

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

VICTOR TELLEZ,

Petitioner,

vs.

THE SUPERIOR COURT  
OF THE STATE OF  
CALIFORNIA,  
COUNTY OF SAN DIEGO

Respondent

Supreme Court Case  
No. S277072

Court of Appeal No.  
D079716

Superior Court No.  
SCE639196

AMICUS CURIAE APPLICATION FOR PERMISSION TO FILE  
AMICUS BRIEF AND BRIEF OF THE CALIFORNIA PUBLIC  
DEFENDER'S ASSOCIATION IN SUPPORT OF APPELLANT  
TELLEZ

California Public Defenders Association  
10324 Placer Lane  
Sacramento, CA 95827

Public Defender for Contra Costa Co.  
Ellen McDonnell (SBN 215106)  
Rachel Draznin-Nagy (SBN 311237)  
Gilbert Rivera (SBN 311250)  
Deputy Public Defender  
800 Ferry Street  
Martinez, CA 94553  
(925) 335-8084  
rachel.draznin-nagy@pd.cccounty.us  
gilbert.rivera@pd.cccounty.us

## Table of Contents

	<u>Pages</u>
Application of CPDA to appear as Amicus Curiae on Behalf of Appellant .....	5
Authors and Absence of monetary contribution .....	8
Amicus Curiae Brief of CPDA in support of Appellant Tellez .....	9
Introduction .....	9
Argument .....	11
I. Failure To Advise A Defendant Of Possible SVP Consequences Is Ineffective Assistance Of Counsel ...	11
A. Commitment under the SVPA constitutes an extraordinary deprivation of liberty.....	16
B. It is objectively unreasonable for defense counsel to fail to advise a defendant that a guilty plea may result in an indefinite deprivation of liberty.....	17
C. It is standard practice among defense practitioners in California to advise defendants of potential SVP consequences.....	19
II. This Court Should Exercise Its Supervisory Powers To Require Trial Courts To Inform Defendants That A Conviction May Subject Him Or Her To A Possible SVP Commitment.....	21
Conclusion .....	24
Certificate of Word Count .....	25
Proof of service .....	end

## Table of Authorities

### Cases

<i>Needham v. Superior Court of Orange County</i> (2022) 82 Cal.App.5th 114.....	17
<i>Adamson v. Superior Court</i> (1980) 113 Cal.App.3d 505 .....	22
<i>Alvernaz v. Ratelle</i> (S.D.Cal 1993) 831 F.Supp.790 .....	14
<i>Barnett v. Superior Court</i> (2010) 50 Cal.4th 890 .....	7
<i>Boykin v. Alabama</i> (1969) 395 U.S. 238 .....	13, 22, 24
<i>California v. Trombetta</i> (1984) 467 U.S. 479.....	7
<i>Ellis v. Roshei Corp</i> (1983) 143 Cal.App.3d 642.....	22
<i>Galindo v. Superior Court</i> (2010) 50 Cal.4th 1.....	7
<i>Gideon v. Wainwright</i> (1963) 372 U.S. 335.....	12, 18
<i>In re Alvernaz</i> (1992) 2 Cal.4th 924 .....	13, 14, 16, 25
<i>In re Ibarra</i> (1983) 34 Cal.3d 277.....	13, 14
<i>In re Resendiz</i> (2001) 25 Cal.4th 230 .....	13, 14
<i>In re Roberts</i> (2005) 36 Cal.4th 575.....	23
<i>In re Tellez</i> (2022) 84 Cal.App.5th 292.....	10
<i>Lafler v. Cooper</i> (2012) 566 U.S. 156.....	15, 23
<i>McMann v. Richardson</i> (1970) 397 U.S. 759 .....	12, 18
<i>Mempa v. Rhay</i> (1967) 389 U.S. 128 .....	13
<i>Missouri v. Frye</i> (2012) 566 U.S. 134 .....	15
<i>Monge v. California</i> (1998) 524 U.S. 721 .....	8
<i>Padilla v. Kentucky</i> (2010) 559 U.S. 356 .....	passim
<i>People v. Alibillar</i> (2010) 51 Cal.4 <sup>th</sup> 47 .....	7
<i>People v. Ledesma</i> (1987) 43 Cal.3d 171 .....	12
<i>People v. Lemcke</i> (2011) 11 Cal.5th 64.....	23
<i>People v. Lenix</i> (2008) 43 Cal.4th 602 .....	7
<i>People v. McDonald</i> (2013) 214 Cal.App.4th 1367 .....	17
<i>People v. Nelson</i> (2008) 43 Cal.4th 1242.....	7
<i>People v. Willard</i> (2007) 154 Cal.App.4th 1329.....	24
<i>People v. Zaidi</i> (2007) 147 Cal.App.4th 1470.....	24
<i>State v. Bellamy</i> (NJ 2003) 835 A.3d 1231 .....	23, 24
<i>Strickland v. Washington</i> (1984) 466 U.S. 668.....	12, 13, 18

<i>Tide Water Associated Oil Co. v. Superior Court of Los Angeles County</i> (1955) 43 Cal.2d 815.....	22
--------------------------------------------------------------------------------------------------------	----

**Statutes**

Bus. & Prof. Code, sec. 6070, subd. (b).....	7
Pen. Code sec. 667.61 .....	16
Welf. & Inst. Code sec. 6600 et seq .....	11, 18
Welf. & Inst. Code sec. 6601 .....	18, 19
Welf. & Inst. Code sec. 6604 .....	17

**Rules of Court**

Cal. Rule of Court 8.520.....	6
-------------------------------	---

**Constitutional Provisions**

Cal. Const. art. I, sec. 15.....	14
U.S.. Const., 6th Am. ....	14

**Secondary Authority**

Amsterdam, <i>Trial Manual for the Defense of Criminal Cases</i> (6th ed. 2016) §15.6.....	21
Chin and Holmes, <i>Effective Assistance of Counsel and the Consequences of Guilty Pleas</i> (2002) 87 Cornell L.Rev. 697 .....	22
O’Neil, <i>Civil Commitment of Sexually Violent Predators: Indeterminate Life Sentencing</i> (Sept. 1999), Voice for the Defense .....	21
ABA Standards of Criminal Justice sec. 14-3.2(b), (f) .....	21

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

VICTOR TELLEZ

Petitioner,

vs.

