IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

VICTOR TELLEZ, Petitioner, v. THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SAN DIEGO, Respondent.	Supreme Court No. S277072 Court of Appeals No. D079716 Superior Court No. SCE369196
THE PEOPLE OF THE STATE OF CALIFORNIA, BY AND THROUGH SUMMER STEPHAN, DISTRICT ATTORNEY FOR THE COUNTY OF SAN DIEGO, Real Party in Interest.	

PETITIONER'S REPLY BRIEF ON THE MERITS

**After Published Opinion by the Court of Appeal,
Fourth District, Division One, No. D079716
Filed October 18, 2022**

MEGAN MARCOTTE, Chief Deputy
Office of the Alternate Public Defender
County of San Diego
ANTHONY B. PARKER,
State Bar No. 299731
Deputy Alternate Public Defender
451 A Street, Suite 1200
San Diego, California 92101
Telephone: (619) 446-2900

Attorneys for Petitioner
VICTOR TELLEZ

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A. Consequences Under the SVPA are Analogous to Immigration Consequences Because they are a Significant Penalty that are Closely Related to the Criminal Process

In *Padilla*, the United States Supreme Court found that immigration consequences, though civil in nature and traditionally considered collateral to a criminal conviction, fell within the "ambit of the Sixth Amendment right to counsel" because deportation is a severe penalty that is closely related to the criminal process and a near automatic result of certain criminal convictions. (*Padilla v. Kentucky* (2010) 559 U.S. 356, 365-366.) Consequences under the Sexually Violent Predator Act (SVPA) are likewise a severe penalty that are closely related to the criminal process.

Respondent concedes that civil commitment under the SVPA is a significant restraint on one's liberty. (Respondent's Answer Brief on the Merits (ABM) 31.) Yet, Respondent argues that despite this restraint on liberty, SVP commitment is not a "penalty" similar to deportation. (ABM 30.) The Court in *Padilla* concluded that deportation has long been recognized as a severe

penalty, citing to its decision in *Fong Yue Ting v. United States* (1893) 149 U.S. 698. (*Padilla, supra*, 559 U.S. at p. 365.) The Court in *Fong Yue Ting* did not mince words. "[D]eportation is punishment" because it "involves arrest, a deprival of liberty; and, second a removal from home, from family, from business, from property." (*Id.* at p. 740.) In *Padilla*, the Court likened deportation to banishment. (*Padilla*, *supra*, 559 U.S. at p. 373.) Banishment as defined in *Fong Yue Ting* is "[a] punishment by forced exile, either for years or for life." (*Fong Yue Ting*, *supra*, 149 U.S. at p. 740 (quoting Rapalje & Lawrence's Law Dictionary).) The Court went on to explain, however, that "it needs no citation of authorities to support the proposition that deportation is punishment. Everyone knows that to be forcibly taken away from home, and family, and friends . . . is punishment." (*Id.* at p. 740.)

Respondent is incorrect in concluding that "SVP commitment thus fundamentally lacks the character that deportation carries as "banishment." (ABM 31.) Individuals indefinitely committed under the SVPA are placed in a locked facility, away from society, their families, their friends, and their homes. It is highly doubtful that anyone currently confined to a state hospital, unable to come and go as they wish, kept away from their families, would consider their commitment anything other than punishment. It is the significant deprivation of liberty that makes SVP commitment a penalty.

While Tellez acknowledges that an indefinite commitment under the SVPA is not a certainty, what is certain is that

everyone who goes to prison and has a qualifying conviction will be evaluated, and thus subjected to the process. (Welf. & Inst. Code § 6601, subd. (a).) While *Padilla* noted that deportation is nearly automatic for many who are convicted of certain offenses, deportation, like SVP consequences, are not actually inevitable. As Respondent acknowledges, there are provisions that allow for the Attorney General to cancel a removal. (ABM 23, fn 10.) Additionally, while a conviction for an aggravated felony makes an alien deportable and ineligible for discretionary relief, whether a specific conviction will be considered an aggravated felony is not always clear. (See *Sessions v. Dimaya* (2018) 138 S. Ct. 1204; *Moncrieffe v. Holder* (2013) 569 U.S. 184.) Therefore, it is not necessarily automatic that a criminal conviction will lead to deportation, just like it is not certain that an individual in prison with a qualifying prior conviction will be subjected to commitment under the SVPA.

