

**The Sixth District of the California Court of Appeal
Throws a Curveball:
The Use of Juvenile Adjudications as Strikes in
California Post-*People v. Nguyen***

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INTRODUCTION

Michael Jones, age twenty-six, has been convicted of robbery in an adult criminal proceeding. Because he suffered a prior juvenile adjudication for the same offense when he was seventeen years old, the Deputy District Attorney alleged that the juvenile adjudication was a strike under California's Three Strikes Law. As a result, Michael's sentence was double what it would normally have been for a first-time robbery offense. As he is sitting in jail, he receives word that his friend is being charged with kidnapping. He remembers that his friend suffered a prior juvenile adjudication for assault when he was sixteen years old. When Michael's friend comes to visit him in jail, he laments the fact that his friend will suffer double the normal penalty due to the assault adjudication being used as a strike. "Actually," his friend tells him, "my lawyer says that the District Attorney can no longer use that juvenile adjudication as a strike against me." Michael is very upset and calls his attorney. His attorney promises to research the issue and see if a re-sentencing hearing can be arranged.

This is the scene across California. California's Three Strikes Law provides that a convicted felon with certain prior felony convictions will receive a sentence beyond the statutory maximum for the current offense.¹ The statute specifically allows for juvenile adjudications to be used as strikes under certain conditions.² However, recent case law has complicated the application of this statute. In *Apprendi v. New Jersey*, the U.S. Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable

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¹ CAL. PENAL CODE § 1170.12 (West Supp. 2008).

² *Id.* § 1170.12(b)(3).

doubt.”³ While most federal circuit courts and California appellate courts have interpreted the *Apprendi* “prior conviction” exception to include juvenile adjudications,⁴ the Ninth Circuit Court of Appeals in *United States v. Tighe*⁵ and the Sixth District of the California Court of Appeal in *People v. Nguyen*⁶ held that juvenile adjudications do not fall within the *Apprendi* exception. These are not the only courts to reexamine the use of juvenile adjudications as prior convictions for sentence enhancement purposes.⁷ The court in *Nguyen* observed that, while only one law review article argued for the use of juvenile adjudications as strikes, “a growing number of state courts have taken the view that *Apprendi* bars the use of juvenile adjudications to enhance adult sentences over and above the otherwise statutorily-set maximum,” and that “[c]ommentators are virtually unanimous in that view.”⁸ The California Supreme Court has granted review of the *Nguyen* decision,⁹ and the ruling will have a large impact on whether California will join the “growing number” of courts and commentators arguing for a ban on the use of juvenile adjudications as sentence enhancers.

This Comment first argues that juvenile adjudications should continue to be used as strikes under the Three Strikes Law, and therefore the California Supreme Court should reverse *Nguyen*.¹⁰ Part I provides a discus-

3 *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (emphasis added).

4 See *Burge v. United States*, 407 F.3d 1183 (11th Cir. 2005); *Jones v. United States*, 332 F.3d 688 (3d Cir. 2003); *Smalley v. United States*, 294 F.3d 1030 (8th Cir. 2002); *United States v. Crowell*, 493 F.3d 744 (6th Cir. 2007); *United States v. Matthews*, 498 F.3d 25 (1st Cir. 2007). The only federal circuit to hold that a juvenile adjudication cannot be used as a strike is the Ninth Circuit. *United States v. Tighe*, 266 F.3d 1187, 1194 (9th Cir. 2001); see also *People v. Linarez*, 66 Cal. Rptr. 3d 762, 766 (Ct. App. 2007); *People v. Grayson*, 66 Cal. Rptr. 3d 603, 610–11 (Ct. App. 2007); *People v. Tu*, 64 Cal. Rptr. 3d 878, 888 (Ct. App. 2007); *People v. Palmer*, 47 Cal. Rptr. 3d 864, 870–71 (Ct. App. 2006); *People v. Buchanan*, 49 Cal. Rptr. 3d 137, 145 (Ct. App. 2006); *People v. Superior Court*, 7 Cal. Rptr. 3d 74, 82 (Ct. App. 2003), *review denied*, 2004 Cal. LEXIS 2034 (Mar. 3, 2004), *cert. denied*, 543 U.S. 884 (2004); *People v. Lee*, 4 Cal. Rptr. 3d 642, 647 (Ct. App. 2003); *People v. Smith*, 1 Cal. Rptr. 3d 901, 905–06 (Ct. App. 2003).

