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In the Supreme Court of the State of California

IN RE VICTOR TELLEZ, ON HABEAS CORPUS.

Fourth Appellate District, Case No. D079716
San Diego County Superior Court, Case No. SCE369196
The Honorable Roderick W. Shelton, Judge

ANSWER BRIEF ON THE MERITS

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ISSUES PRESENTED

Does constitutionally effective assistance of counsel require defense counsel to advise a defendant that a guilty plea may subject the defendant to commitment proceedings under the Sexually Violent Predator Act (Welf. & Inst. Code, § 6600 et seq.; SVPA)? If so, did petitioner in this case suffer prejudice?

In the alternative, should this Court, in the exercise of its supervisory powers (see, e.g., *People v. Howard* (1992) 1 Cal.4th 1132, 1175; *Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 605), require that a defendant be advised that a guilty plea may subject him to SVPA commitment proceedings? If so, is petitioner entitled to relief?

INTRODUCTION

Petitioner Victor Tellez seeks to vacate his conviction for committing a lewd act upon a child, claiming that he received ineffective assistance of counsel at the time of his guilty plea because his attorney did not tell him that the conviction could permit future civil commitment proceedings under the Sexually Violent Predator Act (SVPA). That Act establishes a multi-step process under which a person who has been convicted of a qualifying offense, after serving any resulting prison term, may be civilly committed to a state hospital for treatment of a diagnosed mental disorder. Tellez is presently the subject of civil commitment proceedings under the SVPA.

Civil commitment is a significant restraint on a person's liberty, and a criminal defendant could understandably be concerned about the possibility, however remote, that a guilty

plea might lead to commitment as a sexually violent predator in the future. When a defense attorney can provide accurate advice about that aspect of a plea, it is good practice to apprise the defendant of the possibility of future SVP proceedings. But it is a separate question whether the Constitution compels such advice. The Sixth Amendment does not mandate every good practice or prescribe detailed rules for criminal defense attorneys to follow; rather, it sets a minimum standard of reasonable competence. Advice about potential civil commitment proceedings that might be pursued in the future based on a particular qualifying conviction is not constitutionally compelled because such proceedings are sufficiently attenuated from the criminal case in that they fall outside the scope of what is required of a reasonably competent criminal defense attorney.

In arguing to the contrary, Tellez primarily relies on an analogy to *Padilla v. Kentucky* (2010) 559 U.S. 356, in which the United States Supreme Court held that the Sixth Amendment requires defense counsel to advise a defendant about the immigration consequences of a guilty plea. But the potential SVP consequences at issue here are markedly different from the immigration consequences at issue in *Padilla*, which the Court described as legally mandatory (or nearly so) and difficult to divorce from the criminal punishment. SVP proceedings, in contrast, are far from certain to result from a particular conviction, they are instituted for the purpose of treating a mental disorder, and any resulting civil commitment is not necessarily permanent. Moreover, prevailing professional norms

do not unambiguously require that defense attorneys give advice about the potential for civil commitment that might result from a guilty plea, in contrast to the overwhelming body of professional guidance requiring advice about immigration consequences as described in *Padilla*.

In any event, Tellez's claim would fail for lack of prejudice even if counsel was constitutionally obligated to advise him about the potential for future SVP proceedings. Tellez has presented only an uncorroborated assertion that he would not have pleaded guilty had he been so advised. Under the circumstances of the case, however, it does not appear reasonably probable that Tellez would have insisted on proceeding to trial or that he would otherwise have proceeded differently during plea negotiations.

Although the Constitution does not compel counsel to advise a client about the potential SVP consequences of a plea, this Court should exercise its supervisory power to require that trial courts warn criminal defendants in appropriate guilty-plea cases about the possibility of future SVP commitment proceedings. As this Court has directed in other, similar circumstances, such a warning would augment a criminal defendant's information about the consequences of a guilty plea and provide added assurance that the plea is voluntary and intelligent.

STATEMENT OF THE CASE

A. Tellez's guilty plea

In March 2017, Tellez approached three boys, ages 9, 10, and 13, at a mall, sat down behind two of the boys, and stroked their

backs. (PFR Exh. F at pp. 63-64.)[1] Subsequently, Tellez approached a 13-year-old girl and hugged her from behind, wrapping his hands around her waist and pulling her close. (PFR Exh. F at pp. 63-64.)

Tellez was charged with three counts of committing a lewd and lascivious act upon a minor under Penal Code section 288, subdivision (a). (PFR Exh. A.) In December 2017, he pleaded guilty to one of those counts. (PFR Exh. B.) Pursuant to a plea agreement, the parties stipulated that the two other counts would be dismissed and that Tellez would be sentenced to three years in prison in lieu of a possible 12-year sentence. (PFR Exhs. C at pp. 2-3, I at p. 12.) The plea form signed by Tellez included a list of possible topics discussed with his attorney, but the topic "Sexually Violent Predator Law" was not circled. (PFR Exh. B at p. 3.) And during the plea colloquy, no mention was made that the conviction was for a sexually violent offense. (See PFR Exh.

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[1] In the "Factual and Procedural Background" section of the opening brief, Tellez cites to the petition for review he filed in this Court on November 18, 2022, and the exhibits attached to that petition, rather than to the habeas corpus petition that is the basis of this case. For the sake of clarity and consistency, and to avoid any confusion, respondent primarily cites to the petition for review, using "PFR." The cited exhibits were also filed as exhibits to Tellez's habeas corpus petition in the Court of Appeal below, though they bore different exhibit numbers. Exhibit F to the petition for review, which is a copy of the respondent's petition for involuntary treatment of a sexually violent predator filed against Tellez, contains its own internal exhibits that are not consecutively numbered. The page citations used here for Exhibit F refer to the consecutive numbering of the petition for review.

C.) The court accepted the plea and imposed the three-year sentence. (PFR Exh. E.)

