Confessional Stipulations: Protecting
Waiver of Constitutional Rights

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The American criminal justice system is often criticized as complex and inefficient, better serving the interests of criminals than the interests of justice. While the criminal process may indeed be cumbersome, the system’s procedural safeguards exist to ensure the protection of defendants’ fundamental constitutional rights and, instrumentally, the rights of all citizens. These rights include the right to an attorney, the right against compelled self-incrimination, the right to a jury trial, and the right to call and confront witnesses. These explicit constitutional guarantees, coupled with various procedural safeguards, form the basic framework of our adversarial system of justice. Protecting these rights warrants a certain amount of complexity and inefficiency.

Initially, a criminal defendant enjoys the full panoply of these rights and protections. If he pleads not guilty, he retains all of these constitutional rights and leaves the prosecution with the burden of proving guilt. Alternatively, a defendant may choose to plead guilty, waive his constitutional rights, and thereby forgo his right to put the state to its proof.¹ Judgment is then entered against him, and a sentence imposed.

Because defendants who explicitly plead guilty waive many of their fundamental rights, the Constitution and the Federal Rules of Criminal Procedure impose certain safeguards in such situations. As stated by the Supreme Court in Boykin v Alabama, the Constitution requires that a defendant waive his rights explicitly, and that this waiver be accompanied by evidence that his plea was knowing and voluntary.² FRCrP 11 ("Rule 11") adds a layer of procedural requirements: the judge must question the defendant personally in open court to ensure the plea is made knowingly and voluntarily, inform the defendant of his rights and the conse-


¹ In some jurisdictions, including the federal system, a defendant may also plead "nolo contendere," which functions much like a guilty plea. See FRCrP 11(a)(1), 11(b).

quences of his waiver, determine a factual basis for the plea, and investigate plea bargaining arrangements. These procedural requirements insure that constitutional mandates are fulfilled and that an adequate record exists for review on appeal.

Not all of a defendant's options fall neatly into the boxes marked "guilty" and "not guilty." Between the firm boundaries establishing explicit pleas of guilty and not guilty lies the ambiguity of stipulations. For a variety of reasons, a defendant may elect to forego an explicit guilty plea but nonetheless stipulate to the essential elements of the charged crime. For example, a defendant may stipulate in exchange for a reduction of a charge or to limit the repercussions of a long recitation of evidence. Although such a stipulation may operate as a de facto guilty plea, courts have failed to apply the same stringent constitutional and procedural protections to stipulations that they routinely accord formal guilty pleas.

Stipulations may assume a variety of forms, with varying degrees of impact on the defendant's rights. Some relatively minor stipulations (for example, to the mere existence of evidence or to jurisdiction) may reduce the government's burden of proof and thus constitute "inculpatory stipulations." More serious stipulations may obviate the need for the government to prove anything at all, thus becoming "confessional stipulations."

This Comment argues that when a stipulation amounts to a de facto guilty plea, the defendant should be afforded the same protections he would have enjoyed had he formally pled guilty. Sec-

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3 The procedures mandated by FRCrP 11, which go beyond Boykin's requirements, are not constitutionally required. See McCarthy v United States, 394 US 459, 465 (1969). There are many state procedural rules analogous to FRCrP 11. See, for example, Wash Superior Ct Crim Rule 4.2(d)-(e); Ala Rule Crim Proc 14.4(a)-(b); Alaska Rule Crim Proc 11(d)-(f); Ariz Rule Criminal Proc 17.1-17.4; Ark Rule Crim Proc 24.4-24.6; Ill S Ct Rule 402(a)-(c); Md Rule Proc 4-242(c)-(d); and Mich Rule Crim Proc 785.7(1)-(5).

4 A stipulation is an "agreement, admission or confession made in a judicial proceeding . . . Such are evidentiary devices used to simplify and expedite trials by dispensing with the need to prove formally uncontested factual issues." Black's Law Dictionary 1415 (West, 6th ed 1991).

5 For purposes of this Comment, an inculpatory stipulation is one which incriminates the defendant and thus increases the probability of a guilty verdict. This is in contrast to a "confessional stipulation," which is so highly incriminating as to amount to a de facto guilty plea.

6 This term has been adopted from the military courts, which define a confessional stipulation as:

a stipulation which practically amounts to a confession . . . [A] stipulation can be said to amount "practically" to a judicial confession when, for all facts and purpose, it constitutes a de facto plea of guilty, i.e., it is the equivalent of entering a guilty plea to the charge.

tion I presents an overview of the applicable law and critiques the approaches taken by the federal circuit courts. Although courts have differed in the degree of their solicitousness toward stipulating defendants, the general consensus is that the law only requires that a stipulation be knowing and voluntary with respect to the specific elements of the stipulation. Section II examines the sufficiency of this standard and argues that it is inconsistent with established principles of constitutional waiver. In short, a defendant's stipulation must not only be knowing and voluntary in the literal sense, but the defendant must understand the ultimate consequences of his stipulation as well. Finally, Section III proposes a test for differentiating confessional stipulations from lesser stipulations and suggests a procedure for courts to follow when addressing these situations.

I. The Current Legal Landscape

A. Formal Guilty Pleas

*Boykin v Alabama* and Rule 11 establish the constitutional and procedural protections required for formal guilty pleas. In *Boykin*, the Court outlined the due process requirements: A defendant must affirmatively demonstrate that his guilty plea is both knowing and voluntary. Also, the defendant must understand that a guilty plea operates as a waiver of his constitutional rights—including the right against compulsory self-incrimination, the right to a jury trial, and the right to confront witnesses.

The *Boykin* requirements are codified in Rule 11, which also establishes further safeguards. The Rule calls for the judge to conduct a “guilty plea colloquy” with the defendant in open court and carefully delineates the points that such a colloquy must address. In addition to ensuring that the defendant understands the nature of the charges, sentencing issues, and the like, the judge must also

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7 395 US at 242.
8 Id at 244. See also *McCarthy*, 394 US at 466.
9 These rights arise from the Fifth and Sixth Amendments to the Constitution. The Fifth Amendment states that: "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ." US Const, Amend V. The Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." US Const, Amend VI.
10 FRCrP 11 was amended in 1974 to reflect the Court's holding in *Boykin*. See Advisory Committee Notes.
inform him that as a consequence of the plea, no trial or adjudication of any kind will be held at any future time, and that he is waiving his constitutional right to plead not guilty, the right to a jury trial, the right to confront witnesses, and the right against compelled self-incrimination.\footnote{FRCrP 11(c)(1)-(4).} The court must ensure that the plea is "voluntary and not the result of force or threats or of promises apart from a plea agreement."\footnote{FRCrP 11(d).} The court must also satisfy itself that a factual basis for the guilty plea exists.\footnote{FRCrP 11(f).}