5 266 F.3d 1187, 1194 (9th Cir. 2001).

6 62 Cal. Rptr. 3d 255, 281 (Ct. App. 2007), *review granted*, 169 P.3d 882 (Cal. 2007).

7 See *State v. Brown*, 879 So. 2d 1276, 1290 (La. 2004); *Pinkston v. State*, 836 N.E.2d 453, 462–63 (Ind. Ct. App. 2005); *State v. Chatman*, 2005 WL 901138 at *6 (Tenn. Crim. App. 2005) (unpublished).

8 *Nguyen*, 62 Cal. Rptr. 3d at 269, 269 n.9 (contrasting several state court decisions with the views of Kevin Holman, *Should Little Joey’s Juvenile Adjudication Be Used Against Him When He Becomes Joe the Habitually Violent Felon?*, 25 J. JUV. L. 45 (2005)). In *Nguyen*, the Sixth District of the California Court of Appeal decided to follow the trend toward the exclusion of juvenile adjudications as strikes:

[We] join the small but growing number of courts across the county [sic] that have likewise concluded that *Apprendi* and its progeny compel us to recognize that the Sixth Amendment right to a jury trial is an integral part of the process that is due before a prior conviction may be used to increase the maximum sentence for a criminal offense.

Id. at 256.

9 169 P.3d 882 (Cal. 2007). The United States Supreme Court has consistently denied certiorari to appeals from cases discussing this issue. See *Burge*, 407 F.3d 1183, *cert. denied*, 546 U.S. 981 (2005); *Jones*, 332 F.3d 688, *cert. denied*, 540 U.S. 1150 (2004); *Smalley*, 294 F.3d 1030, *cert. denied*, 537 U.S. 1114 (2003); *Crowell*, 493 F.3d 744, *cert. denied*, 128 S. Ct. 880 (2008); *Matthews*, 498 F.3d 25, *cert. denied*, 128 S. Ct. 1463 (2008).

10 I will only focus on the constitutionality of using juvenile adjudications to enhance a sentence

sion of the purpose, history, and provisions of the Three Strikes Law. This part also discusses the unique characteristics of the juvenile justice system and how these unique characteristics complicate the use of prior juvenile adjudications as strikes. This part then gives a background of *Apprendi*, the cases leading up to *Apprendi* and how both federal and California courts have interpreted *Apprendi* in the context of juvenile adjudications. Part II argues for the inclusion of juvenile adjudications in *Apprendi*'s exception based on (1) the justification for considering recidivism in sentencing; (2) the reliability of juvenile adjudications to indicate recidivism; and (3) the positive impact of using juvenile adjudications as strikes on the juvenile justice system and society in general. This Comment concludes by discussing possible future ramifications of the California Supreme Court's review of *Nguyen*, both in California and nationwide.

I. THE THREE STRIKES LAW, THE CALIFORNIA JUVENILE SYSTEM, AND THE *APPRENDI* PROBLEM

A. The History, Purpose, and Provisions of the Three Strikes Law

In 1994, California voters approved Proposition 184 in a general election.¹¹ Proposition 184 was codified in California Penal Code section 1170.12.¹² Section 1170.12 is commonly known as "The Three Strikes Law."¹³ Proponents of the Three Strikes Law argued that it would keep society safe from habitual offenders,¹⁴ while opponents argued that the Three Strikes Law would remove judges' power to keep sentences proportional to the crime and the criminal.¹⁵

beyond the statutory maximum. Precedent clearly states that judges may use juvenile adjudications to enhance sentences within the statutory limits. *United States v. Williams*, 891 F.2d 212, 215 (9th Cir. 1989) (allowing an adult's criminal sentence to be enhanced because of a conviction at a prior proceeding to which the right to a jury trial did not attach). *Nguyen* briefly mentions *Williams* and does not reject its holding. 62 Cal. Rptr. 3d at 272 ("[I]n both *United States v. Williams* and *United States v. Johnson*, the defendants were given sentences within the normal range of the federal sentencing guidelines."). California Rules of Court also include "the defendant's prior convictions as an adult or *sustained petitions in juvenile delinquency proceedings*" as aggravating circumstances. CAL. R. CT. 4.421 (West 2007) (emphasis added).