B. Proceedings under the SVPA

The SVP Act, codified at Welfare and Institutions Code section 6600 et seq., authorizes the involuntary civil commitment of an individual who, upon the completion of a prison term for a qualifying sexually violent offense, is determined to suffer from a diagnosed mental disorder that makes the individual likely to engage in sexually violent criminal behavior. (§ 6600, subds. (a)-(d).)[2] Tellez's lewd-act conviction is a qualifying SVP offense. (§ 6600, subd. (b).) Before his release from prison, the process to civilly commit Tellez as an SVP was initiated. That process involves a number steps, addressed more particularly in the argument below. (See §§ 6601-6605.) Presently, Tellez is in custody pending the outcome of the SVP commitment proceedings. (PFR 5, 10.)[3]

C. Habeas proceedings

After initiation of the SVP proceedings, Tellez filed a petition for writ of habeas corpus in the San Diego County Superior Court, arguing, among other things, that his defense

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[2] Subsequent unspecified statutory references are to the Welfare and Institutions Code.

[3] Counsel for respondent understands that the district attorney has filed a petition in the superior court to commit Tellez as an SVP (PFR Exh. F) and that the case remains pending in the superior court awaiting a probable cause hearing, which has been continued in light of the current appellate proceedings.

counsel had provided ineffective assistance by failing to advise him of possible SVP commitment as a consequence of his guilty plea. (PFR Exh. I.)[4] The superior court issued an order to show cause and subsequently denied the petition. (PFR Exhs. L & M.)

Tellez then filed a petition for writ of habeas corpus in the Court of Appeal, renewing his claim of ineffective assistance of counsel. (Hab. Pet.)[5] He claimed that he "was left completely unaware that a guilty plea could result in indefinite commitment" and that he would not have pleaded guilty had he been advised of possible SVP consequences. (Hab. Pet. 13, 17.) The Court of Appeal summarily denied the petition as untimely and on the ground that Tellez had failed to state a prima facie case that his counsel provided ineffective assistance. (PFR Exh. N.)

Tellez petitioned for this Court's review of the denial of his habeas petition. (Case No. S272209; Opn. 3.) The Court granted

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[4] Although Tellez had completed his prison sentence by this time and had been taken into custody on the SVP petition, a successful ineffective assistance of counsel claim would invalidate his plea and conviction. In turn, the pending SVP commitment proceedings would have to be dismissed, as they are premised upon Tellez's Penal Code section 288 conviction. Respondent did not below, and does not here, challenge Tellez's habeas corpus petition on grounds of lack of custody or mootness. (See *People v. Villa* (2009) 45 Cal.4th 1063, 1069-1070 [discussing constructive custody and collateral consequences of conviction as relevant to habeas jurisdiction].)

[5] "Hab. Petn." refers to Tellez's habeas corpus petition filed in the Court of Appeal below on November 22, 2021.

review and transferred the matter to the Court of Appeal to vacate its denial and issue an order to show cause. (Opn. 3.)

On remand, after receiving a formal return and a traverse, the Court of Appeal denied the petition in a published opinion. The court rejected Tellez's claim that counsel had provided ineffective assistance by failing to advise him that his guilty plea could subject him to SVP commitment. (Opn. 6.)[6] Implicitly accepting for purposes of its analysis Tellez's allegation that counsel did not advise him regarding the possibility of potential SVP commitment, the court held that counsel had no constitutional duty to give that advice. (Opn. 6-7.)

Adhering to its previous decision in *People v. Codinha* (2021) 71 Cal.App.5th 1047, the Court of Appeal distinguished the United States Supreme Court's decision in *Padilla*, which held that "counsel performed deficiently by failing to advise a noncitizen that his plea of guilty . . . would make him subject to automatic deportation." (Opn. 6-7, citing *Padilla*, *supra*, 559 U.S. at p. 360.) It reasoned that, whereas deportation is a "severe penalty" that is "nearly an automatic result" of a noncitizen's guilty plea, SVP commitment is neither a "presumptively mandatory" nor an "automatic" result of a guilty plea. (Opn. 8-10; see *Codinha*, at p. 1069.) The court also concluded that the weight of prevailing professional norms—a factor that was

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[6] In light of this Court's order directing the Court of Appeal to issue an order to show cause, the court below proceeded to the merits of Tellez's claim without addressing any potentially applicable procedural bars. (Opn. 4-5.)

important to the decision in *Padilla*—did not compel counsel to give advice about potential SVP consequences. (Opn. 10-12; see *Codinha*, at p. 1068.) And it observed that its analysis was in accord with "the majority of courts in other jurisdictions to have ruled on the matter. (Opn. 12-14.)

The Court of Appeal additionally determined that Tellez had failed to establish prejudice as a result of his attorney's failure to advise him about potential SVP commitment. (Opn. 15.) It held that Tellez's uncorroborated declaration, claiming he would not have pleaded guilty if told of that possibility, was insufficient by itself to satisfy his burden of showing a reasonable probability of a different outcome. (Opn. 15.)

Tellez again petitioned for review, and this Court granted his petition on the question of whether counsel rendered ineffective assistance. The Court also ordered the parties to address whether it should exercise its supervisory power to require a warning when a guilty plea could support civil commitment proceedings under the SVPA.

ARGUMENT

I. TELLEZ HAS NOT ESTABLISHED A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON HIS ATTORNEY'S FAILURE TO PROVIDE ADVICE ABOUT POTENTIAL SVP COMMITMENT PROCEEDINGS

Tellez's trial counsel did not provide ineffective assistance in violation of the Sixth Amendment, even accepting Tellez's allegation that counsel failed to advise him at the time of his plea

about possible future SVP proceedings.[7] The Sixth Amendment right to the effective assistance of counsel requires that a defense attorney provide competent advice about a decision whether to plead guilty to criminal charges. But it does not extend so far as to compel defense counsel to advise a defendant about the potential for future civil commitment proceedings under the SVPA that might be premised on a criminal conviction. Moreover, Tellez would not be entitled to relief even if counsel did have a duty to provide advice about possible SVP proceedings because Tellez has failed to establish that he was prejudiced by the absence of such advice in this case.

A. The Sixth Amendment right to the effective assistance of counsel in the context of guilty pleas

The federal and state Constitutions guarantee a criminal defendant the right to the effective assistance of counsel at a criminal trial. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 15; *Strickland v. Washington* (1984) 466 U.S. 668, 686; *In re Long* (2020) 10 Cal.5th 764, 773.) This right applies to the assistance counsel gives to a defendant deciding whether to plead guilty. (*Padilla*, *supra*, 559 U.S. at p. 364.) To establish a claim

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[7] In responding to Tellez's claim of deficient performance in the Court of Appeal below, respondent argued only that counsel had no constitutional obligation to provide advice about potential SVP proceedings and did not specifically contest Tellez's factual allegations about counsel's advice in this case. And the Court of Appeal decided the claim only on the basis of the legal question about the scope of the Sixth Amendment right to the effective assistance of counsel. It is only that legal question that is at issue in this case.

of ineffective assistance of counsel, a defendant must show that counsel's representation was deficient, meaning the representation fell below an objective standard of professional reasonableness. (*Strickland,* at pp. 687-688.) The defendant must also establish that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Id*. at p. 694.)