Just as *Padilla* found that, despite its civil nature, deportation is "intimately related to the criminal process," so too is the loss of liberty under the SVPA. (See *Padilla*, *supra*, 559 U.S. at p. 365.) An individual does not need to be convicted of a crime to be deported from the United States, however, the *only* individuals who are subject to SVP commitment are those who have suffered a specified criminal conviction and who are currently serving a prison sentence. Every person serving a prison sentence that has a qualifying conviction *must* be screened by the Department of Corrections and Rehabilitation. (Welf. & Inst. § 6601, subd. (a).) Additionally, this process occurs while the

individual is still serving a prison sentence. (*Ibid.*) Furthermore, if an individual is ultimately committed under the SVPA, any parole that they are subject to is tolled. (Pen. Code § 3000.) "[P]arole is punishment." (*In re Palmer* (2021) 10 Cal.5th 959, 976.) Therefore, it is impossible to divorce an SVP commitment from the criminal sanction, and thus the criminal process.

An indefinite commitment under the SVPA, like deportation, is a severe penalty. Additionally, a qualifying conviction makes evaluation by the Department of Corrections and Rehabilitation automatic. And finally, an indefinite SVP commitment flows directly from a qualifying criminal conviction and a prison sentence, thus making it intimately connected to the criminal process. As such, SVP consequences, like deportation, are unique and under *Padilla* this Court should find that the Sixth Amendment requires counsel to advise of the potential for an indefinite SVP commitment. Afterall, "[t]he assistance of counsel is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty." (*Gideon v. Wainwright* (1963) 372 U.S. 335, 343 (quoting *Johnson v. Zerbst* (1938) 304 U.S. 458, 462).)

B. Tellez's Counsel's Performance Fell Below an Objective Standard of Reasonableness

As Respondent correctly notes, the plea form signed by Tellez, his attorney, and the court, contained a list potential consequences of the plea, which included "Sexually Violent Predator." (ABM 13; PFR Exh. B at p. 2.) There are a total of 19

possible consequences listed, and several of them are circled, including the requirement that Tellez must register as a sex offender, however, "Sexually Violent Predator" is not. (PFR Exh. B at p. 2.)

Tellez's counsel signed the form, declaring that he "personally read and explained to the defendant the entire contents of this plea form." (PFR Exh. B at p. 3.) However, despite the potential SVP consequence being listed on the form, counsel failed to circle and thus advise Tellez of that consequence. Either counsel was aware that the charge carried the potential for SVP commitment and yet failed to advise. Or counsel was unaware that the charge carried the potential for SVP commitment, and despite the consequence being listed on the form, failed to conduct the necessary research to ensure that Tellez was properly advised. In both instances, counsel's performance falls below an objective standard of reasonableness.

Respondent points to the lack of guides and standards relied upon in *Padilla* to argue that there is no expectation within the legal community to advise of SVP consequences. (ABM 32.) However, that argument fails because the San Diego Superior Court has included "Sexually Violent Predator" as a potential consequence on a change of plea form required by the court and used throughout San Diego County. Additionally, after *Padilla*, counsel should be on notice that the Sixth Amendment may require them to advise of potentially severe consequences such as those under the SVPA. Furthermore, Respondent cites to publications and guides that advocate for counsel to advise of

civil and collateral consequences, acknowledging that there are some professional guidelines that indicate counsel should advise of the civil consequences of a conviction. (ABM 32-35.)