THE SUPERIOR COURT  
OF THE STATE OF CALIFORNIA,  
COUNTY OF SAN DIEGO

Respondent

Supreme Court Case  
No. S277072

Court of Appeal No.  
D079716

Superior Court No.  
SCE639196

AMICUS CURIAE APPLICATION FOR PERMISSION TO FILE  
AMICUS BRIEF IN SUPPORT OF APPELLANT TELLEZ AND  
BRIEF OF AMICUS CURIAE

Pursuant to Rule 8.520 of the California Rules of Court, the California Public Defenders Association (CPDA) and the Contra Costa County Public Defender (CCPD) respectfully apply for permission to file the attached amicus brief in support of Appellant Tellez.

APPLICATION OF CPDA TO APPEAR AS AMICUS CURIEA  
ON BEHALF OF APPELLANT

Identification of CPDA and Its Interest

The California Public Defenders Association is the largest association of criminal defense attorneys and public defenders in the State of California. With a membership of more than 4,000 criminal defense attorneys and associated professionals, CPDA is an important voice of the criminal defense bar.

CPDA has been a leader in continuing legal education for defense attorneys for a half century. It is an approved provider of Mandatory Continuing Legal Education and Criminal Law Specialization Education and is one of only two organizations deemed by the Legislature to be an “automatically” approved legal education provider. (Bus. & Prof. Code, § 6070, subd. (b).)

Courts have granted CPDA leave to appear as *Amicus Curiea* in nearly fifty California cases that culminated in published opinions. (See, e.g., *People v. Alibillar* (2010) 51 Cal.4th 47 [sufficiency of evidence in a gang-related prosecution]; *Barnett v. Superior Court* (2010) 50 Cal.4th 890 [post-trial discovery]; *Galindo v. Superior Court* (2010) 50 Cal.4th 1 [preliminary hearing discovery]; *People v. Lenix* (2008) 43 Cal.4th 602 [comparative juror analysis for the first time on appeal]; *People v. Nelson* (2008) 43 Cal.4th 1242 [DNA evidence in a cold hit case].)

CPDA has also served as *Amicus Curiea* in the United States Supreme Court. (See e.g., *California v. Trombetta* (1984) 467 U.S. 479 [the duty to preserve evidence is limited to evidence

that might be expected to play a significant role in the suspect's defense); *Monge v. California* (1998) 524 U.S. 721 [double jeopardy clause does not bar retrial of a prior conviction allegation after an appellate finding of evidentiary insufficiency).] Attorneys with the Contra Costa County Public Defender's Office, members of CPDA, are providing this additional briefing.

CPDA and the Contra Costa County Public Defender are familiar with the briefing and issues in this case. We believe that additional briefing would be beneficial, particularly regarding constitutional and ethical duties of defense attorneys, especially those that may have deleterious effects on a defendant's liberty. CPDA has both a general and specific interest in the subject matter of this litigation. Our members represent the majority of defendants charged with sexual offenses that may subject a person to a potential lifetime commitment as a Sexually Violent Predator under Welfare and Institutions Code section 6600 *et seq* (SVP). CPDA has trained regularly on this topic since 2019.

It is incumbent on a defense attorney to constitutionally and dutifully advise a defendant of substantial and life-impacting consequences of a plea deal. An accused, due to the technical and seemingly Byzantine nature of criminal law, sentencing, and civil consequences, must rely on a defense attorney for information and expertise. Defense attorneys, in turn, have a specific constitutional and ethical duty to ensure a client's plea is intelligent, voluntary, and knowing. Defendants expect a defense attorney to keep him or her fully informed of the consequences of a plea. A defense attorney must be aware of SVP consequences

and advise a defendant of the possibility of permanent deprivation of liberty as mandated under California's SVP scheme.

Authors and Absence of Monetary Contribution

Rachel Draznin-Nagy and Gilbert Rivera, Deputy Public Defenders for Contra Costa County, as members of CPDA, authored the attached brief. No one has made a monetary contribution intended to fund the preparation or submission of this brief.

Date: October 9, 2023

Respectfully submitted,

\_\_\_\_\_/s/\_\_\_\_\_  
Rachel Draznin-Nagy  
Deputy Public Defender  
Contra Costa County

\_\_\_\_\_/s/\_\_\_\_\_  
Gilbert Rivera  
Deputy Public Defender  
Contra Costa County



IN THE SUPREME COURT OF THE STATE OF  
CALIFORNIA

VICTOR TELLEZ,

Petitioner

vs.

THE SUPERIOR COURT OF  
THE STATE OF CALIFORNIA,  
COUNTY OF SAN DIEGO

Respondent

Supreme Court Case  
No. S277072

Court of Appeal No.  
D079716

Superior Court No.  
SCE639196

**AMICUS CURIAE BRIEF OF THE CALIFORNIA PUBLIC  
DEFENDER'S ASSOCIATION IN SUPPORT OF  
APPELLANT TELLEZ**

**INTRODUCTION**

In *In re Tellez* (2022) 84 Cal.App.5th 292 the Court of Appeal for the Fourth District held that defense counsel's failure to advise the defendant, prior to a guilty plea, that he could be committed as a sexually violent predator was not ineffective assistance of counsel.