¹¹ Dan Morain & Virginia Ellis, *Voters Approve 'Three Strikes' Law, Rejecting Smoking Measure*, L.A. TIMES, Nov. 9, 1994, at A3.

¹² CAL. PENAL CODE § 1170.12 (West Supp. 2008).

¹³ Morain & Ellis, *supra* note 11.

¹⁴ Republican Bill Morrow, incumbent candidate for State Assembly Member, explained:

I am a co-author and strongly support the 'three strikes' legislation. Such a law will cause people inclined to criminal behavior to think twice about committing a crime when they are assured that commission of a third felony will land them in prison for life. When repeat offenders are jailed for good, the public will be protected from their predation and can rest assured they will not be loosed upon society again.

Campaign '94: Issues and Answers, L.A. TIMES (Orange County Ed.), Oct. 23, 1994, at B3.

¹⁵ Tonatiuh Rodriguez-Nikl, also a candidate for State Assembly Member at the time, explained her opposition:

[The Three Strikes Law] violates the freedom judges must have to ensure that the punishment is proportional to the crime. Violent crime is actually down. Crime hysteria is up and the 'three strikes' law feeds that hysteria The 'three strikes' law would result in filling

The Three Strikes Law gives minimum sentence standards for persons who have already been convicted of one or more felonies.¹⁶ If the individual already has one prior felony conviction, the sentence will be double what the sentence would ordinarily be for the current offense.¹⁷ If the individual has two or more prior felony convictions, the sentence for the current offense will be an indeterminate term of life imprisonment with a minimum term of one of the following, whichever is greater:

[1] three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions, or [2] twenty-five years or [3] the term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 190 or 3046.¹⁸

The Three Strikes Law states, “[a]ny offense defined in subdivision (c) of Section 667.5 [of the California Penal Code] as a violent felony or any offense defined in subdivision (c) of Section 1192.7 [of the California Penal Code] as a serious felony in this state” will qualify as a felony for the sentence enhancement purposes of the law.¹⁹ A prior juvenile adjudication is a prior felony conviction if:

(A) The juvenile was sixteen years of age or older at the time he or she committed the prior offense, and (B) The prior offense is (i) listed in subdivision (b) of Section 707 of the Welfare and Institutions Code, or (ii) listed in this subdivision as a felony, and (C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law, and (D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code.²⁰

B. The Goals and Unique Characteristics of the California Juvenile Justice System Compared to the Adult Criminal Justice System

In California, the juvenile justice system is significantly different from the adult criminal justice system. The goals of the juvenile courts are protection and rehabilitation of the minor, rather than punishment.²¹ One of

up prisons while draining billions of dollars that can be used for social programs. I favor lighter sentences and more money for education.

Id.

¹⁶ CAL. PENAL CODE § 1170.12 (West Supp. 2008).

¹⁷ *Id.* § 1170.12(c)(1).

¹⁸ *Id.* § 1170.12(c)(2).

¹⁹ *Id.* § 1170.12(b)(1). California Penal Code section 667.5 includes the following as violent felonies: murder or voluntary manslaughter, mayhem, rape, sodomy. California Penal Code section 1192.7 lists twelve serious felonies, including arson, carjacking, and burglary.

²⁰ *Id.* § 1170.12(b)(3).