Rule 11 also carefully delineates the types of permissible prosecutorial promises and requires that the parties notify the court of any plea agreement.\footnote{FRCrP 11(e)(1)-(2).} Although the court is not allowed to participate in actual negotiations, it may accept or reject any proposed agreement.\footnote{FRCrP 11(e)(3).} These procedures are designed to prevent prosecutorial abuse.\footnote{The Advisory Committee noted that these provisions were "designed to prevent abuse of plea discussions and agreements by providing appropriate and adequate safeguards." Committee Note on 1974 Amendment. For a discussion of restrictions and guidelines regarding plea agreements, see Brady v United States, 397 US 742, 753-55 (1970), and Santobello v New York, 404 US 257, 261-62 (1971).}

B. Confessional Stipulations

In contrast to the relatively well-defined safeguards that surround formal guilty pleas, the constitutional and procedural protections required for confessional stipulations remain unsettled. The Supreme Court has never expressly addressed the issue, and the lower courts have taken varying approaches to confessional stipulations. Although a few circuits have also examined protections for lesser inculpatory stipulations,\footnote{See, for example, United States v Perate, 719 F2d 706 (4th Cir 1983) (stipulation to testimony at suppression hearing in place of live testimony); United States v Robertson, 698 F2d 703 (5th Cir 1983) (stipulations coupled with a reservation of nonjurisdictional defenses).} this discussion will focus on confessional stipulations—those which effectively show guilt beyond a reasonable doubt.
1. The fascination with labels.

In the Eighth and Ninth Circuits, the procedural label attached to a defendant's plea determines the level of protection it receives. Only a formal guilty plea receives the traditional safeguards. The Ninth Circuit has steadfastly opposed treating confessional stipulations, which often lack the clear indications of guilty pleas, as de facto guilty pleas. Most recently, an en banc panel in *Adams v Peterson* identified several reasons for this treatment. First, the court reasoned that although the defendant stipulated that the facts enumerated in the indictment could be proved beyond a reasonable doubt, it was still up to the judge to infer guilt. Second, the court found that equating confessional stipulations with guilty pleas would be unduly burdensome on the judicial system because of the inherent difficulties in distinguishing confessional stipulations from stipulations to minor elements of the prosecution's case. Many relatively minor stipulations are made during the adjudicative process, and it would be unclear how or when the court should determine that a stipulation amounts to a de facto guilty plea. Third, the *Adams* court took into consideration "the purposes of the defendant and his counsel in choosing this method of presenting evidence to the trier of fact."

In a concurring opinion, Judge Kozinski articulated an alternative rationale for not finding a de facto guilty plea. He argued that rather than "embodying the requirements of due process," *Boykin* simply announced a prophylactic rule—that is, one which

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18 United States v Terrack, 515 F2d 558, 561 (9th Cir 1975); United States v Miller, 588 F2d 1256, 1263-64 (9th Cir 1978); United States v Schuster, 734 F2d 424, 425 (9th Cir 1984); Adams v Peterson, 968 F2d 835 (9th Cir 1992) (en banc).

19 968 F2d 835 (9th Cir 1992), cert denied, 113 S Ct 1818 (1993). The defendant in *Adams* was charged with rape, sodomy, and burglary. He signed a written stipulation which mirrored the state’s indictment and included a provision stating, “Based on this stipulation, it is the expectation of the parties that the defendant will be found guilty . . . .” Id at 837.

20 Id at 839.

21 Id at 840, quoting Terrack, 515 F2d at 561 n 3 (“To create a gray area where stipulations, as a part of a trial, would be governed by the rules on the acceptance of pleas would further complicate the trial judge’s duties and push him further into the role of an advocate.”).

22 Id at 840, citing Terrack, 515 F2d at 561 n 3.

23 968 F2d at 842. Adams's attorney believed the defendant might receive a harsher sentence after an extended trial. Additionally, in exchange for the stipulations, the prosecutor dismissed two other pending indictments against Adams.

24 Id at 845-47.
“can be violated without necessarily violating the constitution.” Kozinski reasoned that Boykin was such a rule because the Supreme Court focused on “providing additional, bright-line protection for enumerated constitutional guarantees” that went beyond constitutional mandates. Since the Boykin requirements are judge-imposed, rather than constitutionally mandated, Kozinski would confine their applicability to the precise case identified by the Supreme Court, namely, the formal guilty plea. Like the Adams majority, Kozinski also proffered a strong judicial economy argument. He stressed that application of the prophylactic rule to these circumstances would create an “entirely unworkable” task, both for trial courts forced to draw “crisp lines” among stipulations and for appellate courts forced to “reverse-engineer” cases to decide which stipulations amounted to de facto guilty pleas.

The Eighth Circuit has also refused to equate confessional stipulations with guilty pleas. It has focused primarily on two distinctions between confessional stipulations and formal guilty pleas. First, the judge still has an opportunity to decide the case on the merits. Second, the defendant still has an opportunity to raise a defense. For example, a fully stipulating defendant preserves a right to appeal his conviction. He may even raise a defense through the stipulations themselves. These options are not available to the defendant who pleads guilty. Thus, the Eighth and Ninth Circuits fail to treat confessional stipulations as guilty pleas, and stipulating defendants receive no special procedural protections.

2. The partial solution of limited protection.

An alternative approach is to recognize confessional stipulations as de facto guilty pleas but to give them only limited procedural protections. In defining confessional stipulations, the First
Circuit distinguishes between stipulations that admit the truth of the prosecution's evidence and those that merely agree to its contents, thus leaving "determinations of veracity" to the court. Stipulations admitting the truth of the prosecution's evidence are de facto guilty pleas because "all the elements necessary for conviction are present . . . [so that] the court must necessarily dispense a guilty verdict."

Although it does not apply the full panoply of Rule 11 protections to confessional stipulations, the First Circuit does extend greater protection than do the label-oriented Eighth and Ninth Circuits. Thus, a trial judge must take "'special pains to satisfy himself' that the waiver was knowing and voluntary to impress upon the defendant the significance of the choice to proceed by stipulation." Although the First Circuit did not rely on Boykin when announcing this rule, the requirement approaches the level of the Boykin protections.

For example, the district court judge in United States v Lyons conducted a lengthy colloquy in which he questioned the defendant about his understanding of his stipulation. The colloquy included a direct warning to the defendant that the court could find him guilty based solely upon the stipulations. The First Circuit found that the judge's questioning had "impress[ed] upon the defendant the significance of the choice to proceed by stipulation," and therefore allowed the conviction to stand.

While the First Circuit's requirement does provide some level of protection, it is not clear how closely the requirement parallels the Boykin safeguards. While the Lyons court notes that the defendant was made aware of the immediate consequence of his stipulation (a possible finding of guilt), the record of the lower court proceedings fails to affirmatively demonstrate that the defendant had knowingly and voluntarily waived his constitutional rights. This certainly departs from Boykin. The Lyons opinion states that the defendant's waivers were discussed in the lower court, but it

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33 In these instances, a defendant stipulates to the existence of evidence and the nature of testimony to be presented at trial. This saves time by relieving the prosecution of the burden of actually presenting evidence.
35 Id.
37 Id.
38 Id at 214 n 3.
39 Id at 215.
fails to reveal which waivers of which rights were discussed. It is thus unclear whether the district judge's questioning went beyond the defendant's explicit waiver of his jury trial right. If it did not, then the degree of questioning with which the First Circuit was satisfied falls far short of that required by Boykin.