Amici addresses the holding of *Tellez* from a trial level defense attorney's perspective. The case concerns a defendant's Sixth Amendment right to effective assistance of counsel. Specifically, it deals with a defendant's decision to plead guilty

when the defendant does not know that that plea could subject a him or her to an indefinite civil commitment to a state hospital. CPDA urges this Court to impose a constitutional and ethical duty on defense counsel to advise a defendant charged with an eligible sex offense to inform a defendant of the possibility of an SVP commitment.

This case presents two questions of import to criminal defendants and defense attorneys. First, where a defense attorney fails to advise a defendant that a guilty plea may subject him or her to civil commitment proceedings under the Sexually Violent Predator Act (Welf. & Inst. Code § 6600 et seq.), has that attorney failed to provide constitutionally effective assistance of counsel? Second, should the California Supreme Court exercise its supervisory powers to require trial courts to advise a defendant that a guilty plea may subject him to SVPA commitment proceedings?

In *Padilla v. Kentucky* (2010) 559 U.S. 356, the United States Supreme Court heightened defense counsel’s advisal duties, requiring that counsel inform a defendant that a guilty plea may subject him to automatic deportation. In so doing, the Court did not answer or consider the question of whether direct or collateral consequences of a plea “define the scope of reasonable professional assistance required under *Strickland* [citations].” (*Id.* at 365.) The Court found that “deportation...is intimately related to the criminal process.” (*Ibid.*) Further, “immigration law [has] made removal nearly an automatic result for a broad class of noncitizen offenders” making the penalty of

deportation “most difficult to divorce [...] from the conviction in the deportation contest.” (*Id.* at 366.) Side-stepping an analysis of direct versus collateral consequences, the Court held that *Strickland* applies to defense failures to advise an accused of deportation consequences. (*Id.*)

Like immigration consequences, SVP commitment is “intimately related to the criminal process.” (*Id.*) Defense counsel should be required to provide defendants a *Padilla*-like advisal regarding the possibility of lifetime SVP hospitalization. This advisal will be limited in application as it will only be mandated for qualifying offenses listed under Welfare and Institutions Code section 6600(b). Imposing such an advisal will not create a burdensome duty on defense attorneys.

## ARGUMENT

### I. FAILURE TO ADVISE A DEFENDANT OF POSSIBLE SVP CONSEQUENCES IS INEFFECTIVE ASSISTANCE OF COUNSEL

“Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the assistance of counsel.” (*People v. Ledesma* (1987) 43 Cal.3d 171, 215, citing *Strickland v. Washington* (1984) 466 U.S. 668, 684-685.) “[T]he right to counsel is the right to the effective assistance of counsel.” (*McMann v. Richardson* (1970) 397 U.S. 759, 771, fn. 14.) An accused is entitled to counsel at all crucial stages of a criminal proceeding where substantial rights may be affected. (*Gideon v. Wainwright* (1963) 372 U.S. 335.) Plea bargaining and pleading

are crucial stages of a criminal proceeding. (*In re Resendiz* (2001) 25 Cal.4th 230, 239, abrogated in part on other grounds by *Padilla v. Kentucky* (201) 559 U.S. 356.) The right to counsel may also apply to sentencing proceedings (*Mempa v. Rhay* (1967) 389 U.S. 128, 134.)

“A plea of guilty is more than confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment.” (*Boykin v. Alabama* (1969) 395 U.S. 238, 242.) A trial court commits error when accepting a guilty plea “without an affirmative showing that it was intelligent and voluntary.” (*Id.*) A guilty plea incorporates a waiver of “several constitutional rights,” including, inter alia, the Fifth Amendment Right against self-incrimination and the Sixth Amendment rights to a jury trial and right to confront and cross-examine witnesses. (*Id.* at 243.)

Separate from the court’s inquiry into the constitutionality of a guilty plea, a defense attorney has a separate “duty to explain the constitutional rights...to his client prior to the client’s entering a plea[.]” (*In re Ibarra* (1983) 34 Cal.3d 277, 286.) An attorney must “consult with the defendant on important decisions and...keep the defendant informed[.]” (*Strickland, supra*, 466 U.S. at 688.) “A defendant possesses a constitutionally protected right to participate in the making of certain decisions which are fundamental to his or her defense.” (*In re Alvernaz* (1992) 2 Cal.4th 924, 936.) The decision to reject or accept a plea offer “should not be made by a defendant encumbered with a grave misconception as to the very nature of the proceedings and

*possible consequences.*” (*Id.*, citing *Beckham v. Wainwright* (5th Cir. 1981) 639 F.2d 262, 267, emphasis added.) Although the decision to plead guilty is ultimately made by a defendant, “it is the attorney, not the client, who is particularly qualified to make an informed evaluation of a proffered plea bargain.” (*Alvernaz, supra*, 2 Cal.4th at 933.) An attorney must be aware that a defendant will “rely on counsel’s independent evaluation of the charges, applicable law, and evidence, and the of the risks and probable outcome of trial.” (*Id.*) State Bar Rules of Professional Conduct and the American Bar Association require that defense counsel must communicate the terms of an offer to a defendant, including the maximum and minimum sentences which may be imposed after conviction. (*Id.* at 937.) The failure to inform a defendant that he or she could receive a life sentence after trial is ineffective assistance of counsel under the first prong of *Strickland*. (*Alvernaz v. Ratelle* (S.D.Cal 1993) 831 F.Supp.790, 792.)

Every defendant has a right to effective assistance of counsel under the Sixth Amendment of the federal constitution and article I, section 15 of the California Constitution during the critical stages of plea bargaining and pleading. (*In re Resendiz, supra*, 25 Cal.4th at 239.) This duty mandates that an attorney inform an accused who is deciding whether to plead guilty of requisite waivers of constitutional rights attached to a jury trial. (*In re Ibarra, supra*, 34 Cal.3d at 286.) Most importantly, a defense attorney must inform a client of his or her potential

maximum sentence and any potentially life-altering consequences of a conviction.