Accordingly, to make out a claim of ineffective assistance in the plea-bargain context, a defendant must show that counsel's advice about the plea fell outside "the range of competence demanded of attorneys in criminal cases" and that "but for counsel's incompetence, [the defendant] would not have pled guilty and would have insisted, instead, on proceeding to trial." (*In re Resendiz* (2001) 25 Cal.4th 230, 248, 253; see also *Hill v. Lockhart* (1985) 474 U.S. 52, 56, 59.) In assessing any ineffectiveness claim, a reviewing court "must indulge a 'strong presumption' that counsel's conduct falls within the wide range of reasonable professional assistance because it is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight." (*Bell v. Cone* (2002) 535 U.S. 685, 702, quoting *Strickland*, *supra*, 466 U.S. at p. 689.)

The Sixth Amendment is centrally concerned with legal assistance in defending against "criminal prosecution." (U.S. Const., 6th Amend.) This constitutional right thus has not been interpreted to require that a criminal defendant be advised by counsel about all *possible* consequences of a conviction. In

addressing the advisements that are due to a criminal defendant in the plea context, some courts have distinguished between a "direct" consequence, defined as having "a definite, immediate and largely automatic effect" on the defendant's punishment, versus a "collateral" consequence, which "does not inexorably flow" from the conviction, holding that warnings about the former, but not the latter, are required. (See *Resendiz*, *supra*, 25 Cal.4th at p. 242; see also *People v. Gurule* (2002) 28 Cal.4th 557, 634 [eligibility for death penalty in the event of a future, subsequent murder conviction is a collateral consequence]; *People v. Aguirre* (2011) 199 Cal.App.4th 525, 529 [future federal prosecution is a collateral consequence]; *People v. Zaidi* (2007) 147 Cal.App.4th 1470, 1484 [restitution fine is a direct consequence]; *People v. Moore* (1998) 69 Cal.App.4th 626, 630 [possibility of SVP commitment is a collateral consequence]; *People v. Victorian* (1992) 2 Cal.App.4th 954, 957 [length of a mandatory parole term is a direct consequence]; *Corley v. Department of Motor Vehicles* (1990) 222 Cal.App.3d 72, 76 [revocation of a driver's license is a direct consequence]; *In re Birch* (1973) 10 Cal.3d 314, 321 [sex offender registration requirement is a direct consequence].)

Both this Court and the United States Supreme Court, however, have cautioned against drawing any rigid demarcation along those lines for Sixth Amendment purposes (see *Padilla*, *supra*, 559 U.S. at p. 365; *Resendiz*, *supra*, 25 Cal.4th at pp. 242-248), especially because some consequences of a plea are "uniquely difficult to classify as either a direct or a collateral

consequence" (*Padilla*, at p. 366). Thus, "'the circumstance-specific reasonableness inquiry required by *Strickland*'" remains the touchstone in this context. (*Resendiz*, at p. 248, quoting *Roe v. Flores-Ortega* (2000) 528 U.S. 470, 478.)[8]

In *Resendiz*, this Court considered counsel's obligation under the Sixth Amendment to provide advice regarding immigration consequences of a plea. (*Resendiz*, *supra*, 25 Cal.4th at p. 240.) There, the defendant, a permanent resident, alleged that he had pleaded guilty upon his counsel's incorrect advice that "he would have 'no problems with immigration'" except that he would not be able to become a citizen. (*Id*. at p. 236.) The Court concluded that "affirmative misadvice regarding immigration consequences can in certain circumstances constitute ineffective assistance of counsel" (*id*. at p. 240) but that, even assuming incorrect advice was given, the defendant had not shown that he was prejudiced (*id*. at pp. 248-254). Preliminary to that determination, the Court in *Resendiz* held that neither Penal Code section 1016.5—which requires that a court taking a plea give a warning about immigration consequences—nor "the 'collateral' nature of immigration consequences" necessarily precluded "an ineffective

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[8] Neither this Court nor the United States Supreme Court has entirely disapproved the direct-versus-collateral framework, and that framework may still offer a useful way to analyze some questions about an attorney's duty to provide constitutionally adequate advice in the plea context. Respondent does not contend here, however, that the constitutional question would be resolved simply by labeling SVP proceedings a collateral consequence of a plea.

assistance of counsel claim based on counsel's misadvice about the adverse immigration consequences of a guilty plea." (*Id*. at pp. 240-248.) The Court also observed that it was not persuaded that the Sixth Amendment imposes a "blanket obligation" on counsel to investigate and research immigration consequences, and it expressly declined to address "whether a mere failure to advise could also constitute ineffective assistance," as that question was not squarely before the Court. (*Id*. at pp. 240, 249-250.)[9]

The United States Supreme Court later took up those questions in *Padilla*, which Tellez invokes as primary support for his argument here. (See OBM 15-18.) The defendant in *Padilla* sought postconviction relief, claiming that his counsel failed to correctly advise him that he could be deported as a result of his conviction. (*Padilla*, *supra*, 559 U.S. at p. 359.) After reviewing the then-recent changes to immigration law, the expansion of removable offenses, and the permanency of removal, the Supreme Court determined that Padilla's counsel rendered constitutionally deficient assistance by failing to advise him that the offense to

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[9] Justice Mosk concurred in *Resendiz* but would have gone further. He would have held that "Penal Code section 1016.5 imposes an affirmative duty on counsel in any criminal case" to provide independent advice about immigration consequences, and that the defendant there was prejudiced by the lack of such advice. (*Resendiz*, *supra*, 25 Cal.4th at pp. 255-259 (conc. opn. of Mosk, J.).) Three dissenting Justices would have held that a court's warnings under section 1016.5 render any incorrect advice by counsel harmless. (*Id*. at pp. 259-267 (conc. & dis. opn. of Brown, J.).)

which he was pleading guilty would require deportation under federal immigration law. (*Id*. at p. 360.) The Court held that "counsel must inform her client whether his plea carries a risk of deportation." (*Id*. at p. 374.)