The D.C. Circuit has also recognized that some stipulations may amount to a de facto guilty plea. While at present only an explicit guilty plea will trigger full procedural protections in that circuit, the court has conceded that the policies behind the procedural safeguards argue for Rule 11-type inquiries for confessional stipulations. These situations are "freighted with what is perhaps more than ordinary significance," and judges should "take heed of at least some of the advices enumerated in Rule 11(c)." Acknowledging that Rule 11 in its current form is not well-suited to deal with stipulations, the court in United States v Strother advocated the construction of a more suitable rule:

Some effort by trial judges along these lines would not only eliminate appeal issues of the kind we now confront, but could also usefully provide a basis for the rulemaking machinery of the federal court system to consider . . . the formulation of a rule addressed explicitly to this phenomenon, which is a frequently recurring one. . . . [I]t is "obviously preferable to have a procedure which would show clearly that a defendant understands the consequences of a stipulated trial.""
Though the D.C. Circuit has urged lower courts to make use of Rule 11 in confessional stipulations, it has stopped short of mandating such compliance. In effect, the D.C. Circuit and similarly aligned courts ultimately agree with the Ninth Circuit that all that is required is that the stipulation be knowing and voluntary in the limited sense. As the following Section will demonstrate, such a meager requirement provides insufficient protection for criminal defendants and is inconsistent with established principles of constitutional waiver.

II. AN ARGUMENT FOR STRINGENT PROTECTIONS

A. The Shortcomings of the Current Approaches

1. Unhelpful labels.

The "label centered" approach of the Eighth and Ninth circuits fails to recognize that formal guilty pleas and confessional stipulations have the same substantive effect. As Judges Ely and Tang noted in dissenting opinions in the Ninth Circuit cases Terrack and Adams, respectively, adhering to the tyranny of labels by protecting only explicitly-marked guilty pleas subordinates the defendant's constitutional rights to arbitrary choices of terminology.

The Boykin Court explained that a guilty plea goes beyond an admission of conduct or a confession because it relieves the state of its burden of proving guilt beyond a reasonable doubt. This is precisely what happens in a confessional stipulation. Ordinarily, the prosecution must prove all of the elements of the crime in order to convict. When a defendant makes a confessional stipulation admitting all of the accused acts, causation, and intent, nothing remains at issue. If he has also waived a jury trial, nothing remains for the court to decide except his sentence. Guilt is not adjudicated but rather proffered up by the defendant himself. In this respect, a

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46 See, for example, Witherspoon, 633 F2d 1247 (6th Cir); Schmidt, 760 F2d 828 (7th Cir).
47 See Adams, 968 F2d 835.
48 See Terrack, 515 F2d at 561-62 (Ely dissenting) ("The prosecution argues, and the majority appears to agree, that the fact that the stipulation was not formally designated as a guilty plea is determinative, even though its consequences were precisely the same as a guilty plea, assured conviction without any presentation of prosecutorial evidence."); Adams, 968 F2d at 847 (Tang dissenting) ("To adopt the majority's distinction is to engage in legalistic hair-splitting, and to exalt form over substance at the expense of constitutional rights.").
defendant who makes a confessional stipulation has entered a de facto guilty plea. Furthermore, a confessional stipulation and a guilty plea result in the waiver of the same constitutional rights. Both waive the defendant’s right against compulsory self-incrimination, his right to confront witnesses, and his right to have the state prove his guilt beyond a reasonable doubt.60

In a closely related area of the law, the Supreme Court has eschewed assigning rights and protections based on arbitrary labels. In North Carolina v Alford, the defendant argued that because he refused to admit guilt when he entered his guilty plea, his plea was invalid.61 The Court rejected this argument finding that his actions effectively amounted to a plea of “nolo contendere” despite its alternative label.62 The Court found that these labels were of “no constitutional significance” because “the Constitution is concerned with [ ] practical consequences, not [ ] formal categorizations.”63

A closer examination of the Ninth Circuit’s opinion in Adams reveals the flaws of the label-centered approach. First, the court declined to equate the defendant’s stipulation with a de facto guilty plea because he did not stipulate to guilt but only to facts from which the judge may or may not infer guilt.64 It is difficult to see how the trial court could have “inferred” anything other than guilt. The stipulation listed specific facts supporting each of the charged crimes, admitted that the facts could be proven beyond a reasonable doubt, and failed to allow for any defenses or other legal arguments. Furthermore, the stipulation also stated that the defendant expected to be found guilty based on his stipulations alone.65 Any assertion that a court could render a verdict of “not guilty” in these circumstances defies logic.

60 The only right remaining—the right to a jury trial—must be explicitly waived under all circumstances. See Wayne R. LaFave and Jerold M. Israel, Criminal Procedure § 22.1(h) at 961 (West, 2d ed 1992). However, in almost all cases of confessional stipulations, the jury trial is expressly waived earlier or the waiver is joined with the stipulations. Even if a jury trial is not waived, little remains for the jury to do except perhaps to “nullify” the legal outcome.
62 A nolo contendere plea is one in which the defendant does not contest the charges, but neither does he admit or deny guilt. Although such a plea is treated the same as a guilty plea, the principal difference is that a nolo contendere plea cannot be used in a subsequent civil action. See FRCrP 11, 12.
63 Alford, 400 US at 37.
64 968 F2d at 839.
65 Id at 837.
Second, the existence of any strategic reasons for the stipulations should not prevent the court from finding a de facto guilty plea. However, the Adams court based its decision not to equate the defendant’s stipulation with a formal guilty plea in part on his desire to avoid “a lengthy and inflammatory recitation of the facts.”

Defendants may plead guilty for a variety of reasons even while professing their innocence, and this paradox does not prevent the entry of a valid plea. Frequently, defendants try to avoid trial in light of a high risk of conviction or because they hope for a lighter sentence. Moreover, in a particularly gruesome case, a defendant may want to prevent a long and repetitive recitation of the facts. These considerations may underlie confessional stipulations just as much as formal guilty pleas. If the presence of strategic factors does not vitiate the defendant’s rights when he makes a formal guilty plea, the same factors should not suddenly become suspect merely because the name of the defendant’s action has changed. The fascination with labels may have a place in the negotiations between a prosecutor and a defendant, but it has no place between the defendant and the court.

2. Illusory problems of judicial economy.

The efficiency issues discussed in Adams—that a rule requiring a Boykin inquiry for confessional stipulations would promote inefficiency due to line-drawing problems—are illusory. Essentially, the Adams court argued that unless a formal guilty plea is entered, one can never be sure when protections “kick in.” However, sophisticated judges—who are presumably well versed in criminal procedure and trial practice—should have no difficulty in discerning a confessional stipulation from other stipulations. Any stipulation that obviates the need to weigh evidence and adjudicate guilt should trigger a Boykin inquiry. This is not a vague standard. As the Boykin Court explained, a guilty plea is distinctive in that “nothing remains but to give judgment and determine punishment.” This standard applies equally well to de facto guilty pleas.