Courts have generally created or imposed few constitutional duties on defense attorneys during the plea bargaining process to ensure defendant's receive fundamental fairness in the process. It is time for this Court to create a procedural rule requiring defense attorneys to inform their clients of possible SVP consequences as part of a guilty plea. The Court must use its inherent authority to create a "whole new field of...plea bargaining law." (*Lafler v. Cooper* (2012) 566 U.S. 156, 175, Scalia, J. dissenting.) "The reality is that plea bargains have become so central to the administration of the criminal justice that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires[.]" (*Missouri v. Frye* (2012) 566 U.S. 134, 143.) This responsibility requires no less than informing a client who is under the assumption of a favorable deal requiring a shorter prison sentence that in fact he or she may be subject to lifetime commitment under California's SVP scheme.

An accused is often bewildered and unknowledgeable about the criminal process. A defendant must look to his or her attorney for knowledge and guidance. When deciding whether to proceed to trial or accept a guilty plea subject to a negotiated disposition, a defendant must rely on defense counsel's knowledge of the maximum potential sentence after trial, pros and cons of accepting a plea or proceeding to trial, and direct and

collateral consequences of a conviction. The decision to enter a plea should not be made with “a grave misconception...of the...possible consequences.” (*In re Alvernaz, supra*, 2 Cal.4th at 936, citing *Beckham v. Wainwright* (5th Cir. 1981) 639 F.2d 262, 269.)

A defendant’s decision to plead guilty to a qualifying sexual offense absent actual knowledge of the possibility of an indefinite commitment under SVP can only be characterized as a decision made with a grave misconception of the possible consequences of that plea. In fact, many defendants will plead guilty to a sex offense to guarantee a determinate, rather than an indeterminate sentence. Special circumstances outlined in Penal Code section 667.61, subsections (a) and (b), mandate an indeterminate sentence of 15 years to life or 25 years to life where certain circumstances are pled or proved. A district attorney may, and often, does agree to strike a special circumstance, permitting a defendant to be sentenced to a specific number of years, instead of a determine sentence. A person may unknowingly plead to a qualifying sex offense under the false impression that he or she will serve an agreed number of years of prison, only to find out that he or she may be subject to lifetime commitment in a state hospital.

**A. COMMITMENT UNDER THE SVPA  
CONSTITUTES AN EXTRAORDINARY  
DEPRIVATION OF LIBERTY.**

Detention under the SVPA, although for the purposes of treatment, involuntarily commits a person to a locked state hospital under the jurisdiction of the California Department of Corrections and Rehabilitation for an indefinite period of time – potentially, for the rest of that person’s life. (Welf. & Inst. Code section 6604.) “A defendant in a proceeding under the SVPA is entitled to due process protection because civil commitment involves a significant deprivation of liberty.” (*People v. McDonald* (2013) 214 Cal.App.4th 1367, 1385.) “The SVPA represents an extraordinary deprivation of a person’s liberty: it enables the state to indefinitely detain a person, not for a crime actually committed, but for a crime that may be committed in the future.” (*Needham v. Superior Court of Orange County* (2022) 82 Cal.App.5th 114, 120, review granted.)

Such deprivation of liberty is a severe potential consequence of a conviction. Indeed, the duration of a commitment under the SVPA may long outlast the original prison sentence on the underlying charge. Anyone facing potential commitment under the SVPA is looking at “an extraordinary deprivation of [...] liberty,” a profoundly serious consequence of their prior criminal conviction. (*McDonald, supra*, 214 Cal.App.4th at 1385.)



**B. IT IS OBJECTIVELY UNREASONABLE FOR DEFENSE COUNSEL TO FAIL TO ADVISE A DEFENDANT THAT A GUILTY PLEA MAY RESULT IN AN INDEFINITE DEPRIVATION OF LIBERTY.**

The Sixth and Fourteenth Amendments guarantee the right to assistance of counsel of anyone accused of a crime. (*Gideon v. Wainwright, supra*, 372 U.S. 335.) During all phases of representation, including plea negotiations, defendants are “entitled to the effective assistance of competent counsel.” (*McMann v. Richardson* (1970) 397 U.S. 759, 771.) Where counsel’s representation falls below “an objective standard of reasonableness,” counsel has been ineffective. (*Strickland v. Washington, supra*, 466 U.S. at 688.)

Given the extraordinary deprivation of liberty that defendants face under the SVPA, it is objectively unreasonable for an attorney to fail to advise a client of such a potential consequence. Like potential deportation in *Padilla*, commitment as an SVP “is a particularly severe penalty” that “may be more important to the client than any potential jail sentence.” (*Padilla v. Kentucky, supra*, 559 U.S. at 365, 368 (internal citations omitted).)

Further, confinement under the SVPA is inextricably intertwined with a criminal conviction. The Court in *Padilla* described deportation as “intimately related to the criminal process.” (*Padilla, supra*, 559 U.S. at 365.) SVP consequences are even more bound up with the criminal process: unlike deportation, the only way that someone can face SVP proceedings

is if he or she has a qualifying criminal conviction. (Welf. & Inst. Code sections 6600.) And for those prisoners with a qualifying criminal conviction, evaluation under the SVPA is an automatic process. (Welf. & Inst. Code section 6601.) The Bureau of Parole Hearings automatically refers all prisoners with a qualifying conviction for review under the SVPA. (“When the Secretary of the Department of Corrections and Rehabilitation determines that an individual who is in custody under the jurisdiction of the Department of Corrections and Rehabilitation [...] may be a sexually violent predator, the secretary **shall** [...] refer the person for evaluation in accordance with this section.” (Welf. & Inst. Code section 6601(a), emphasis added).)