Under *Strickland*, a defendant claiming ineffective assistance of counsel "must show that counsel's performance was deficient." (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) "This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." (*Ibid.*) Looking to prevailing professional norms is one way to determine if counsel's performance fell below an objective standard of reasonableness. However, standards and guides are not needed when counsel is tasked with completing a judicially created form that contains potential consequences of the plea, and lists the very consequence at issue here, and nevertheless fails to advise Tellez of that consequence. Tellez's counsel's failure to advise of the potential SVP consequences was not reasonable given the plea form, and therefore, counsel's performance fell below the level of competence guaranteed by the Sixth Amendment.

C. Tellez Suffered Actual Prejudice

Respondent argues that Tellez has failed to produce objective evidence that corroborates his assertion that he would not have pleaded guilty but for counsel's failure to advise of SVP consequences. (ABM 38-40.) Respondent then lists examples of possible corroborating evidence, such as a "declaration by trial counsel or contemporaneous correspondence." (*Ibid.*) However,

Tellez was completely unaware of what the SVPA was or what its potential consequences were at the time of his plea. Given the fact that Tellez was ignorant of the SVPA's existence, it's difficult to imagine how he would be able to produce contemporaneous proof that knowledge of SVP consequences would have affected his decision to plead guilty.

Tellez was facing a maximum sentence of 12 years in state prison, but accepted a plea deal where he would be sentenced to three years. (ABM 13; PFR Exh. A.) It can be inferred that Tellez was concerned with reducing the amount of time he would be incarcerated, ultimately accepting the lowest term possible. (See PFR Exh. A.) The possibility of an indefinite commitment would surely have affected his decision-making process in this case. It's reasonable to conclude that, had he known that his three-year term could transform into an indefinite period of custody, he would have demanded the psychological evaluation that counsel had promised him or taken his case to preliminary hearing and tested the validity and veracity of the evidence against him. Both could have resulted in a different plea deal that would not have carried the potential for SVP commitment.

Respondent surmises that Tellez would have pleaded guilty regardless of an advisal of potential of SVP consequences because he had no defense and the prosecution's case was strong. (See ABM 40.) Respondent takes facts from the arrest report embedded in the Department of State Hospitals Evaluation Report and then, without any proof, affirmatively states that two of the alleged victims would "certainly have corroborated" each

other and lent credibility to the alleged third victim. (ABM 40.) However, Tellez changed his plea before a preliminary hearing was conducted or any sworn evidence was presented. None of the alleged victims were subject to cross examination and there is no sworn testimony from anyone to corroborate the allegations in the arrest report. Furthermore, police reports are not admissible evidence. In addition, Tellez denied the conduct at the time of his arrest and was noted to have the strong odor of alcohol coming from his breath and person. (PFR Exh. F at p. 63.) Given the alleged conduct was relatively benign as it involved over-the-clothes touching, and because Tellez may have been intoxicated, Respondent is incorrect in implying that his case was indefensible.

Tellez is currently incarcerated and has been since the filing of the petition under the SVPA in 2019. (PFR Exhs. F, H.) Under the plea as understood by Tellez, he should have been released on parole in 2019. However, completely unknown to him, he was subject to a lifetime commitment under the SVPA and was rearrested rather than being released.

Tellez has suffered actual prejudice. He was promised a sentence of three years and has now been in continuous custody four years longer than he was expecting and may see his freedom taken indefinitely under the SVPA. Respondent acknowledges that even a minimal probability of SVP commitment might weigh on the decision to plead guilty. (ABM 41.) Had Tellez been aware of that risk he would not have pleaded guilty and has therefore been prejudiced.

II. The Parties Agree that this Court Should Exercise its Supervisory Power to Require Trial Courts to Advise of Potential SVP Consequences, However, the Newly Enacted Rule Should be Applied Retroactively

Petitioner and Respondent agree that this Court should utilize its supervisory powers to create a rule that requires trial courts to advise a defendant of the potential SVP consequences of a plea. Likewise, the parties agree that this rule should be created because of the substantial liberty interest at stake in the potential for a lifetime commitment in a locked facility. The substantial liberty interest at stake is also why this Court should apply the new rule retroactively.