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56 Id at 842. Despite the stipulations, the judge sentenced Adams to the maximum penalty. Id at 837.
57 See, for example, Brady v United States, 387 US 742, 749-55 (1970) (upholding the validity of a guilty plea offered in order to avoid the death penalty, even though the defendant continued to deny the acts charged).
58 See Adams, 968 F2d at 840, 846-47.
59 See text accompanying notes 98-101, proposing a method for distinguishing different types of stipulations.
60 395 US at 242.
If a stipulation presents a judge with a situation where "nothing remains but to give judgment and determine punishment," then the defendant has entered a de facto guilty plea.

Even if lesser protection for confessional stipulations proved less burdensome at the district court level,\textsuperscript{61} efficiency should not take precedence over justice. Because of the stigma, loss of liberty, and state coercion inherent in a criminal prosecution, procedural and constitutional safeguards deliberately prevent the criminal process from operating at maximum efficiency. If these safeguards were removed, then we may indeed approach maximum efficiency, but only at the cost of inviting maximum tyranny.\textsuperscript{62} Efficiency concerns should yield to firm measures that safeguard the criminal defendant's individual rights and the overall integrity of the system.\textsuperscript{63} Requiring a Boykin inquiry for confessional stipulations helps achieve these fundamental goals.\textsuperscript{64}

\textsuperscript{61} The effect on appellate courts of adopting a Boykin-like rule for confessional stipulations is discussed below. See text accompanying note 96.


\textsuperscript{63} There are better ways to increase judicial economy than sacrificing the rights of the criminal defendant. For example, existing court capacity could be used much more effectively that it is now. See Albert W. Alschuler, Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System, 50 U Chi L Rev 931, 1013-15 (1983).

\textsuperscript{64} This rationale applies whether or not one agrees with Kozinski's prophylactic rule analysis. See Adams, 968 F2d at 845-47. Even if Boykin is viewed as a prophylactic rule requiring a formal guilty plea to trigger constitutional protections, that rule sacrifices the defendant's constitutional rights for illusory efficiency gains. At a minimum, confessional stipulations should receive the benefit of Boykin's requirement that waivers of constitutional rights be "knowing and voluntary," because that rule was a simple extension of established constitutional waiver doctrine and is thus not a prophylactic rule.

But confessional stipulations should also fall under the on-the-record requirement, even if that rule is prophylactic. Prophylactic rules help assure sufficient protection of constitutional rights, and, generally, a prophylactic rule which protects constitutional rights in one domain should be extended to other domains in which it can be of service to the Constitution, except where such an extension imposes too high a cost on the judicial system.

As discussed above and in the text accompanying note 96, the efficiency costs of granting Boykin protection to defendants who make confessional stipulations are small. There is consequently no reason not to extend the prophylactic Boykin rule to confessional stipulations. Although the legitimacy of prophylactic rules has come under frequent attack, see, for example, Joseph D. Grano, Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy, 80 Nw U L Rev 100 (1985), and in recent years the Court has expressed some hostility toward such rules, the Court has stopped short of discarding them completely and, in a recent decision, reaffirmed the recognized importance of such safeguards. See Withrow v Williams, 113 S Ct 1745 (1993) (Miranda warnings).
3. Remaining problems of “limited protection.”

Even the more progressive circuits have never fully explained why confessional stipulations do not warrant the full range of Rule 11 safeguards. For example, even if all the appropriate inquiries had been made in Lyons, the court’s rule would remain unsatisfactory because the court had not precisely identified when it should be applied; nowhere did the court expressly set out its guidelines for distinguishing stipulations deserving of protection from other stipulations. Such silence invites inconsistent application. Moreover, because a court is not required to ascertain whether a defendant fully understands the waiver implications of his stipulation, it does not sufficiently ensure the protection of the defendant’s fundamental constitutional rights. Although the demand for a heightened level of protection for confessional stipulations is a step in the right direction, it simply fails to go far enough.

B. The Waiver of Constitutional Rights: Current Doctrine

Current approaches to confessional stipulations fall far short of the Supreme Court’s standard for waiver of constitutional rights as enunciated in Johnson v Zerbst. The Johnson Court defined waiver as “an intentional relinquishment or abandonment of a known right or privilege.” Although Johnson concerned the waiver of the Sixth Amendment right to counsel, it has been subsequently interpreted to apply to a defendant’s constitutional rights generally. Also, Johnson creates a presumption against waiver. “[C]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights and [ ] we do not presume acquiescence in the loss of fundamental rights.” The trial court should clearly determine that the defendant has made a valid waiver, and “it would be fitting and appropriate for that determination to appear upon the record.”

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65 304 US 458 (1938).
66 Id at 464.
67 See Adams v McCann, 317 US 269, 277, 279 (1942) (The defendant may waive jury trial “where this action is taken with his express, intelligent consent”; the defendant may waive counsel “if he knows what he is doing and his choice is made with eyes open.”). See also Fay v Nita, 372 US 391, 438-40 (1963) (waiver standard applies to the right to appeal).
68 Johnson, 304 US at 464.
69 Id, quoting Aetna Insurance Co. v Kennedy, 301 US 389, 393 (1937), Hodges v Easton, 106 US 408, 412 (1882), and Ohio Bell Telephone Co. v Public Utilities Comm’n, 301 US 292, 307 (1937).
70 Johnson, 304 US at 465.
Boykin applied this waiver standard to guilty pleas and mandated a formal procedure to ensure adherence to this standard. Boykin strengthened the well-settled principle that fundamental constitutional rights must be explicitly waived and that “presuming waiver . . . is impermissible.” Because a guilty plea results in the waiver of several distinct constitutional rights, courts must take adequate steps to ensure that the waiver of each of these rights is knowing and voluntary. Boykin requires an affirmative, on-the-record showing of this waiver. If the record fails to demonstrate an explicit waiver of these rights, then the accompanying guilty plea is invalid, and reversal is required.

Confessional stipulations implicate the same constitutional rights as formal guilty pleas. A guilty plea “constitutes a waiver of the fundamental rights . . . to confront one’s accusers, to present witnesses in one’s defense, to remain silent, and to be convicted by proof beyond all reasonable doubt.” So too does a confessional stipulation. The defendant forgoes both a trial on the merits of his case and the opportunity to present and cross-examine witnesses. His silence is replaced by self-incriminating confessional statements, and the state need not prove any element of guilt.