Moreover, like the immigration statute at issue in *Padilla*, the “terms of the relevant [...] statute are succinct, clear, and explicit” in defining the commitment consequence for defendants who are sentenced to prison and have been convicted of certain sex offenses. (*Padilla, supra*, 559 U.S. at 368.) The key statutes are Welfare and Institutions Code sections 6600, 6601, and 6604: three straightforward laws that set out the qualifying convictions for evaluation under the SVPA, the procedure for evaluation, and the consequences of commitment.

Finally, a prisoner is not appointed legal representation between imprisonment on a criminal case and the initiation of SVP proceedings. (Welf. & Inst. Code sec. 6601.) Therefore, the only legal professional positioned to advise a defendant of the possibility of SVP consequences is his or her criminal defense attorney.

Because the consequences of commitment under the SVPA are most severe, because those consequences are intimately bound up with a criminal conviction, because the legal framework of the SVPA is straightforward and readily available, and because no one but a criminal defense attorney has an opportunity to advise a defendant of potential SVP proceedings, it is objectively unreasonable for a defense attorney to fail to advise a client of potential SVP consequences to a plea.

**C. IT IS STANDARD PRACTICE AMONG DEFENSE PRACTITIONERS IN CALIFORNIA TO ADVISE DEFENDANTS OF POTENTIAL SVP CONSEQUENCES.**

The weight of prevailing professional norms supports the view that counsel must advise his or her client of the risk of SVP proceedings at the time of case resolution. The California Public Defender's Association, the leading voice of the California criminal defense bar, has provided regular trainings on the consequences of the SVPA.

The California Public Defender's Association is not alone in setting this standard. Other state defender organizations agree. For example, David P. O'Neil, the former Director of Trial Services for the State Counsel for Offenders in Texas, wrote in the September 1999 issue of *Voice for the Defense*,<sup>1</sup> "[A]ll criminal defense attorneys should understand the subtleties of the [SVP] statute. Every day defendants in Texas enter pleas of guilty to

---

<sup>1</sup> *Voice for the Defense* is the Texas Criminal Defense Lawyers Association monthly magazine.

sex offenses, or they enter pleas to other crimes but have a history of sex offenses. Defense attorneys have an obligation to advise their clients on the consequences of their plea. This includes how the SVP statute can apply to them.”<sup>2</sup> (O’Neil, *Civil Commitment of Sexually Violent Predators: Indeterminate Life Sentencing* (Sept. 1999), p. 14, accessed at available at [http://www.paroletexas.com/articles/civil\\_svp\\_final%20-%20Copy.pdf](http://www.paroletexas.com/articles/civil_svp_final%20-%20Copy.pdf) on October 9, 2023.)

Furthermore, it is already standard practice throughout California, as articulated by a sampling of county offices of the public defender, for defense attorneys to advise clients facing potential SVP proceedings of that risk. (See Exhs. A-E.)

This practice is in line with longstanding ethical rules that emphasize the defense attorney’s obligation to investigate the issues most important to a client in a particular case, and advise of all consequences of a conviction, whether those consequences are collateral or direct<sup>3</sup>. The American Bar Association, in its Standard for Criminal Justice, states that the duties of defense attorneys include “address[ing] considerations deemed important by defense counsel or the defendant” as well as advising of the “possible collateral consequences that might ensue from the entry of the contemplated plea.” (SCJ 14-3.2(b), (f). )

This standard is also supported by academic research and treatises on the subject. “No intelligent plea decision can be made by either lawyer or client without full understanding of the

---

<sup>3</sup> We do not concede here that consequences of the SVPA are collateral rather than direct.

possible consequences of a conviction.” (Amsterdam, *Trial Manual for the Defense of Criminal Cases* (6th ed. 2016) §15.6.) “A defendant is not asking too much in expecting that her counsel will give her reasonable advice about the legal consequences of her decisions.” (Chin and Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas* (2002) 87 Cornell L.Rev. 697, 735.)

Fundamental to every defense attorney’s job is to minimize a defendant’s loss of liberty. Confinement under the SVPA is a loss of liberty. Investigating a client’s exposure to consequences under the SVPA and advising a client of that potential additional confinement is fundamental in the duties of the defense attorney.

## **II. THIS COURT SHOULD USE ITS SUPERVISORY POWERS TO REQUIRE TRIAL COURTS TO INFORM DEFENDANTS THAT A CONVICTION MAY SUBJECT HIM OR HER TO A POSSIBLE SVP COMMITMENT**

Commitment as an SVP creates a significant deprivation of liberty. SVP commitment holds a potential lifetime civil imprisonment in a state hospital. A trial court must ensure that a guilty plea is entered knowingly, intelligently, and voluntarily with a full understanding of constitutional waiver of rights. (*Boykin, supra*, 395 U.S. at 242.)

“Courts are not powerless to formulate rules of procedure where justice demands it.” (*Adamson v. Superior Court* (1980) 113 Cal.App.3d 505, 509.) This Court has inherent authority to promulgate rules not mandated by statute of the Judicial

Council. (*Tide Water Associated Oil Co. v. Superior Court of Los Angeles County* (1955) 43 Cal.2d 815, 826.) This authority is most important to safeguard against “inept procedures.” (*Ellis v. Roshei Corp* (1983) 143 Cal.App.3d 642, 648-649.) The California Supreme Court “has inherent authority to establish rules of judicial procedures to be followed by superior courts[.]” (*In re Roberts* (2005) 36 Cal.4th 575, 593, citing *Griggs v. Superior Court of San Bernadino County* (1976) 16 Cal.3d 341, 347.)