Inherent in this Court's supervisory powers to create new judicial rules of criminal procedure is the power to decide whether those rules are applied retroactively. When this Court has had occasion to create new rules that have implicated constitutional considerations, it has utilized a three-factor analysis in deciding whether the new rule should be applied retroactively. (*In re Tahl* (1969) 1 Cal.3d 122, 133; *In re Yurko* (1974) 10 Cal.3d 857, 865.)

The question in *Tahl* was whether the U.S. Supreme Court's decision in *Boykin v. Alabama* required express waivers of the rights to self-incrimination, confrontation, and jury trial. (*In re Tahl*, *supra*, 1 Cal.3d at p. 131-132.) In deciding that the newly created *Boykin-Tahl* rule should be prospective only, this Court made its determination "based on a consideration of the standards for retroactivity" that had recently been delineated by

the Supreme Court in *Halliday v. United States* (1969) 394 U.S. 831. This court thus utilized the three criteria the U.S. Supreme Court had applied when determining the retroactivity of their constitutional ruling: "1) the purpose of the new rule, 2) the extent of reliance upon the old rule, and 3) the effect of retroactivity application would have on the administration of justice." (*In re Tahl*, *supra*, 1 Cal.3d at p. 133-134 (citing *Halliday, supra*, 394 U.S. at p. 832).)

In *Yurko,* this court again employed the three criteria utilized in *Tahl* when it created a new rule that required "express and specific admonitions as to the constitutional rights waived by an admission" that a defendant has suffered a prior felony conviction. (*In re Yurko*, *supra*, 10 Cal.3d at p. 863.) Analyzing the three criteria, this court ruled that the new rule would be given prospective application only. (*Id.* at p. 865.)

Both the rules created in *Tahl* and *Yurko* involved the waiver of federal constitutional rights, extending and expanding upon the U.S. Supreme Court's decision in *Boykin v. Alabama.* The reason this Court utilized the three criteria for retroactivity in both cases was due to the constitutional nature of the rules.

When this Court has used its supervisory powers to create rules that do not implicate constitutional issues, it often has not addressed retroactivity at all, or has declared the rule to be prospective without insight into its decision. (See *In re Roberts* (2005) 36 Cal.4th 575 (creating a rule governing the procedure for challenging the denial of parole through a habeas corpus petition without discussion as to retroactivity); *People v.*

Burgener (2003) 29 Cal.4th 833 (creating a rule prohibiting state courts from making race-conscious assignments from the jury assembly and applying that rule prospectively but without discussion or analysis of retroactivity); *People v. Pena* (2004) 32 Cal.4th 389 (creating a rule prohibiting the Courts of Appeal from utilizing an oral argument waiver notice).)

In *People v. Coleman* (1975) 13 Cal.3d 867, this Court created a "judicial rule of evidence" that a probationer's testimony at a probation revocation hearing cannot be used at a subsequent trial where the basis for the revocation are the charges underlying the criminal case. While this Court granted relief to Mr. Coleman, it declared that the new rule "be given prospective effect only." (*Id.* at p. 897.) This court did not conduct an analysis or discuss the reasoning behind the decision to make the rule prospective.

This Court's supervisory powers enable it to create "rules of procedure where justice demands it." (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 100.) Within this Court's power to create rules that ensure the fair and equitable administration of justice is the power to apply those rules retroactively.

Both parties agree "civil commitment is a significant restraint on a person's liberty." (ABM 10.) That such a restraint is potentially indefinite under the SVPA elevates the importance of the advisal that both Petitioner and Respondent agree should be given. It is the liberty interests at stake that should also compel this Court to apply the new rule retroactively. As

Respondent concedes, the potential indefinite loss of liberty under the SVPA, no matter how remote, is of great concern to a defendant contemplating a plea to a charge that could lead to SVP commitment. (See ABM 10-11.) Given the magnitude of the liberty interest at stake, this Court should apply the new rule retroactively, or at the very least, to Tellez. Even if this Court were to rely on the three criteria in *Tahl*, the new rule should still be applied retroactively.

