

## **People v. Nguyen and Blakely-Apprendi Challenges to Juvenile Priors: Time To Move Elsewhere**

In the December 8, 2009, news alert we advised attorneys with issues involving the use of juvenile priors as strikes to preserve the constitutional issues resolved adversely in *People v. Nguyen* (2009) 46 Cal.4th 1007 until it was determined whether the United States Supreme Court would take up the issue. In *Nguyen*, the California Supreme Court held that use of a prior juvenile adjudication to increase the defendant's sentence under the Three Strikes Law is appropriate under the *Almendarez-Torres* prior conviction exception to *Blakely-Apprendi*,<sup>1</sup> even though the right to a jury trial was not afforded in the prior juvenile proceeding. The court said that the absence of a jury trial right does not materially undermine the reliability of a juvenile adjudication and thus does not remove it from the *Almendarez-Torres* rationale.

On April 19, 2010, certiorari was denied in *Nguyen*. The court also has denied it in several other California cases raising the same issue. For the time being, therefore, it seems the handwriting is on the wall: we will have to live with the decision of the California Supreme Court.

As a result, we have called off the earlier advice. We no longer urge the issue routinely be pursued in order to preserve it for federal review.<sup>2</sup> Of course, if in a given case counsel can credibly reframe the issue in a way not resolved in *Nguyen* and not inconsistent with its holding, we certainly would encourage that effort.

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<sup>1</sup>*Almendarez-Torres v. United States* (1998) 523 U.S. 224; *Blakely v. Washington* (2004) 542 U.S. 296; *Apprendi v. New Jersey* (2000) 530 U.S. 466.

<sup>2</sup>In our opinion, certiorari in the Supreme Court was the most realistic federal remedy. AEDPA specifies that federal habeas corpus relief cannot be granted unless the state decision was contrary to or an unreasonable application of "clearly established Federal law, as determined by the Supreme Court of the United States." (28 U.S.C. § 2254(d)(1); see ADI California Criminal Appellate Practice Manual, §§7.106 and 9.24 et seq.) Most federal circuits have reached the same conclusion as *Nguyen*, and the U.S. Supreme Court has not spoken directly on the subject; thus it is difficult to demonstrate *Nguyen* was contrary to clearly established federal law. In the Ninth Circuit, *United States v. Tighe* (9th Cir. 2001) 266 F.3d 1187 reached the opposite conclusion from *Nguyen* on the merits, but in a direct federal appeal, which does not carry AEDPA's restrictions. In *Boyd v. Newland* (9th Cir. 2006) 467 F.3d 1139, the Ninth Circuit declined to apply *Tighe* to a habeas corpus case challenging a state conviction.