Central to the Court's holding was the "unique nature of deportation." (*Padilla*, *supra*, 559 U.S. at p. 365.) While acknowledging that "we must be especially careful about recognizing new grounds for attacking the validity of guilty pleas," the Court emphasized several aspects of deportation that rendered correct advice on that topic particularly important and, indeed, so closely linked to the conviction that it implicated criminal defense counsel's constitutional duties under the Sixth Amendment. (*Id*. at pp. 365-366, 372.)

Padilla explained that deportation is a "severe penalty," equivalent to banishment or exile. (*Padilla*, *supra*, 559 U.S. at pp. 365, 373.) And it is "intimately related to the criminal process," as it is, as a legal matter, "nearly an automatic result" for noncitizen criminal offenders. (*Id*. at pp. 365-366.) The Court observed that, under federal law, if a noncitizen commits a removable offense, "his removal is practically inevitable." (*Id*. at pp. 363-364.)[10] The Court also explained that "[o]ur law has

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[10] Under current federal immigration law, for a person convicted of a removable offense, deportation is mandatory but for the possibility of the Attorney General exercising discretion to waive removal in limited situations. (8 U.S.C. § 1229b; *Padilla*, *supra*, 559 U.S. at p. 363.) The *Padilla* Court's characterization of deportation as nearly automatic appears to have been based on that de jure consequence of a removable offense. As a practical

(continued…)

enmeshed criminal convictions and the penalty of deportation for nearly a century," and that "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." (*Id*. at p. 364, fn. omitted.) Because of these "unique" characteristics of deportation, the Court concluded that it is "'most difficult' to divorce the penalty from the conviction in the deportation context." (*Id*. at p. 366.)

In determining that counsel's performance "fell below an objective standard of reasonableness," the *Padilla* Court also considered "the practice and expectations of the legal community" as reflected in various guidelines. (*Padilla*, *supra*, 559 U.S. at pp. 366-367.) The Court recognized that "[a]uthorities of every stripe—including the American Bar Association, criminal defense and public defender organizations, authoritative treatises, and state and city bar publications—universally require defense attorneys to advise as to the risk of deportation consequences for non-citizen clients[.]" (*Id*. at p. 367, internal quotation marks omitted.) The Court noted that in Padilla's case, the immigration statute was "succinct, clear, and explicit in defining the removal consequence" such that "Padilla's counsel could have easily

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(…continued)

matter, however, not every person legally subject to deportation will necessarily be promptly removed. (See, e.g., *People v. Espinoza* (2023) 14 Cal.5th 311, 319 [defendant did not learn of immigration consequences of plea until detained upon return from trip out of United States more than a decade after plea].)

determined that his plea would make him eligible for deportation simply from reading the text of the statute." (*Id.* at p. 368.) The Court also stated that, in cases where the law is less clear, "a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." (*Id.* at p. 369.)

In light of "longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country," the Court held that counsel has a Sixth Amendment obligation to inform a defendant when his or her plea carries a risk of deportation. (*Padilla*, *supra*, 559 U.S. at p. 374.) Accordingly, the Court concluded that Padilla could make out a claim of deficient performance on the basis that counsel failed to provide that advice. (*Ibid.*)[11]

B. Counsel was not constitutionally required to advise Tellez about possible SVP proceedings

Tellez cannot satisfy the first prong of *Strickland* because his attorney's performance did not fall below an objective standard of reasonableness. In arguing that his attorney performed deficiently by failing to advise him that his guilty plea could permit the initiation of SVP proceedings in the future, Tellez relies principally on *Padilla*, analogizing the deportation

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[11] The Court did not determine whether Padilla had established prejudice under the second prong of *Strickland*, instead remanding the matter for the state court to consider the issue in the first instance. (*Padilla*, *supra*, 559 U.S. at p. 369.)

consequence at issue there to the potential for SVP civil commitment. (OBM 15-18.) But the circumstances in *Padilla* are distinguishable and highlight why advice about the potential SVP consequences of a plea does not come within the scope of the Sixth Amendment.

1. Potential commitment under the SVPA is unlike the deportation consequence of a guilty plea

One key aspect of *Padilla*'s holding was that the deportation consequence of the plea at issue there was "intimately related to the criminal process" because it was similar in character to punishment and, at least legally, a near-mandatory result of a qualifying conviction. (*Padilla*, *supra*, 559 U.S. at pp. 363-366.) Tellez argues that potential SVP proceedings following a criminal conviction are similarly intertwined with punishment, so that they too implicate criminal defense counsel's Sixth Amendment obligations. (OBM 15-18.) The analogy is inapt. SVP commitment is not so closely akin to criminal punishment that it implicates the special considerations supporting the result in *Padilla*.

Civil commitment proceedings under the SVPA are far from an automatic legal result of a qualifying conviction; rather the commitment process involves a number of discrete steps that filter the pool of eligible persons to a small minority who are eventually committed as SVPs. To initiate SVP proceedings, the Department of Corrections and Rehabilitation must first screen an eligible inmate, generally at least six months before his or her scheduled release date. (§ 6601, subd. (a).) The screening is

"based on whether the person has committed a sexually violent predatory offense and on a review of the person's social, criminal, and institutional history." (§ 6601, subd. (b).) If the Department of Corrections and Rehabilitation determines that the inmate is "likely" to meet the SVP criteria—that is, that the inmate suffers from a diagnosed mental disorder that makes him or her likely to engage in sexually violent criminal behavior—it refers the matter to the Department of State Hospitals (DSH) for a "full evaluation." (§ 6601, subd. (b).)

The inmate is then evaluated by two doctors (psychologists or psychiatrists). (§§ 6601, subd. (d), 6604.1.) If both doctors concur that the individual meets the criteria for commitment, DSH forwards a request that the designated representative of the People (usually the district attorney) file a petition for the individual's commitment. (§ 6601, subds. (d) & (i).) This psychological evaluation process significantly narrows the number of petitions for commitment that are ultimately filed. A state audit of DSH's SVP commitment program showed the number of offenders evaluated by DSH psychologists and the outcomes for the years 2009 through 2014. (California State Auditor, California Department of State Hospitals, Report 2014-125 (2015), Chapter 2, Table 5: Final Case Outcomes of the Evaluation of Offenders Based on the California Department of State Hospitals' Clinical Evaluations of Potential Sexually Violent Predators, pp. 40-41 [https://www.auditor.ca.gov/pdfs/

reports/2014-125.pdf].)[12] The audit reported that from 2009 through 2014, "the rate by which State Hospitals determined that offenders met the criteria to be an SVP remained below 8 percent." (*Ibid.*) In other words, in more than 90 percent of initial SVP evaluations, the evaluators found that the offender did not meet the criteria for SVP commitment, so no commitment petition was filed against the offender.