The Supreme Court of California has expressly exercised its supervisory powers to guarantee due process rights or correct errors. In *People v. Lemcke* (2011) 11 Cal.5th 644, 669, the Court used its supervisory powers to order trial courts omit certain factors from Judicial Council of California Criminal Jury Instruction 315.

This Court must use its supervisory powers to mandate certain advisements to ensure fundamental due process in the plea-bargaining process. Plea bargaining has become the norm in the criminal justice system. The American criminal legal system “is for the most part a system of pleas, not a system of trials.” (*Lafler, supra*, 566 U.S. at 170.) The Court in *Padilla* recognized that pleas account for nearly ninety-five percent of criminal convictions. (*Padilla, supra*, 559 US. At 372.) Fundamental due process requires that trial courts advise defendants of the possibility of lifetime SVP commitment prior to accepting a guilty plea.

Other state courts have created such a rule. For example, the Supreme Court of New Jersey in *State v. Bellamy* (NJ 2003)

835 A.3d 1231, 1238 held that “fundamental fairness” requires a trial court, prior to accepting a plea to a predicate offense under the State’s Sexually Violent Predator Act, must ensure a defendant understands that as a result of the plea, he or she is subject to the possibility of a future commitment and that the commitment may be for an indefinite period of time, including lifetime commitment. In that case, the court held that the appropriate remedy was to permit the defendant to withdraw his plea. (*Id.* at 1239.)

There is proof in case law that trial courts have *sua sponte* inquired about a defendant’s knowledge of SVP consequences before accepting a plea. For example, in *People v. Willard* (2007) 154 Cal.App.4th 1329, 1332, the Court of Appeal noted that the “[trial] court confirmed defense counsel had advised defendant of the SVP consequences.” Additionally, the court “advised defendant [that] following his time in custody, he will either be committed as a sexually violent predator or released on parole for ten years.” (*Id.* at 1333, internal quotations omitted.) At least one appellate court has imposed a duty on trial courts to advise defendants of potential sex offender registration consequences of a conviction. (See *People v. Zaidi* (2007) 147 Cal.App.4th 1470, 1481-1482.)

This Court should exercise its supervisory powers to impose a duty on trial courts to advise defendants of potential SVP commitment before accepting a guilty plea to a qualifying SVP offense. Additionally, trial courts should inform the defendant that SVP commitment may include lifetime commitment at a

California state hospital. Due Process requires such information be conveyed to a defendant to positively show he or she is entering a plea intelligently and voluntarily, (See *Boykin, supra*, 395 U.S. at 241-242) and to assure that a defendant does not enter a plea “with a grave misconception as to the...possible consequences.” (*In re Alvernaz, supra*, 2 Cal.4th at 936.)

### CONCLUSION

Indefinite confinement under the Sexually Violent Predator Act is a profoundly serious consequence to a criminal conviction. It is objectively unreasonable for defense counsel to fail to advise, at the time of plea, of such a consequence. Advisal is already the standard practice across California. Amicus CPDA asks this Court to find that failure to advise of SVP consequences at the time of plea is ineffective assistance of counsel, and to exercise its supervisory powers to impose a duty on trial courts to advise defendants of potential SVP consequences before accepting a guilty plea to a qualifying SVP offense.

Date: October 9, 2023

Respectfully submitted,

\_\_\_\_\_/s/\_\_\_\_\_  
Rachel Draznin-Nagy  
Deputy Public Defender  
Contra Costa County

\_\_\_\_\_/s/\_\_\_\_\_  
Gilbert Rivera  
Deputy Public Defender  
Contra Costa County



## Certification of Word Count

I, Rachel Draznin-Nagy, hereby certify that the above-included brief consists of 4,324 words, according to the Microsoft Word word count function.

\_\_\_\_\_/s/\_\_\_\_\_  
\_\_\_\_\_

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

VICTOR TELLEZ,

Petitioner

vs.

THE SUPERIOR COURT OF  
THE STATE OF CALIFORNIA,  
COUNTY OF SAN DIEGO

Respondent

Supreme Court Case  
No. S277072

Court of Appeal No.  
D079716

Superior Court No.  
SCE639196

**Proof of Service**

I am a citizen of the United States and am employed in Contra Costa County. I am over the age of 18 years and am not a party to this action. My business address is 800 Ferry Street, Martinez, CA 94553.

On October 9, 2023 I served a correct copy of the attached Application to file amicus curiae brief and amicus curiae brief in support of Appellant Tellez on the below listed 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, Ste. 1800  
San Deigo, 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, Ste. 300  
San Diego, CA 92101  
*Truefiling Electronic Service*

Office of the Alternate Defender  
Attn: Anthony B. Parker  
451 A Street, Ste. 1200  
San Diego, CA 92101  
Phone: (619) 446-2900  
*Truefiling Electronic Service*

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 9, 2023 in Martinez, CA.

\_\_\_\_\_/s/\_\_\_\_\_  
Gilbert Rivera  
Declarant

# EXHIBIT A

1                   DECLARATION OF PUBLIC DEFENDER ELLEN McDONNEL

2                   I, Ellen McDonnell, do state and declare as follows:  
3

- 4       1.       That I am an attorney licensed by the State of California.  
5             If called and sworn to testify, I would competently testify to the following:  
6       2.       I am the Public Defender of Contra Costa County.  
7       3.       As the Public Defender, I ensure that our office provides frequent trainings and  
8             maintains practice standards for criminal representation.  
9       4.       Our standard of practice requires that attorney representing clients advise clients  
10            of potential consequences of any conviction, including potential consequences  
11            under the Sexually Violent Predator Act.  
12       5.       The Contra Costa Office of the Public Defender provides training to attorneys on  
13            the consequences of the Sexually Violent Predator Act so that they can  
14            accurately advise each client.  
15       6.       We have a designated attorney who specializes in Sexually Violent Predator  
16            proceedings who also consults with attorneys representing clients who could face  
17            potential SVP consequences.  
18  
19  
20

