B.1.

and will result in none of the confusion typical of its application in the criminal context.

Conclusion

The current state of SVP commitment allows the government to effectively act as architects of the proceeding's final outcome. This was the precise situation the Court aimed to avoid by enacting the *Brady* Rule in criminal trials. While the Supreme Court has continually found civil commitment to be rehabilitative rather than punitive, the role of the government and severe consequences of SVP commitment liken it to something much closer to a criminal proceeding than a traditional civil matter. Accordingly, SVP commitment requires application of the heightened *Brady* protection. Moreover, *Brady*'s use in extradition hearings—a similarly quasi-criminal hearing—suggests that the rule's utilization in SVP commitment proceedings would not be a drastic shift from what already occurs in practice elsewhere.

Additionally, the original objectives of SVP commitment statutes were to offer rehabilitation and protect society from a specific group of dangerous individuals. However, these just and constitutional goals cannot be truly achieved if the government can manipulate outcome-determinative expert testimony in order to confine those who do not meet the requisite threshold of dangerousness. While it is clear that SVP commitment can be effective when the process is tailored to meet the proper objectives, the entire system is delegitimized when the State withholds evidence that would prevent an unnecessary loss of liberty. If *Brady* Rule application can remedy this problem with little confusion or negative effects, a formalistic "civil v. criminal" argument should not stand in its way.

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