In the distinct minority of cases where both evaluators agree that the offender meets the criteria for SVP commitment and a civil commitment petition is filed in the superior court, a determination of probable cause must be made that the individual is in fact an SVP. (§ 6602, subd. (a).) If the court finds probable cause, the individual is detained in custody in a secure facility (such as a state hospital) pending trial on the petition. (§§ 6602, subd. (a), 6602.5.)

At a trial on an SVP petition, the burden of proof is on the People to show beyond a reasonable doubt that the individual meets the criteria for commitment. (§ 6604.) Both the individual on trial and the People have the right to a trial by jury, and the jury's verdict must be unanimous. (§ 6603, subds. (a), (b) & (g).) If the trial results in a determination that the person is an SVP, the person is "committed for an indeterminate term to the

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[12] Concurrent with the filing of this brief, respondent has requested that this Court to take judicial notice of the state audit report as an official act of the state legislative branch pursuant to Evidence Code section 452, subdivision (c) and California Rules of Court, rule 8.252. To the best of counsel's knowledge, this is the most recent such report.

custody of the State Department of State Hospitals for appropriate treatment and confinement in a secure facility designated by the Director of State Hospitals." (§ 6004.)[13]

After commitment, an SVP is evaluated every year to consider "whether the committed person currently meets the definition of a sexually violent predator and whether conditional release to a less restrictive alternative, pursuant to Section 6608, or an unconditional discharge, pursuant to Section 6605, is in the best interest of the person and conditions can be imposed that would adequately protect the community." (§ 6604.9.) Under certain circumstances, an SVP may petition the court for either conditional release (§ 6608) or unconditional discharge (§ 6605).

The nature of this scheme alone readily distinguishes the potential SVP consequences of a plea from the deportation consequence at issue in *Padilla*. (*Padilla*, *supra*, 559 U.S. at p. 366.) At least as a legal matter, the deportation consequence at issue in *Padilla* is subject only to a limited discretionary exception (*Padilla*, *supra*, 559 U.S. at p. 363), whereas California's SVP commitment process by design narrows the pool of potential civil committees over the course of a multi-stage evaluation culminating in a formal adjudication. SVP proceedings are simply not, in this respect, "intimately related to

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[13] Originally, the Act provided for a two-year term of commitment, which could be renewed. (See § 6604, as added by Stats. 1995, ch. 763 (AB 888), § 3.) But, since the passage of Proposition 83 in November 2006, the Act provides for an indeterminate term of commitment. (§ 6604; *In re Butler* (2020) 55 Cal.App.5th 614, 628, fn. 2.)

the criminal process" and "most difficult to divorce" from the conviction for Sixth Amendment purposes. (*Id.* at pp. 365-366.)

Nor is SVP commitment closely analogous in character to a penalty or penal consequence, like the immigration consequence in *Padilla*. Indeed, this Court has consistently held that SVP commitment is not a penal consequence given its nonpunitive purpose of treatment and rehabilitation. The legislative history of the SVPA reveals that the Legislature intended to enact a civil, nonpunitive regulatory scheme. (See, e.g., Stats. 1995, ch. 763, § 1 ["It is the intent of the Legislature that these individuals be committed and treated for their disorders only as long as the disorders persist and not for any punitive purposes"].) This Court has acknowledged that, in enacting the SVPA, "the Legislature disavowed any 'punitive purpose,' and declared its intent to establish 'civil commitment' proceedings in order to provide 'treatment' to mentally disordered individuals who cannot control sexually violent criminal behavior." (*Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1171.) "The Legislature also made clear that, despite their criminal record, persons eligible for commitment and treatment as SVP's are to be viewed 'not as criminals, but as sick persons.'" (*Ibid.*) Thus, "[c]onsistent with these remarks, the SVPA was placed in the Welfare and Institutions Code, surrounded on each side by other schemes concerned with the care and treatment of various mentally ill and disabled groups." (*Ibid*; see also *People v. McKee* (2010) 47 Cal.4th 1172, 1194; *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 252 ["It is correct that the SVPA is a civil commitment

scheme, and therefore, we should not construe the consequence of commitment as 'criminal' or 'punitive' in nature"].)[14]

To be sure, a civil commitment entails "affirmative restraints on liberty" (*McKee*, *supra*, 47 Cal.4th at p. 1195), something that will rightfully concern those subject to SVP proceedings. But such proceedings are instituted on the basis of medical evaluation and for the purpose of treatment; and, unlike the permanent sanction of deportation, an SVP commitment has as its end goal conditional release or unconditional discharge when treatment is successful. (§§ 6605, 6608.) SVP commitment thus fundamentally lacks the punitive character that deportation carries as "banishment" and "exile" resulting from conviction of a particular offense. (See *Padilla*, *supra*, 559 U.S. at p. 373.)

Tellez argues that the Court of Appeal's decision in *People v. Moore*, *supra*, 69 Cal.App.4th 626 correctly "analogized SVPA proceedings to deportation." (OBM 16-18.) *Moore*, however, was decided long before *Padilla* (and this Court's decision in *Resendiz*), it addressed the different question of whether a court was obligated to provide a warning about possible SVP proceedings in taking a plea, and it based its reasoning primarily on the "collateral consequence" rationale. (*Moore*, at pp. 630-631.) In that context, *Moore* held that possible SVP proceedings

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[14] The United States Supreme Court, in reviewing similar sexually violent predator civil commitment schemes in other states, has also held that such schemes are nonpunitive. (See *Seling v. Young* (2001) 531 U.S. 250, 261; *Kansas v. Hendricks* (1997) 521 U.S. 346, 363.)

were analogous to deportation, which did *not* require a warning under this Court's authority governing trial-court plea advisements but only as a matter of statutory compulsion. (*Id*. at p. 633.) *Moore* is therefore of little relevance here. Even so, *Moore* recognized that possible SVP proceedings are "at most a collateral consequence" of a plea because commitment is not an "immediate" or "inexorable" result of a guilty plea but "would result only from new determinations years in the future of issues such as whether Moore was *at that point* mentally disordered and likely to reoffend." (*Id*. at p. 632.) It also recognized that potential SVP proceedings are not a "penal" consequence in the sense that they are not an immediate result of the plea ordered by the criminal court. (*Id*. at pp. 632-633.) In these respects, *Moore* supports the conclusion that SVP proceedings do not come within the rationale of *Padilla*.