21 I declare under penalty of perjury that the forgoing is true and correct. Executed this 9<sup>th</sup>  
22 day of October 2023 at Martinez, California.  
23

24                   *Ellen M McDonnell*  
                    \_\_\_\_\_  
                    Ellen McDonnell, Declarant  
25  
26  
27  
28

# EXHIBIT B

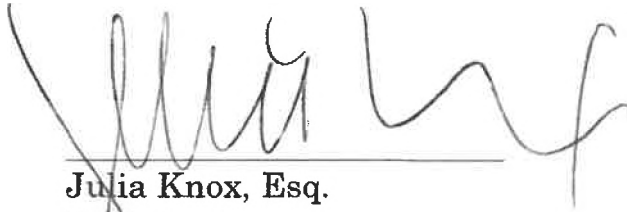
## DECLARATION OF JULIA KNOX

I, Julia Knox, declare:

1. I am the Head Deputy of the Sexually Violent Predator Unit (known as the Civil Commitments Unit or CCU in our office) of the Los Angeles County Office of the Public Defender.
2. The standard of practice in our Office is that attorneys representing clients accused of sex crimes advise our clients of potential consequences under the Sexually Violent Predator Act of any qualifying conviction.
3. Our Office has stated to our lawyers that the Office expects them to advise their clients of these potential consequences of their pleas will and that advisement is typically given to our clients. This practice is tantamount to our standard of practice regarding advisements to our clients of the immigration consequences to criminal convictions.
4. The CCU in the Los Angeles County Public Defender has designated attorneys who are subject-matter experts in the practice of SVP law.
5. As the Head Deputy of the CCU, I ensure that the felony trial attorneys in our Office have a simple mechanism by which they can consult with these subject-matter experts in the CCU, and I ensure that the subject-matter experts are available for consultation to assist the trial attorneys in how a client should be advised. Our office teaches and encourages our trial attorneys to seek these consultations.
6. A trial attorney seeking an SVP consult need only submit a request for the consult and fill out a form with case-specific information through our computerized Client Case Management System (CCMS). The request for a consult is then routed to me, and I assign the consult to an attorney in the CCU. The attorneys in my Unit are taught to respond to the consult request in a timely manner, and to put their advice into writing so that it appears in the attorney Casenote section for that specific client in CCMS. This practice is identical to our standard of practice regarding advisements to our clients of the immigration consequences to criminal convictions.

I declare under penalty of perjury under the laws of the state of California that the facts stated in the foregoing are true and correct.

Dated this 5th day of October, 2023, in Chatsworth, California.



---

**Julia Knox, Esq.**  
**Declarant**



# EXHIBIT C

1                   DECLARATION OF DEPUTY PUBLIC DEFENDER JEFFREY LOWRY

2                   I, Jeffrey Lowry, do state and declare as follows:

3                   1. That I am an attorney licensed by the State of California and my State Bar  
4 number is 122326. If called and sworn to testify, I would competently testify to the  
5 following:

6                   2. I am and have been employed as a Deputy Public Defender with the San  
7 Bernardino County Public Defender's Office for the past 23 years.

8                   3. For the past 23 years I have been assigned to the Special Litigation Unit/Civil  
9 Commitment Unit exclusively handling sexually violent predator [SVP] cases (Welfare  
10 and Institutions Code 6600, et. seq.).

11                  4. A few years ago, P.D. Administration asked our Unit to provide training to the  
12 line deputies regarding SVP law and procedure as well as ideas and factors deputies  
13 should be take into account when pleading a client in a case where there is a potential  
14 of future SVP exposure.

15                  5. One of the goals, besides providing an overview of the SVP process, was to  
16 advise on approaches a line deputy may consider in entering into a plea to possibly  
17 lessen or avoid future SVP proceedings at the end of a prison term.

18                  6. We also provide education and training on accurately advising clients who  
19 have the potential of facing SVP proceedings at the end of their prison sentence.

20                  7. We explain that one has to be careful and thorough in looking at past  
21 convictions or out-of-state convictions to ascertain if, based on such a conviction, a  
22 client could be eligible for SVP proceedings. We emphasize that even though a  
23 conviction on a current charge may not involve a sexually violent offense, any conviction  
24 at any time in the past for a sexually violent offense listed in WIC 6600, or in any other  
25 jurisdiction, will trigger SVP evaluation.

26                  8. Additionally, we emphasize that since 2006 and the passage of Jessica's  
27 Law, an SVP commitment is indeterminate, which can, and often does, result in a  
28 commitment that lasts years and sometimes can be life-long.


1           9. We stress it is imperative the client be fully informed that SVP is an  
2 indefinite commitment and once committed, it is extremely difficult to get out of the  
3 hospital.

4           10. We prepared a handout to be given to all line deputies and we also developed  
5 a PowerPoint presentation that we use in meetings with deputies at each PD office.

6           11. Attorneys in our unit periodically give this training to each office for both new  
7 deputies and to refresh those who have already attended previous trainings.  
8 Additionally, we update the memo, power point and training to reflect changes in SVP  
9 law and procedure.

10           12. In each training, we provide phone numbers to each attorney in the SVP Unit  
11 and tell attendees to call if they have any questions regarding any aspect of SVP. We  
12 receive on average 2-3 calls per month.

13  
14 I declare under penalty of perjury that the forgoing is true and correct. Executed this 4<sup>th</sup>  
15 day of October 2023 at San Bernardino, California.

16  
17  
18   
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Jeffrey Lowry, Declarant

# EXHIBIT D

1 DECLARATION OF DEPUTY PUBLIC DEFENDER SANDY FEINLAND

2 I, Sandy Feinland, do state and declare as follows:

3 1. That I am an attorney licensed by the State of California.