Because the same rights are waived, the Johnson standard should apply to confessional stipulations just as it does to formal guilty pleas. The defendant’s waiver of rights should be knowing and voluntary in the broad sense. If a court only requires that a stipulation be knowing and voluntary, it deviates from the Boykin requirements by not ensuring that the waiver of the underlying rights is knowing and voluntary. A defendant “knowingly” makes a stipulation so long as he understands that his stipulation means that the stipulated fact need not be proved at trial and that evidence on the issue will not be introduced. This is far different from

72 See Boykin, 395 US at 243 (guilty plea implicates self-incrimination, trial by jury, and witness confrontation rights).
73 Id at 243-44.
75 Adams illustrates the procedure in such situations. The defendant agreed to waive his right to a jury trial and to enter a stipulation which mirrored the state’s indictment. When the parties appeared for the stipulated-facts trial, the judge first ascertained that Adams agreed to waive a jury. Next, the judge asked if Adams agreed to proceed by stipulated facts. Immediately after Adams agreed, the judge said, “Stipulated facts will be filed with the clerk, and I’ll read those over. You may be seated. All right, I would find the Defendant guilty.” 968 F2d at 837, quoting from trial transcript. No time lapsed between entry of stipulations and the announcement of verdict. Other than the explicit jury trial waiver, none of Adams’s constitutional rights were discussed.
"knowing" and understanding that the cumulative effect of a series of stipulations amounts to a de facto guilty plea and that the series of stipulations amounts to the waiver of constitutional rights. Even knowing that a guilty verdict will result is not the equivalent of a conscious waiver of constitutional rights. A defendant who formally pleads guilty also knows that a conviction will result. The issue is not simply knowing what action the judge will take but knowing all of the consequences of one’s actions—knowing that fundamental constitutional rights exist and knowing that these rights are being waived. Anything less runs contrary to the mandate of Johnson. To remain faithful to the Johnson standard, each constitutional right being waived should be expressly stated and affirmatively waived on the record to ensure that "no right is lost unless the loser knows it."\(^7\)

C. Monitoring Prosecutorial Coercion

Many factors can motivate a defendant to make a confessional stipulation. A court might have rejected a guilty plea, or the defendant may wish to preserve certain issues for appeal (such as adverse pretrial evidentiary rulings). A formal guilty plea precludes such appeals. In jurisdictions where a conditional guilty plea is

\(^7\) The Adams court stated that "[a] stipulation is valid and binding if the defendant understands the contents of the stipulation . . . and the likelihood of a guilty finding." Id at 844.


\(^8\) See United States v Bertelson, 3 MJ 314, 315 (CMA 1977). The military judge rejected the defendant's proffered guilty plea because the defendant had previously asserted that he lacked the predisposition for the criminal act. The defendant made a confessional stipulation to ensure that his pretrial sentencing agreement would still be honored.

\(^9\) At times, adverse evidentiary rulings can determine the prosecutor's ability to prove guilt beyond a reasonable doubt: Within the adversary system, which makes even a response to police illegality dependent on the initiative of defense counsel, the [evidentiary] hearing, months after the event in issue, is too often a "swearing contest" between the police and the defendant, which the judge must resolve as he can. Motions to suppress evidence sometimes have a perceptible effect on the outcome of a prosecution. But, unsurprisingly in the circumstances, judges rarely decide in favor of the defendant unless the conduct of the police was flagrantly unlawful; and they are the less likely to do so if the evidence at stake appears to be critical to the government's case.


\(^8\) A conditional guilty plea, by contrast, would preserve such issues for appeal. In federal courts, FRCrP 11(a)(2) governs conditional pleas: "With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty . . . reserving in writing the right, on appeal . . . to review of the adverse determination of any specified pre-trial motion. A defendant who prevails on appeal shall be allowed to withdraw
unavailable, or where a judge refuses to accept such a plea, the defendant’s only recourse may be a confessional stipulation.

Prosecutorial coercion can also induce a confessional stipulation. Sometimes a prosecutor will offer to drop or reduce other related charges in exchange for a confessional stipulation. Although this “implied plea bargain” resembles a plea agreement, it lacks the mandated structure or procedural protections that accompany a formal plea agreement. While prosecutors are allowed to make certain promises to defendants, there are many promises which are impermissible. The formal protections for guilty pleas work to screen out such impermissible forms of coercion, but under the current regime, confessional stipulations are not subject to any checking process. For example, unless the defendant enters a formal guilty plea, the court is not required to inquire into the existence and terms of any plea agreement. A failure to make an analogous inquiry within the context of confessional stipulations invites unrestricted implied plea bargains and prosecutorial abuse through the offering of impermissible or unfulfillable promises.

A prosecutor already faces great incentives to seek guilty pleas; the same incentives also push her to seek confessional stipulations. A prosecutor may find confessional stipulations more attractive because formal guilty pleas have become increasingly burdensome. When a formal guilty plea is entered, FRCrP’s non-negotiable protections come into play. In addition to conducting the usual guilty plea colloquy, the court must inquire into any plea agreements and ensure that the prosecutor has not exceeded her

the plea.” Before 1983, a defendant would have had to pursue alternatives to a formal guilty plea if he wanted to preserve his right to direct appeal. See FRCrP 11(a), 18 USC Appendix (1982); Amendments to Federal Rules of Criminal Procedure, 461 US 1117, 1122-23 (1983). See generally Lefkowitz v Newsome, 420 US 283 (1975).


82 This strategy frequently arises in the plea-bargaining context, and such an offer can have a strong impact on inducing the defendant to alter his plea. See Peter F. Nardulli, Roy B. Fleming, and James Eisenstein, Criminal Courts and Bureaucratic Justice: Concessions and Consensus in the Guilty Plea Process, 76 J Crim L & Criminology 1103, 1113 (1985). However, the value of a prosecutorial promise is relatively minimal. Though in theory “reduced charges can limit the defendant’s legal liability at sentencing,” id, in practice concurrent sentencing often renders such charge reductions largely symbolic. LaFave & Israel, Criminal Procedure § 21.1(a) at 898 (cited in note 50).

83 See FRCrP 11(e).

84 See, for example, FRCrP 11(d).

85 See United States v Robertson, 698 F2d 703, 708 (5th Cir 1983) (“Unfortunately, the significant advantages to be gained from having a defendant plead guilty exert pressure on an over-zealous prosecutor to wring involuntary guilty pleas from uninformed defendants.”).
Confessional Stipulations

authority in negotiations. It then must review the substance of the agreement and decide whether to accept or reject it. Of course, the whole negotiation could fail at any stage in the process. The time and energy taken up complying with Rule 11 necessarily burdens court personnel and slows down the prosecutor's office.66

A confessional stipulation mirrors a guilty plea in that both eliminate the adversarial nature of the relationship between the defendant and the state. In both situations, the prosecution is relieved of its burden of establishing guilt beyond a reasonable doubt, and the defendant participates in ensuring his own conviction. Although in many circumstances it may appear that the defendant will almost surely be convicted regardless of his own participation, "the defendant always has a right to put the [state] to its proof and may win a dismissal if any essential witness fails to appear."87 Therefore, the defendant's culpability notwithstanding, the prosecution's case always retains an element of uncertainty. One effective way of reducing this uncertainty, short of soliciting a guilty plea, is to induce the defendant to stipulate to some or all of the prosecution's case.