2. Prevailing professional norms do not support a constitutional duty to advise about potential SVP commitment

The *Padilla* Court also looked to "the practice and expectations of the legal community" in determining whether a reasonable attorney under prevailing professional norms would provide advice about deportation. (*Padilla*, *supra*, 559 U.S. at pp. 366-368.) Tellez does not point to any authority like the robust collection of guides and standards relied upon in *Padilla* that would show the existence of a prevailing professional norm about advice that a guilty plea might lead to SVP commitment proceedings in the future. Nor does it appear that such a universal consensus exists. As the Court of Appeal below

observed, after reviewing the guidelines of the National Legal Aid and Defender Association and the American Bar Association Standards (ABA) for Criminal Justice, there is "no clear direction from professional organizations on the subject." (Opn. 10; see also *Codinha*, *supra*, 71 Cal.App.5th at pp. 1068-1069 [noting that there is an absence of prevailing professional norms regarding the advisement of SVP commitment as a consequence of a guilty plea as compared to potential immigration consequences].)

Standard 14-3.2(f) of the ABA Standards for Criminal Justice provides: "To the extent possible, defense counsel should determine and advise the client, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea." (ABA Stds. for Crim. Justice (3d ed. 1999) std. 14-3.2(f), p. 116.) The commentary for the rule explains that attorneys should "routinely be aware of the collateral consequences that obtain in their jurisdiction with respect to certain categories of conduct," such as controlled substance crimes and sex offenses, because convictions for such offenses are "the most likely to carry with them serious and wide-ranging collateral consequences." (*Id.*, com. to std. 14-3.2(f), p. 126.) However, the commentary also recognizes the impracticality of requiring defense counsel to provide an exhaustive account of collateral consequences: "Given the ever-increasing host of collateral consequences that may flow from a plea of guilty or nolo contendere, it may be very difficult for defense counsel to fully brief every client on every likely effect

of a plea in all circumstances. Courts do not require such an expansive debriefing in order to validate a guilty plea." (*Ibid.*)

Some sources mention, even if only generally or obliquely, that counsel should apprise a client of any civil consequences of a plea. A guideline from the National Legal Aid and Defender Association provides that "counsel should be fully aware of, and make sure the client is fully aware of . . . other consequences of conviction such as deportation and civil disabilities." (NLADA, Performance Guidelines for Criminal Defense Representation (4th ed. 2006) Guideline 6.2(a)(3).) And the Federal Adaptation of the NLADA Performance Guidelines for Criminal Defense Representation, adopted by the Defender Services Advisory Group in October 2015, Guideline 6.2(a)(3) states: "In order to develop an overall negotiation plan, counsel should be fully aware of, and make sure the client is aware of . . . consequences of conviction, including deportation, sex offender registration, possible civil commitment, and civil disabilities." (https://www.fd.org/sites/default/files/cja_resources/federal-adaptation-of-nlada-performance-guidelines-for-criminal-defense-representatives_0.pdf.) The introductory note preceding these Guidelines explains: "These standards are not all inclusive; effectiveness is not the minimum; zealous, quality representation is the goal." (*Ibid.*)

Even if some professional guidelines indicate that counsel should address possible civil disabilities that might result from a conviction, this is far from the sort of robust consensus about a specific consequence of the sort highlighted in *Padilla*, where

"authorities of every stripe" universally required immigration advice. Of course, if counsel can provide accurate and helpful advice about potential future civil commitment proceedings under the SVPA it is good practice to give such advice. But that is a separate question from whether the advice is constitutionally compelled. In *Strickland*, the Court explained that "[p]revailing norms of practice as reflected in American Bar Association standards . . . are guides to determining what is reasonable, but they are only guides." (*Strickland*, *supra*, 466 U.S. at p. 688; see also *Padilla*, *supra*, 559 U.S. at p. 377 (conc. opn. of Alito, J.) ["Although we may appropriately consult standards promulgated by private bar groups, we cannot delegate to these groups our task of determining what the Constitution commands. And we must recognize that such standards may represent only the aspirations of a bar group rather than an empirical assessment of actual practice," citation omitted].) The lack of universal professional standards about SVP commitment necessarily undermines Tellez's analogy to *Padilla* and weighs against a conclusion that counsel is constitutionally compelled to provide advice about possible future SVP proceedings.

3. The Sixth Amendment does not compel every good practice or seek to impose detailed rules for criminal defense counsel

As the *Padilla* Court properly observed, "we must be especially careful about recognizing new grounds for attacking the validity of guilty pleas." (*Padilla*, *supra*, 559 U.S. at p. 372.) "[T]he purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation,

although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial." (*Strickland*, *supra*, 466 U.S. at p. 689.) The imposition of detailed rules for counsel's conduct "would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions" and "could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause." (*Id.* at p. 689.) Furthermore, "[i]ntensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client." (*Id.* at p. 690.)

The possibility that SVP proceedings might be instituted in the future based on a qualifying conviction may no doubt be helpful for criminal defendants to know. But it is not so closely connected to the criminal conviction, like the deportation consequence considered in *Padilla*, that the Constitution compels counsel to provide advice about it. This is especially true because the constitutional standard of performance for an attorney representing a defendant in plea proceedings is to provide advice "within the range of competence demanded of attorneys *in criminal cases*." (*McMann v. Richardson* (1970) 397 U.S. 759, 770, 771, italics added.)

That standard reflects a recognition that criminal defense attorneys "are not expected to possess—and very often do not possess—expertise in other areas of law, and it is unrealistic to

expect them to provide expert advice on matters that lie outside their area of training and experience." (*Padilla*, *supra*, 559 U.S. at p. 376 (conc. opn. of Alito, J.).) Thus, while "criminal convictions can carry a wide variety of consequences other than conviction and sentencing, including civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits . . . , and loss of business or professional licenses," the high court has "never held that a criminal defense attorney's Sixth Amendment duties extend to providing advice about such matters." (*Id*. at p. 376 (conc. opn. of Alito, J.).)