As noted above, the three criteria applied in *Tahl* regarding retroactivity are: 1) the purpose of the new rule, 2) the extent of reliance upon the old rule, and 3) the effect of retroactivity application would have on the administration of justice." (*In re Tahl*, *supra*, 1 Cal.3d at p. 133-134 (citing *Halliday, supra*, 394 U.S. at p. 832).)

The purpose of the new rule, that courts are to advise defendants of the potential SVP consequences of a plea, is to ensure that the defendant is aware of the potential for an indefinite commitment and loss of liberty as a result of their plea, and to guarantee that the plea is thus knowing, intelligent, and voluntary. Unlike in *Tahl* and *Yurko*, the proposed rule here is not to ensure a complete record that will aid in the disposition of post-conviction litigation regarding the validity of a plea or admission. (See *In re Tahl*, *supra,* 1 Cal.3d at p. 134; *In re Yurko*, *supra*, 10 Cal.3d at p. 865.) Rather, the rule here is to guarantee that a plea is knowing and intelligent, and that a defendant is never left in the dark regarding the potential for a lifetime deprivation of liberty, and the importance of that purpose

compels that the rule be applied retroactively.

There is no current rule that requires courts to advise of potential SVP consequences when accepting a plea. The decision in *People v. Moore* (1998) 69 Cal.App.4th 626, ruled that there was no obligation that a court advise a defendant of potential SVP consequence because such consequences were collateral, and that a defendant need only be advised of direct consequences of his plea. However, as noted in Petitioner's Opening Brief on the Merits, the distinction between collateral and direct consequences in light of *Padilla v. Kentucky* is no longer dispositive. (OBM 13-15.) While *Moore* found that a court is not required to advise of SVP consequences, it's unclear the extent to which that decision has been relied upon, especially in San Diego where the change of plea form for felonies contains a section that lists "Sexually Violent Predator" as a potential consequence. (PFR Exh. B.)

The effect that retroactive application of the proposed rule would have on the administration of justice would be insignificant. The number of individuals that meet the criteria for SVP commitment is small. (ABM 27-28.) Unlike the rules enacted in *Tahl* and *Yurko*, that affect every plea entered in California, the proposed rule here would only affect those who have pleaded guilty to an enumerated charge within Welfare and Institutions Code section 6600. Since, the proposed rule would only apply to defendants who entered a change of plea, the new rule would not impact every individual who falls under the SVPA. Therefore, the effect on the administration of justice

would be slight, especially given the important liberty issues at stake.

In *People v. McIntyre* (1989) 209 Cal.App.3d 548, the court found a trial court's failure to advise the defendant that his plea of not guilty by reason of insanity could result in a commitment in the state hospital for life was prejudicial error. The question in *McIntyre* was whether the decision in *People v. Lomboy* (1981) 116 Cal.App.3d 67 was to be applied retroactively. (*People v. McIntyre*, *supra*, 209 Cal.App.3d at p. 553.) *Lomboy* held that a defendant who enters a plea of not guilty by reason of insanity must be advised that their plea may result in a commitment greater than that which could be imposed on the underlying offense. (*Lomboy*, *supra*, 116 Cal.App.3d at p. 68-69.)

In *McIntyre*, the court relied upon the "*Tahl* retroactivity criteria" in finding that *Lomboy* should be retroactive. The court noted that the purpose of advising a defendant who pleads not guilty by reason of insanity of the potential length of commitment was to "ensure fundamental fairness." (*McIntyre*, *supra*, 209 Cal.App.3d at p. 558.) The court went on to explain that "[i]f an accused, aware of this risked liberty, pleads NGI that is fair. But if an accused, ignorant of his risked liberty, is allowed to plea NGI, that is unfair. To tolerate such unfairness is incompatible with basic notions of due process" (*Ibid.*)

While there are differences between a not guilty by reason of insanity plea and commitment under the SVPA, the potential outcome is the same – the potential for an indefinite deprivation of liberty. The reasoning in *McIntyre* is sound. It is simply not

fair, and strikes at the very notion of due process, that a defendant be allowed to enter a plea without knowledge of the significant impact on his liberty that plea may have. As such, this court should apply the proposed new rule retroactively.