In contrast to guilty pleas, a confessional stipulation requires no colloquy. This reduces the time required to process a case and the opportunity for things to go awry. Although this reduction may amount to only a few minutes per case, over time this reduction leads to a substantial savings for the prosecution.68 Thus, the prosecutor indeed has a strong incentive to bargain for a confessional stipulation rather than a guilty plea.69

Rule 11 acts as a check upon prosecutorial discretion and authority. When the plea bargaining provision was added to Rule 11, it was heralded as granting "recognition to the propriety of plea

66 Although the length of time devoted to these procedures varies from court to court, the entry and acceptance of a guilty plea can approach an hour of courtroom time. See Alschuler, 50 U Chi L Rev at 939 (cited in note 63); Stephen J. Schulhofer, Is Plea Bargaining Inevitable?, 97 Harv L Rev 1037, 1055-57 (1984).
67 Schulhofer, 97 Harv L Rev at 1069-70.
68 See id at 1055-57.
69 Although this type of negotiating between the prosecutor and the defendant does not conform to the common perceptions surrounding plea bargaining, it fits into widely acknowledged forms of alternative bargaining such as "implicit bargaining" and "slow pleas." See Peter F. Nardulli, James Eisenstein, and Roy B. Fleming, The Tenor of Justice: Criminal Courts and the Guilty Plea Process 205 (Illinois, 1988). See also Nardulli, Fleming, and Eisenstein, 76 J Crim L & Criminol at 1107-08 (cited in note 82); Schulhofer, 97 Harv L Rev at 1049, 1073-75, 1083 (cited in note 86); Welsh S. White, A Proposal for Reform of the Plea Bargaining Process, 119 U Pa L Rev 439, 441-42 (1971) (Waivers of jury trial proceedings amount to "slow pleas of guilty" and defendants thereby implicitly or explicitly admit guilt without entering a formal plea.).
discussions and plea agreements provided that they are disclosed in open court and subject to acceptance or rejection by the trial judge." The policies behind this checkpoint are subverted when a prosecutor may avoid it by a small shift in bargaining tactics.

D. Preserving the Values Underlying the Adversarial Process

The American legal system rests on an adversarial theory of justice which posits that from the sharp clash of proofs presented by opponents in a structured setting, a neutral arbitrator will receive the information necessary to resolve a litigated dispute. Although both the prosecutor and defense counsel control the conduct of the case, a crucial element of the criminal adversarial process is that it is "the government's burden 'to shoulder the entire load' and prove the defendant's guilt without assistance from him." Today, this element of the adversarial process is systematically subverted by the heavy reliance upon negotiated guilty pleas to obtain convictions. In addition to pressures on prosecutors to obtain convictions, the defense bar also has strong incentives to negotiate pleas: economic reasons for private counsel and institutional pressures on the public defender.

Although the defendant may be represented by counsel during plea negotiations, the lack of court supervision leaves the adversarial nature of these negotiations in doubt. As one commentator has noted:

The charges to which the defendant pleads guilty are arranged in a brief conversation between the two lawyers. They

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91 In discussing Article 45(a) of the Uniform Code of Military Justice, which is analogous to FRCrP Rule 11, the Court of Military Appeals stated:

To allow the Government to enter into pretrial agreements conditioned upon a stipulation (as opposed to a plea) of guilt . . . would utterly defeat the congressional purpose behind [the rule], for it would allow the Government to avoid the hurdles Congress imposed . . . while nevertheless reaping benefits equivalent to a guilty plea. Bertelson, 3 MJ at 317.
92 Stephan Landsman, The Adversary System: A Description and Defense 2 (American Enterprise Institute, 1984). For a general critique and indictment of the American adversarial system of justice, see Anne Strick, Injustice For All 20, 37 (Putnam, 1977). Strick contends that the current system is a barbaric one which works to the advantage of the unscrupulous and fails to promote morality and virtue.
93 Weinreb, Denial of Justice at 46 (cited in note 79).
94 "In fact, we rely on the defendant's formal admission of guilt far more than other countries, whose procedures we criticize [as not based on] our conception of an adversary system." Id at 72.
may have a meeting in the prosecutor's office or talk in a hallway of the courthouse or a courtroom where both happen to be present for another purpose or on the telephone. There is nothing novel about most negotiations, and the result is predictable. Neither lawyer bases his 'bargaining position' on a detailed examination of the particular facts of the case.\textsuperscript{95}

The fairness of the adversary process is jeopardized when most of the transactions occur off the record and out of court. At least when negotiations come to fruition in the form of a plea agreement, such an agreement receives judicial scrutiny and subsequent enforcement. But when no formal guilty plea results, as in the case of confessional stipulations, no such scrutiny is required. Courts should institute similar mechanisms for confessional stipulations to protect the values underlying the adversarial process.

E. Judicial Economy vs. Substantial Justice

Contrary to the view of some courts, extending full protections to confessional stipulations promotes rather than hinders the efficient use of judicial resources. Because a court must already make an inquiry into the knowing and voluntary elements of the confessional stipulation, a full Boykin/Rule 11 inquiry will only marginally increase the expenditure of time. The court should not balk at taking a few additional moments to make sure the defendant's waiver of fundamental constitutional rights is also knowing and voluntary. Indeed, a strict bright-line rule requiring a Boykin hearing for confessional stipulations would ultimately save judicial resources. These few additional moments at the trial court level would reduce the number of post-conviction appeals. This savings at the appellate level would increase overall judicial economy because appellate resources are arguably more valuable than trial court resources.\textsuperscript{96}

\textsuperscript{95} Id at 76.

It is inevitable, at least in retrospect, that the federal system would have placed greater weight on economizing on the time of appellate judges than on that of trial judges. The reason lies in the pyramidal structure of a judicial system combined with the geographic extent of the federal judicial system. . . . [A] vital task of the appellate process—maintaining a reasonable uniformity and consistency of law—cannot be performed effectively if there is more than a handful of judges."

Note also that although the federal judiciary approaches 900 members, only 179 judges sit at the appellate level. See 28 USCA §§ 44(a), 133(a) (West Supp 1992). See also Stephen Reinhardt, \textit{Dialogue: Are 1,000 Federal Judges Enough?; No. More Cases Should be Heard}, NY
Of course, a bright-line rule that confessional stipulations are not entitled to Boykin/Rule 11 inquiries could also reduce the number of post-conviction appeals. But such a rule would do grave injustice to the rights of criminal defendants. The Boykin Court set a high standard for waiving rights through guilty pleas, emphasizing the importance of due process. As one commentator has noted, "[w]aiver standards in the guilty plea context are justifiably set high, [ ] for a guilty plea is a waiver of the whole 'bundle of rights' the accused has. Brief and cursory colloquies [ ] do not meet the standard set forth in Boykin." Thus, we must adhere to rules which erect strong procedural safeguards in order to protect our constitutional rights.

III. IMPLEMENTING FULL PROTECTION: IDENTIFYING AND PROTECTING CONFESSIONAL STIPULATIONS

In the preceding Sections, this Comment explored why confessional stipulations constitute de facto guilty pleas and why they must receive the same constitutional and procedural protections as formal guilty pleas. As the D.C. Circuit has advocated, a clearly defined procedure applicable to confessional stipulations should be established. This Section proposes a simple test for distinguishing confessional stipulations from lesser inculpatory stipulations and outlines an Rule 11-type approach to ensure the sufficient protection of defendants' rights.