Similarly, no court in this State has accepted the argument Tellez makes here. And as the Court of Appeal below observed, "the majority of courts in other jurisdictions" have held that defense counsel is not obligated under the Sixth Amendment to advise of the possibility of SVP commitment. (Opn. 12.) For example, in *State v. LeMere* (Wis. 2016) 879 N.W.2d 580, the Wisconsin Supreme Court held that the Sixth Amendment does not require defense counsel to inform a client about the possibility of civil commitment under Wis. Stat. ch. 980. (*Id*. at pp. 598-599.) Similarly, in *Hamm v. State* (S.C. 2013) 744 S.E.2d 503, the Supreme Court of South Carolina explained that even if the court were to reach the habeas petitioner's *Padilla* claim, the petitioner would not be entitled to relief because the United States Supreme Court's rationale under *Padilla* "does not extend to a person's civil commitment under the SVP Act." (*Id*. at pp. 504-505; see also *State v. Schaefer* (Kan. 2016) 385 P.3d 918, 927 [holding that remote possibility of involuntary commitment

as a sexually violent predator did not impose a duty on defense counsel to advise the defendant of that consequence]; *Fields v. State* (Mo.Ct.App. 2022) 642 S.W.3d 774 [failure to communicate possibility of civil commitment did not constitute deficient performance]; *Thomas v. State* (Tex.Ct.App. 2012) 365 S.W.3d 537, 542-544 [same]; *Gully v. State* (Iowa Ct.App. 2002) 658 N.W.2d 114, 121 [same]; *Watrous v. State* (Fla.Dist.Ct.App. 2001) 793 So.2d 6, 8-11 [same]; but see *People v. Hughes* (Ill. 2012) 983 N.E.2d 439, 457 [holding defense counsel "has a minimal duty to advise a defendant who pleads guilty to a triggering offense subject to [the state's SVP act] that he will be evaluated for and may risk involuntary commitment after completing his prison term"].)

Tellez offers no compelling reason to depart from the weight of authority and to establish, contrary to the caution urged by the *Padilla* Court itself, a new categorical rule governing criminal defense counsel's obligations under the Sixth Amendment.

C. Even if Tellez's counsel performed deficiently, Tellez has not established prejudice

Tellez's ineffective assistance of counsel claim also fails because he has not shown that he suffered prejudice from a lack of advice at the time of his plea about potential SVP proceedings. To establish prejudice, Tellez has the burden of showing that there is a reasonable probability that, but for counsel's performance, he would not have pleaded guilty. (*Lafler v. Cooper* (2012) 566 U.S. 156, 163, citing *Hill*, *supra*, 474 U.S. at p. 59; *People v. Patterson* (2017) 2 Cal.5th 885.) "'In determining whether a defendant, with effective assistance, would have

accepted [or rejected a plea] offer, pertinent factors to be considered include: whether counsel actually and accurately communicated the offer to the defendant; the advice, if any, given by counsel; the disparity between the terms of the proposed plea bargain and the probable consequences of proceeding to trial, as viewed at the time of the offer; and whether the defendant indicated he or she was amenable to negotiating a plea bargain.'" (*In re Resendiz*, *supra*, 25 Cal.4th at p. 253.) Moreover, when a defendant claims that he would not have pleaded guilty had he been competently advised, this Court has "long required the defendant corroborate such assertions with objective evidence." (*People v. Vivar* (2021) 11 Cal.5th 510, 530 [considering prejudice in context of statutory claim], quoting *Resendiz*, at p. 253, internal quotation marks omitted.)

Tellez here makes only an uncorroborated assertion that he would not have pleaded guilty if he had been advised that the conviction authorized potential SVP commitment proceedings in the future. (OBM 18-19.) As the court below correctly noted, he has not provided any independent, objective evidence to corroborate his assertion, such as a declaration by trial counsel or contemporaneous correspondence, files, or notes from counsel. (Opn. 15.) There is no indication that Tellez considered avoiding an SVP-qualifying conviction of particular importance. Nor is there any indication that the bargaining process would have unfolded any differently had he been aware of the SVP consequence, for instance by resulting in an agreement that would have avoided the possibility of future SVP proceedings.

(See *Resendiz*, *supra*, 25 Cal.4th at p. 253-254.) And the record otherwise belies any claim of prejudice.

Tellez was charged with three counts of committing a lewd and lascivious act against three separate children under 14 years old. (PFR Exh. A.) He faced 12 years in prison if convicted. (PFR Exh. I at p. 12.) In a relatively perfunctory declaration attached to Tellez's habeas corpus petition, he states that his defense attorney advised him to plead guilty because he would not prevail at trial. (PFR Exh. D.) The underlying facts showed that Tellez approached the 13-year-old female victim at the mall, told her to "Come here," grabbed her from behind, wrapped his arms around her waist, and pulled her body close. (PFR Exh. F at p. 63.) Three young boys who were also at the mall reported to police that Tellez also had touched them earlier, stroking two of the boys on their backs as he sat down behind them. (PFR Exh. F at p. 63.) At a trial, the boys would certainly have corroborated each other's account, and their account of what happened to them would lend support to the girl's claim that she was suddenly grabbed from behind.

As Tellez faced conviction on multiple offenses and a maximum term of 12 years in prison, he received a significant benefit by accepting the plea deal to a single offense and a three-year term. Nothing submitted by Tellez suggests that advice about future potential SVP proceedings might have altered his calculus in choosing to plead guilty in the face of a strong prosecution case. In the absence of such evidence, a different outcome does not appear reasonably probable.

II. THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER TO REQUIRE TRIAL COURTS IN APPROPRIATE GUILTY-PLEA CASES TO WARN ABOUT POSSIBLE SVP CONSEQUENCES

Although the Sixth Amendment does not extend so far as to obligate criminal defense counsel to provide advice about potential SVP civil commitment proceedings, it would be prudent to ensure that criminal defendants are aware in general terms that pleading guilty to a qualifying conviction could lead to SVP proceedings in the future. As described above, it is far from certain in any given case that a qualifying conviction will lead to SVP commitment. But given the liberty interest at stake, even a modest probability of such a result might weigh into a plea decision depending on all the circumstances of the case. Therefore, this Court should exercise its inherent supervisory authority to direct trial courts to provide an SVP warning in appropriate guilty-plea cases.