²¹ NAT’L COUNCIL ON CRIME AND DELINQUENCY, JUVENILE JUSTICE POLICY STATEMENT 3 (Apr. 1991); *In re Florance*, 300 P.2d 825, 827 (Cal. 1956) (en banc) (“The primary consideration in proceedings to declare a minor a ward of the juvenile court is the minor’s welfare.”); *In re Charles C.*, 284 Cal. Rptr. 4, 5 (Ct. App. 1991) (“[A] juvenile commitment is geared toward treatment and rehabilitation with the state providing substitute parental care for wayward youths during their *minority*.”) (em-

the ways the system protects the minor is with proceedings that are by design less formal and intimidating than their adult counterparts.²² The proceedings are not criminal in nature²³ and juveniles are not convicted, but deemed to be a ward of the court.²⁴ The delinquent juvenile is not sentenced, but the court conducts a disposition hearing to determine what outcome will best serve the juvenile.²⁵ Punishments range from the juvenile being sent home to his or her parents²⁶ to being committed in a detention facility operated by the California Department of Corrections and Rehabilitation, Division of Juvenile Facilities, for a period of time not to exceed the equivalent sentence for the same offense in an adult proceeding.²⁷

California also allows a minor the opportunity to seal his or her record. Under California law, juveniles may petition the court to have their records sealed when they reach the age of eighteen or five years after the juvenile court's jurisdiction terminates.²⁸ This option is not available for juveniles tried in adult criminal court, but they may have their records expunged after an honorable discharge from a youth authority facility.²⁹ This allows rehabilitated juveniles the opportunity to avoid difficulties in obtaining employment because it erases a juvenile's conviction from his or her record.

Traditionally, the due process rights afforded to adults in criminal courts have not been given to juveniles, because the goal of the juvenile justice system is rehabilitation and not punishment.³⁰ However, in *In re Gault*, the U.S. Supreme Court held that juveniles in juvenile proceedings have the right to counsel, the right to receive notice of charges, the privilege against self-incrimination, and the right to confront and cross-examine witnesses.³¹ Three years later, the Court held that a juvenile's guilt must be

phasis in original).

²² *In re Charles C.*, 284 Cal. Rptr. at 6.

²³ *People v. Arias*, 51 Cal. Rptr. 2d 770, 817 (Ct. App. 1996) ("Juvenile proceedings are not criminal prosecutions.").

²⁴ CAL. WELF. & INST. CODE § 602 (West Supp. 2008).

²⁵ *Id.* § 706.

²⁶ *Id.* § 727(a).

²⁷ *Id.* § 731.

²⁸ *Id.* § 781(a). One observer notes that, under the Three Strikes Law, a sealed juvenile adjudication can still be used as a strike:

The sealed record statute provides that if the juvenile committed an offense under section 707(b) of the Welfare and Institutions Code, the record will not be sealed until six years after the last offense. This is specifically applicable to the 'three strikes' law which allows juvenile offenses committed under section 707(b) to be used as strikes. However, the three strikes law has no limit on how far back it may look for use of a prior juvenile adjudication. The juvenile adjudication could have taken place twenty years ago, and the prosecution may still use it to constitute a strike. This is in direct opposition to the sealed record statute, which states once a record is sealed, "the proceedings shall be deemed never to have occurred"

Tonya K. Cole, *Counting Juvenile Adjudications as Strikes Under California's 'Three Strikes' Law: An Undermining of the Separateness of the Adult and Juvenile Systems*, 19 J. Juv. L. 335, 344-45 (1998).

²⁹ Holman, *supra* note 8 at 47; CAL. WELF. & INST. CODE § 1772 (West Supp. 2008).

³⁰ See *McKeiver v. Pennsylvania*, 403 U.S. 528, 553 (1971) (plurality opinion).

³¹ *In re Gault*, 387 U.S. 1 (1967).

proven beyond a reasonable doubt rather than by a preponderance of the evidence.³² Juveniles are also protected against double jeopardy.³³ However, in *McKeiver v. Pennsylvania*, the Court held that not all due process rights enjoyed by adults are required in juvenile proceedings.³⁴ The Court concluded that jury trials are not required in juvenile hearings because they would disrupt the intimate nature of the juvenile proceedings and are not necessary for accurate fact-finding.³⁵ The Court emphasized that its decision gives the states discretion to decide whether juveniles are afforded a jury trial.³⁶ However, California does not require jury trials in juvenile proceedings because juvenile proceedings are reformatory in nature and not penal.³⁷