A. Identifying Confessional Stipulations

Before courts can afford proper protection to defendants making confessional stipulations, they must learn to recognize when a given stipulation rises to the level of a confessional stipulation. At the commencement of a trial, a judge should examine the proffered stipulations and determine: (1) whether the defendant's actions have resulted in a waiver of any of his constitutional rights; and (2) whether the adversarial nature of the proceedings has been com-

88 See United States v Strother, 578 F2d 397, 404-05 (DC Cir 1978). One commentator echoed the D.C. Circuit's concerns in a discussion of waiver of counsel, noting that the lack of a clear rule "foster[s] inefficiency, unnecessary litigation, unequal treatment, and unprincipled decision-making." James J. Tomkovicz, Standards for Invocation and Waiver of Counsel in Confession Contexts, 71 Iowa L Rev 975, 978 (1986).
promised. If either of these two prongs is satisfied, the judge should conduct an on-the-record colloquy that makes the appropriate inquiries and admonishments.

1. Waiver of constitutional rights.

The rights implicated by a confessional stipulation include the Fifth Amendment privilege against compelled self-incrimination, the Sixth Amendment right to trial by jury, and the Sixth Amendment right to call and confront witnesses. At the first stage of the inquiry, the judge should determine whether each of these rights has been retained. Determining the retention of the Sixth Amendment rights presents a relatively simple task: it takes no demanding exercise of legal judgment to see whether a jury has been retained. At some point prior to or in conjunction with the entry of a confessional stipulation, a defendant may expressly waive a jury trial. This should put a judge on notice that heightened scrutiny of the ensuing stipulations is in order.

As for the right to call and confront witnesses, a judge should examine whether the defendant’s stipulations foreclose his opportunity to call witnesses or foreclose his opportunity for cross-examination (by stipulating to the testimony of prosecution witnesses). If so, the defendant’s constitutional rights have been undermined to a degree sufficient to constitute a waiver. Accordingly, the judge should apply the *Johnson* waiver standard and take pains to ensure that the defendant’s waiver is both voluntary and intelligent.

An inquiry into the possible waiver of the defendant’s Fifth Amendment privilege against self-incrimination may be more problematic. A stipulation could be incriminating but nonetheless fail to rise to the compromising nature of a confessional stipulation. In situations where the only right implicated is the Fifth Amendment self-incrimination privilege, then a clear answer under part one of the test is unlikely and courts should proceed to the second part. In sum, a waiver of the jury trial right only calls for the judge to give heightened scrutiny to other stipulations, whereas waiver of the other two rights triggers the colloquy. Although a defendant need only waive one of the other rights to gain the benefits

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**In order to analyze the adversarial nature of the proceedings, the court should assess three factors: a) whether the court must assess evidence or resolve issues; b) whether the defendant retains some defense or legal argument; and c) whether the prosecution is relieved of its burden of proving guilt beyond a reasonable doubt.**

**On crafting appropriate colloquies, see text accompanying notes 113-14.**
of the colloquy, only a waiver of the right to call and confront witnesses will clearly trigger a colloquy given the varying degrees of self-incrimination.

2. Adversarial nature of proceedings.

The substantial diminishment or absence of an adversarial tone to the criminal proceedings may also indicate a confessional stipulation. Although the waiver of constitutional rights diminishes the adversarial nature of the proceedings, courts may examine other factors that indicate a lack of adversity. These include a lack of judicial assessment of evidence, the defendant's failure to retain a legal defense, and the alleviation of the prosecution's burden of proof. If any one of these factors is present, a colloquy is required.

   a) No need for judicial assessment of evidence. Not all stipulations to evidence fatally compromise the adversarial nature of a criminal proceeding. For example, in certain stipulations to evidence, a defendant acknowledges the existence of evidence and the nature of the testimony to be presented at trial, but does not concede the veracity or the sufficiency of the evidence. In such instances, the court must still evaluate the evidence, determine its persuasiveness, and rule on its sufficiency. There remains a strong possibility that the defendant will be acquitted. Stipulations for which a judicial assessment of the evidence is required thus maintain the adversarial nature of the proceedings.

   This contrasts sharply with a stipulation to the sufficiency of the evidence, in which the defendant stipulates that the state's evidence is sufficient to meet its burden of proving guilt beyond a reasonable doubt. Where a defendant has made such a stipulation, the adversarial nature of the proceedings has been seriously compromised, and Boykin-like protections are warranted.

   b) No retention of legal defense. A defendant may stipulate to the truth of all of the factual bases for the charges against him, yet argue that some additional factor or factors relieve him of criminal liability. For example, the defendant might seek exculpation through the traditional defenses of duress or entrapment. A defendant's retention of some such legally grounded defense, separate from the factual basis of the criminal charge, will clearly

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101 The sufficiency of evidence is at issue, for example, where the defendant produces witnesses or evidence outside of the stipulations.
Confessional Stipulations

maintain the adversarial nature of the proceedings. Because the defendant actively resists conviction, there need be no fear that he is acquiescing to impermissible pressures from the state. But when a defendant plans to stipulate to an inculpating set of facts without retaining any viable legal defense, a judge should recognize that much of the adversarial flavor of the trial has been lost, and be prepared to step in with the protections outlined below.

c) Alleviation of the prosecution's burden of proof. Absent a guilty plea, the state must prove a defendant's guilt beyond a reasonable doubt. Even if the defendant is factually guilty, a variety of factors may prevent the state from meeting its burden of proof. A key piece of evidence may be excluded or its value discounted due to a limiting instruction, or an essential witness may fail to appear. The allocation of the burden of proof works heavily in the defendant's favor. A confessional stipulation removes this burden from the state and relieves it from proving anything at all. Where a stipulation, or a series of stipulations, amounts to a guilty plea by effectively relieving the state of its burden of proving the defendant guilty, the defendant making the stipulation should be fully informed that he is waiving several constitutional rights.

To summarize, if either the defendant's stipulation effectively waives one of his constitutional rights or the adversarial nature of the proceedings is substantially compromised, the judge should conduct a colloquy. If no evidence is judicially assessed, no legal defense retained, or if the prosecution is relieved of its burden of proof, then the adversarial nature of the proceedings is sufficiently compromised to trigger a colloquy.

B. The Test Applied

An application of this test to the facts of actual cases will demonstrate how it can make substantive distinctions between different sorts of stipulations. These examples show that the rights of the defendants in both Adams v Peterson and United States v Schmidt would have been better protected under the confessional stipulations test.

1. Adams.

In Adams, the defendant signed a stipulation that mirrored the original indictment and contained a provision stating that both the prosecution and the defendant expected that he would be
found guilty on all three counts of the indictment.\textsuperscript{102} The stipulation admitted the defendant’s intent to commit the crime and his commission of the criminal acts. Immediately after the stipulations were read into the record, the judge pronounced the defendant guilty. No additional witnesses, testimony, or evidence was introduced.\textsuperscript{103}

Applying the proposed test, the defendant’s stipulation satisfies both prongs, either one of which would have been sufficient to trigger a more extensive inquiry. First, the defendant expressly waived his right to a jury trial.\textsuperscript{104} This should have put the court on notice that any stipulations may amount to a de facto guilty plea. Moreover, the stipulation amounted to a waiver of the defendant’s right to call and confront witnesses (although the court did not apprise him of this). Second, the three-factor analysis of the test’s second prong shows that the proceeding completely lacked an adversarial nature.\textsuperscript{105} No judicial assessment of evidence was required, the defendant did not put forth any legal defense or argument, and the prosecution was entirely relieved of its burden of proof. Thus, the proposed test reveals the Adams stipulation to be a confessional stipulation; the judge should have conducted the appropriate colloquy under Rule 11.