4 If called and sworn to testify, I would competently testify to the following:

5 2. I am and have been employed as a Deputy Public Defender with the San  
6 Francisco County Public Defender’s Office since 2001. I have been practicing  
7 criminal defense for over 30 years, as a public defender and private attorney.  
8

9 3. I am the Director of Training at the San Francisco Public Defender’s Office.

10 4. In 2011, I established our office’s first Sexual Assault Unit, and in 2019, our first  
11 Forensics Unit.

12 5. I have presented on the topic of defending sexual assault cases for the California  
13 Public Defender’s Association and nationally for the National Association of  
14 Criminal Defense Lawyers and the National Association of Public Defenders.  
15


16 6. I was a contributing editor for the Continuing Education of the Bar’s *California*  
17 *Criminal Sentencing Enhancements, Sex Crimes* from 2021-22.  
18

19 7. As Training Director and former head of our Sexual Assault Unit, I personally  
20 provide a training to all attorneys who enter the felony rotation called “Sex  
21 Sentencing,” which includes a section on the SVPA and how to advise our  
22 clients.  
23

24 I declare under penalty of perjury that the forgoing is true and correct. Executed this 9<sup>th</sup>  
25 day of October 2023 at San Francisco, California.

26 \_\_\_\_\_/s/\_\_\_\_\_  
27 Sandy Feinland, Declarant  
28

# EXHIBIT E

<p style="text-align: center;">LAW OFFICES VENTURA COUNTY PUBLIC DEFENDER POLICIES AND PROCEDURES</p>	<p>DATE: July 2008 REVISED: October 2019; May 2020 POLICY No. B-10A PAGES: 1</p>
<p>TITLE:</p> <p style="text-align: center;">SVP REPRESENTATION</p>	<p>APPROVED:</p> <p style="text-align: center;"></p> <hr/> <p>TODD W. HOWETH PUBLIC DEFENDER</p>

**POLICY:**

The Public Defender’s office recognizes that proper representation of SVP clients will be consistent with our policies regarding quality representation generally (B-1) and file documentation (B-5).

**PROCEDURES:**

**Pleading to a sexually violent offense:** A conviction of a sexually violent offense together with other elements, may support the future filing of a Sexually Violent Predator petition. Prior to the entry of a plea of guilty to sexually violent offense, the attorney should inform the client of such a possible future filing and answer any questions the client may have about the current SVPA law. **This advisement must be noted along with the date in our case file.**

**SVP representation:**

The attorney must inform the SVP client that we will endeavor to prepare and get ready for litigation and trial within a reasonable period of time. Though there is not set deadline for starting or completing a trial, unjustified extensive delays in the trial of SVP cases may violate the right to due process. (See, *People v. Litmon* (2008) 162 Cal.App.4th 383 and *People v. Landau* (2013) 214 Cal.App.4th 1.

The attorney must also advise the SVP client that, although we will advise the court if the client wants to continue the case, we are duty bound to inform the

court when we are ready for litigation and trial. This situation does not create a conflict.

The attorney will not continue cases simply because the client wants to continue the matter to avoid conclusion of the SVP case.

A new SVP client will be brought to our jurisdiction pending a Probable Cause Hearing. They have the right to have the hearing heard within 10 days. Should the client or attorney seek to extend a Probable Cause Hearing beyond six months, a supervisor must be apprised as to the necessary reason for such continuances and the file must be documented accordingly.

The SVP client will typically be situated at a committing hospital after the Probable Cause hearing has concluded. Should the client desire to remain at the hospital, rather than be transported for appearances, a written waiver, waiving personal appearance, should be executed by the client and lodged in the court file by counsel. This appearance waiver should last no more than one year from the date executed and will not be attributed as a waiver of presence at trial. A new waiver may be submitted each calendar year as needed.

Any waivers regarding the client's presence at trial must be taken directly by the court.

The client must execute a *Litmon Waiver* (Attachment A), a waiver of speedy trial rights, for any continuances that exceed a year past a Probable Cause hearing. This waiver must be executed every six months thereafter.

The attorney must notify their supervisor of any case that exceeds three years of representation. Additionally, any continuances beyond three years from the Probable Cause hearing will require filing a written motion showing good cause to continue.

**FILE:**

The attorney is responsible for maintaining all file documents. Additionally, the attorney must note where the client is located, maintain a log of ongoing correspondence with client, a log of hours spent developing the case, and a copy of all waivers executed by the client.



The file must note the client's objectives and our advisement that we seek to satisfy their objectives in a timely, constitutionally appropriate manner.

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**

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. My email address used to e-serve: **Gilbert.Rivera@pd.cccounty.us**
3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	tellez brief complete with bookmarks

Service Recipients:

Person Served	Email Address	Type	Date / Time
Martin Doyle Office of the District Attorney 239162	Martin.Doyle@sdcca.org	e-Serve	10/10/2023 4:29:08 PM
Anthony Parker San Diego County Alternate Public Defender 299731	anthony.parker@sdcountry.ca.gov	e-Serve	10/10/2023 4:29:08 PM
Attorney Attorney General - San Diego Office Christine Y. Friedman, Deputy Attorney General 186560	Christine.Friedman@doj.ca.gov	e-Serve	10/10/2023 4:29:08 PM
Vickie Fernandes San Diego County Office of the Alternate Public Defender 239752	Vickie.Fernandes@sdcountry.ca.gov	e-Serve	10/10/2023 4:29:08 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

10/10/2023

Date

/s/Diana Garrido

Signature

Rivera, Gilbert (311250)

Last Name, First Name (PNum)

Contra Costa County Public Defender

Law Firm

---