Even if this Court decides to make the new rule prospective only, it can still grant relief to Tellez. In *Coleman*, this Court held that, "aside from the instant case," the new exclusionary rule that it created would be applied prospectively. (*Coleman*, *supra*, 13 Cal.3d at p. 897.) Therefore, should this Court apply the new rule prospectively, it should still grant relief to Tellez.

CONCLUSION

Tellez and Respondent agree that this court should use its supervisory powers to create a new rule of criminal procedure and require trial courts to advise defendants of the potential SVPA consequences in the appropriate cases. Given the substantial liberty interests at stake, and considering notions of fundamental fairness and due process, this new rule should be applied retroactively.

This Court should also find that Tellez received ineffective assistance of counsel when his counsel failed to advise him of the potential SVPA consequences of his plea. SVPA consequences are analogous to deportation as they are both a severe penalty and closely related to the criminal process. Additionally, his counsel fell below an objective standard of reasonableness when, confronted with a change of plea form that listed "Sexually Violent Predator" as a possible consequence, failed to advise

Tellez that his plea would trigger that consequence. As Tellez would not have accepted his plea if he had been properly advised, he has suffered prejudice that requires relief.

Accordingly, Tellez asks this Court to vacate his conviction and set further proceedings.

Dated: September 8, 2023

Respectfully submitted,

MEGAN MARCOTTE,
Chief Deputy
Office of the Alternate Public Defender

_/s/ Anthony B. Parker
ANTHONY B PARKER
Deputy Alternate Public Defender
Attorneys for Real Party in Interest
VICTOR TELLEZ

CERTIFICATE OF WORD COUNT COMPLIANCE

I, ANTHONY B. PARKER, hereby certify that, based on the software in the Microsoft Word program used to prepare this document, the word count for this brief is 3,873 words. I swear under the penalty of perjury that the foregoing is true and correct.

Dated: September 8, 2023

Respectfully submitted,

/s/ Anthony B. Parker
ANTHONY B. PARKER
Deputy Alternate Public Defender

Attorney for Petitioner
VICTOR TELLEZ

PROOF OF SERVICE

I, undersigned declarant, state that I am a citizen of the United States and a resident of the County of San Diego, State of California. I am over the age of 18 years and not a party to the action herein. My office address is 451 "A" Street, Suite 1200, San Diego, California 92101.

On the date of execution of this document, served the attached **PETITIONER TELLEZ'S REPLY BRIEF ON THE MERITS** to the following parties:

The Hon. Roderick Shelton
Judge of the Superior Court
C/O JUDICIAL SERVICES
220 W. Broadway
San Diego, CA 92101
Truefiling Electronic Service

California Attorney General
Attn: Appellate Division
600 W. Broadway, Suite 1800
San Diego, CA 92101
Phone: (619) 645-2001
Truefiling Electronic Service

Summer Stephan
San Diego County District Attorney
Attn: Appellate Division
330 W. Broadway, 8th Floor
San Diego, CA 92101
Phone: (619) 531-3544
Truefiling Electronic Service

Court of Appeal, Fourth Appellate District, Division One
750 B Street, Suite 300, San Diego, California 92101
Truefiling Electronic Service

Mr. Victor Tellez, Petitioner
(*through counsel*)

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 8, 2023, in San Diego, California.

Signed: ___/s/ Anthony B. Parker_____

Printed: __Anthony B. Parker_____
DECLARANT

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **TELLEZ (VICTOR RAUL) ON H.C.**
Case Number: **S277072**
Lower Court Case Number: **D079716**

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Parker, Anthony (299731)
Last Name, First Name (PNum)

San Diego County Alternate Public Defender

Law Firm