This Court has long recognized its supervisory power, or inherent authority, to establish rules of judicial procedure. (*People v. Delgadillo* (2022) 14 Cal.5th 216, 231; *Robinson v. Lewis* (2020) 9 Cal.5th 883, 899; *Griggs v. Superior Court* (1976) 16 Cal.3d 341, 347.) In particular, this Court has on prior occasions exercised its supervisory power to announce procedural requirements to ensure the knowing and voluntary waiver of a defendant's rights in guilty plea and submission cases. (See *Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 599-600; *People v. Howard* (1992) 1 Cal.4th 1132, 1178-1179.)

In *Bunnell*, for example, the Court exercised its supervisory power to require that defendants submitting the issue of guilt on the basis of a preliminary hearing transcript "be fully advised" of

their *Boykin-Tahl* rights to a jury trial, confrontation, and against self-incrimination. (13 Cal.3d at p. 605.)[15] The Court also required that defendants be advised of other rights in connection with such "slow pleas" and the consequences of waiving those rights, as well as the direct consequences of conviction. (*Id.* at p. 605.)

The *Bunnell* Court acknowledged that some of these requirements were not constitutionally compelled. (*Bunnell*, *supra*, 13 Cal.3d at p. 605.) But it required the warnings "in order to give maximum assurance that defendants are fully aware of the significant rights that they surrender in any submission . . . ." (*Ibid.*) The Court further explained, "The additional burden, if any, will be far outweighed by the benefits of assuring criminal defendants that the full panoply of constitutional and statutory rights provided by our system of criminal justice is available to them and by our attempt to insure that any waiver thereof by defendants is both voluntary and intelligent." (*Id.* at pp. 605-606.)

Similarly, in *Howard*, the Court explained that the weight of intervening authority made it clear that *Tahl*'s interpretation of *Boykin* was not required by the federal Constitution. (1 Cal.4th 1132 at pp. 1175, 1178-1179.) But the Court nonetheless

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[15] *Boykin v. Alabama* (1969) 395 U.S. 238 [holding that a guilty plea is not valid unless the record reflects a free and intelligent waiver of the rights to confrontation, a jury trial, and against self-incrimination]; *In re Tahl* (1969) 1 Cal.3d 122 [requiring express acknowledgment and waiver of rights set forth in *Boykin*].

declared, in the exercise of the its supervisory power, that trial courts would continue to be required to expressly advise defendants on the record of their *Boykin-Tahl* rights. (*Ibid.*)

Here too, the Court should, in the exercise of its supervisory power, require trial courts to advise defendants in certain guilty-plea cases that a potential consequence of the plea is future SVP commitment proceedings. Of course, caution is warranted before adding to the already lengthy list of court-required warnings. (See, e.g., *Tahl*, *supra*, 1 Cal.3d at p. 132 [court must advise regarding nature of the charges required]; *In re Yurko* (1974) 10 Cal.3d 857, 863 [court must advise regarding prior convictions]; *In re Moser* (1993) 6 Cal.4th 342, 352 [court must advise regarding direct consequences of a plea, including mandatory parole]; *People v. Barella* (1999) 20 Cal.4th 261 [court must advise regarding parole eligibility under Three Strikes law].) The accumulation of such advisements burdens already taxed trial courts and could have the unintended result of diluting the efficacy of the warnings. But the burden of identifying a qualifying SVP offense would be slight, and, as in *Bunnell*, it would be outweighed by the benefit of the warning, which would help to "maximize the assurance" that a guilty plea is voluntary and intelligent. (See *Bunnell*, *supra*, 13 Cal.3d at p. 605.) That would be particularly appropriate in light of the potential restriction of liberty due to involuntary civil commitment under the SVPA. (*McKee*, *supra*, 47 Cal.4th at p. 1195 [SVP civil commitment imposes "affirmative restraints on liberty"].)

Such an advisement should be given only to a defendant who either is pleading guilty to an offense enumerated in the SVPA or was previously convicted of such an offense. (See § 6600, subd. (a)(2) [qualifying sexually violent offense can be a "current or prior conviction"].) It should inform the defendant that a guilty plea *may result* in future SVP commitment proceedings against him or her. As discussed above, even when an offender is convicted of an enumerated offense, commitment as an SVP is far from a foregone conclusion. Therefore, a general advisement alerting the defendant to the possibility of future SVP commitment proceedings will be sufficient.[16]

If this Court chooses to establish a new rule of judicial procedure as a matter of supervisory authority, it would apply only to future cases. Such a rule, though warranted as a matter of prudence, would not be compelled as a legal matter. It thus would not support any claim of error that would entitle Tellez, or similarly situated individuals, to relief. (See *Bunnell*, *supra*, 13 Cal.3d at p. 605 [new rule of judicial procedure requiring advisement of *Boykin-Tahl* rights shall be "effective upon the date on which this opinion becomes final"]; see also *People v.*

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[16] It is possible that in cases where a defendant pleads guilty prior to the preparation of a pre-plea report (see Pen. Code, § 1203.7), the trial court may not be aware of a qualifying prior conviction. Nevertheless, as an exercise of this Court's supervisory authority, the advisement suggested here would suffice to meet the goals identified above in the majority of cases and would be preferable to an advisement that is either overbroad or unnecessarily complicated.

Lemcke (2021) 11 Cal.5th 644, 669-670 [judgment affirmed and new rule requiring omission of certainty factor from witness credibility instruction applied prospectively]; *People v. Engelman* (2002) 28 Cal.4th 436, 449 ["in the exercise of our supervisory power [citations], we direct that CALJIC No. 17.41.1 not be given in trials conducted in the future"].) Indeed, even when similar advisements *were* constitutionally compelled, this Court has held that such rules applied prospectively only. (See *Tahl*, *supra*, 1 Cal.3d at pp. 130, 134-135; *Mills v. Municipal Court* (1973) 10 Cal.3d 288, 308-311; *Yurko*, *supra*, 10 Cal.3d at pp. 860, 865-866) The same would be true here.

CONCLUSION

The judgment of the Court of Appeal should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Answer Brief on the Merits uses a 13-point Century Schoolbook font and contains 8,064 words.

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