2. Schmidt.

In Schmidt, the defendant and the government stipulated to all of the evidence, including government exhibits.\textsuperscript{106} The stipulations stated facts to which the government’s witnesses would have testified (had they appeared in court), but no stipulation as to the truthfulness of the testimony was made. Moreover, the stipulations contained no assertions about intent.\textsuperscript{107}

The facts in Schmidt do not satisfy the second prong of the test. Judicial assessment of evidence was required because the stipulation did not address the veracity of the testimony. No addi-

\textsuperscript{102} 988 F2d 835, 837 (9th Cir 1992).
\textsuperscript{103} Id.
\textsuperscript{104} The judge determined that this express waiver had been “knowing” and “voluntary.” Id. This determination was made in isolation, however. Here, we are concerned with the effect of this waiver when viewed in the total context of the stipulations made, in other words, whether the jury trial waiver in addition to the remaining stipulations amounted to a de facto guilty plea.
\textsuperscript{105} Note that the stipulation was the result of a bargain between the prosecutor and the defendant. Id at 842.
\textsuperscript{106} 760 F2d 828, 830 (7th Cir 1985).
\textsuperscript{107} Id at 834-35.
tional defenses or legal arguments outside of the stipulations were presented; however, because the defendant did not stipulate to veracity, the prosecution still had to satisfy its burden of proof. Thus, the proceedings maintained some of their adversarial flavor. Nonetheless, it appears that the defendant waived his right to call and confront witnesses—satisfying the first prong of the test. Therefore, the judge should have conducted the appropriate colloquy.


Commonwealth v Babcock presents a more difficult case. The defendant (charged with a variety of crimes, including rape, burglary, and assault and battery) waived his right to a jury trial and agreed to limit the presentation of evidence to documentary and photographic materials. This case demonstrates that a stipulation can in fact be quite damaging without arising to the level of a confessional stipulation.

Under the first part of the test, the defendant waived his right to a jury trial, thereby signalling the need for heightened judicial scrutiny of the remaining proceedings. Although no witnesses were called at trial, the defendant included his own exculpatory testimonial statement among the documentary evidence. Thus, on paper the defendant was able to confront and counter the testimony of the victims and the police. In addition, although the evidence agreed upon for presentation was highly incriminatory, its incriminating nature was completely independent of the defendant’s procedural choice. For example, the photographic evidence consisted of pictures taken by the defendant and his cohort as they tortured their victim. Because the defendant declined to stipulate to the veracity of the prosecution’s evidence, the testimonial value of the pictures was not enhanced. Therefore, under the first prong of the test, Babcock did not amount to a confessional stipulation.

Under the second prong, it appears that the adversarial nature of the proceedings was maintained. First, all the evidence presented remained open to judicial assessment. The documents and photographs presented contradictory versions of the events at issue and it was unclear whether the evidence was sufficient to support all sixteen counts of the indictment. Also, the defendant

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108 In fact, the defendants were acquitted of some of the counts against them. Id at 830.
110 521 NE2d at 1066.
111 Id at 1067.
clearly resisted conviction and attempted to show mitigating circumstances warranting a lighter sentence. Finally, the burden of proof remained upon the prosecution, and in fact the state resisted attempts to alleviate it (by rejecting a plea bargain).\textsuperscript{112} Thus, under both parts of the test, the Babcock stipulations were not confessional stipulations.

C. Crafting Appropriate Colloquies

Generally, to ensure proper procedural safeguards for confessional stipulations, courts should adhere to Rule 11.\textsuperscript{113} All the provisions regarding the colloquy and plea agreements are applicable, and failure to comply substantially with its provisions should be grounds for reversal.

Rule 11 instructs courts to address the following points in plea colloquies: the nature of the charges, mandatory minimum and maximum possible penalties, other special sentencing guideline provisions, and the defendant's constitutional rights. In the context of stipulations, courts should take special pains to ensure that the colloquy addresses the specific issues raised by the test. If the first prong of the test indicates that the defendant's constitutional rights were implicitly or explicitly waived, the court should inform the defendant accordingly. For example, if the right to confront witnesses is implicated, the judge should query the defendant specifically on that issue and ascertain whether the defendant understands that he has this right and that his stipulation forecloses it. If the second prong of the test indicates that the proceedings lack the appropriate adversarial tone, then the stipulation should be treated as a general plea. One modification courts should make is to ensure that the defendant understands that he has a right to plead not guilty without any stipulations and to make the prosecution establish all necessary facts beyond a reasonable doubt.

The plea agreement provisions of Rule 11 are equally applicable to stipulations. The court should ascertain whether the stipulations were made pursuant to an agreement with the prosecutor. If the stipulations stem from prosecutorial negotiations, the court should ensure that any promises made by the prosecutor conform

\textsuperscript{112} Id.

\textsuperscript{113} The model suggested by the military courts is that once the stipulation meets the criteria for a confessional stipulation, the judge must determine 1) that a factual basis exists for the stipulation, and 2) whether a plea bargain exists. In addition, any existing plea agreement must preclude raising any defenses or motions. If such a possibility exists, the confessional stipulation must be rejected. Bertelson, 3 MJ at 317.
to the limits set by Rule 11. The prosecutor is limited to moving for dismissal of additional charges, agreeing to make sentence recommendations or not to oppose defendant’s sentence recommendations, and agreeing on a specific sentence to be rendered.\textsuperscript{1}\textsuperscript{4} Because, as this Comment has argued, negotiated confessional stipulations have the same effect as negotiated guilty pleas, the court should have the same power to either accept or reject such negotiated agreements.

**CONCLUSION**

Rule 11 allows for pleas of guilty, not guilty, and nolo contendere. The effect on the defendant’s constitutional rights in each of these situations is clearly understood and the applicable procedures are settled. However, these three discrete categories fail to cover the broad spectrum of defendant choices. Through confessional stipulations, a defendant can formally plead not guilty but present his case in a way that amounts to a de facto guilty plea. Defendants pursue this route for a variety of reasons, ranging from trial strategy to prosecutorial coercion.

A defendant’s rights are not sufficiently protected by simply requiring that a confessional stipulation be “knowing” and “voluntary” in the literal sense. Stipulations that are tantamount to a guilty plea implicitly waive several fundamental constitutional rights, and a failure to apply the *Boykin* standard to confessional stipulations is inconsistent with established principles of constitutional waiver. The stipulations cannot truly be “knowing” unless the defendant understands all of the rights that are being waived. Therefore, just as a guilty plea must conform to *Boykin* requirements, so too must confessional stipulations. Anything less undermines the constitutional and procedural safeguards established to protect the interests of all parties in the criminal justice system.