On March 8, 2000, Proposition 21 became law and gave prosecutors greater ability to try juveniles in adult criminal court.³⁸ Juveniles in California who are at least fourteen years of age and charged with murder or certain sexual assault crimes must be tried as an adult in criminal court.³⁹ Prosecutors may choose between criminal or juvenile court when a juvenile of at least sixteen years of age commits any offense listed in California Welfare & Institutions Code section 707(b).⁴⁰ Prosecutors can also file charges in criminal court against any juvenile that is sixteen years of age or older and has a prior felony adjudication.⁴¹

Proposition 21 reduces the number of juvenile adjudications that can be used as strikes.⁴² However, there are still many juvenile offenses that can be used as strikes that either cannot be charged in adult proceedings at all,⁴³ or where prosecutors have a choice between adult and juvenile court.⁴⁴

³² *In re Winship*, 397 U.S. 358 (1970). This is important, because the reliability of prior convictions is questioned when the standard of proof is less than beyond a reasonable doubt. In *Apprendi*, the United States Supreme Court only stated what *does* constitute sufficient procedural safeguards (a right to a trial by jury and proof beyond a reasonable doubt) and what *does not* (judge-made findings under a lesser standard of proof). *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000).

³³ *Breed v. Jones*, 421 U.S. 519, 541 (1975).

³⁴ *McKeiver*, 403 U.S. at 533.

³⁵ *Id.* at 550.

³⁶ *Id.* at 553.

³⁷ *Id.* at 568.

³⁸ Anthony Costanzo, *Proposition 21: The Future of an Illusion*, 24 J. JUV. L. 68, 73 n.41 (2004). Proposition 21 amended section 777 of the California Welfare and Institutions Code. *Id.* at 68.

³⁹ CAL. WELF. & INST. CODE § 602(b) (West Supp. 2008).

⁴⁰ *Id.* § 707(d)(1). These offenses include murder, robbery, torture, kidnapping, etc. *Id.* § 707(b).

⁴¹ *Id.* § 707(d)(3). The prior felony must have been committed when he or she was fourteen years of age or older. *Id.*

⁴² Holman, *supra* note 8.

⁴³ These are the offenses that qualify as strikes under California Penal Code sections 667.5 or 1192.7 that are not listed in California Welfare and Institutions Code sections 602(b) (the prosecutor must try the case in adult criminal court) or 707(b) (the prosecutor may try the case in adult criminal court). Some offenses include non-aggravated mayhem, kidnapping without bodily harm or ransom, and extortion.

⁴⁴ If the offense is a strike and is listed under California Welfare and Institutions Code section 707(b), the prosecutor has discretion to try the case in adult criminal court under California Welfare and Institutions Code section 707(d)(1) (2008). Examples of these offenses are arson, assault with a fire-

C. The U.S. Supreme Court and *Almendarez-Torres*, *Jones*, and *Apprendi*—Enhancing a Sentence Beyond the Statutory Maximum with Prior Convictions

In *Almendarez-Torres v. United States*, the Supreme Court held that prior convictions could be treated as sentencing factors that raise the maximum penalty of an offense.⁴⁵ In September 1995, Hugo Almendarez-Torres was indicted by a federal grand jury for a violation of 8 U.S.C. section 1326(a), which makes it a crime for a deported alien to return to the United States.⁴⁶ Without a prior conviction, the maximum prison term is two years.⁴⁷ Section 1326(b)(2) authorizes a maximum prison term of twenty years if the initial deportation “was subsequent to a conviction for commission of an aggravated felony.”⁴⁸ Almendarez-Torres pled guilty and admitted in a hearing that he had been deported pursuant to three convictions for aggravated felonies.⁴⁹

Almendarez-Torres argued that the prior aggravated felony convictions were elements of a crime, and because the government failed to include the prior convictions in the indictment, he could not be sentenced beyond the statutory maximum of two years as set forth in Section 1326(a).⁵⁰ The district court rejected this argument and gave Almendarez-Torres a prison term, ranging from seventy-seven to ninety-six months. The Fifth Circuit affirmed the verdict.⁵¹ The Supreme Court agreed and found that an indictment does not need to set forth sentencing factors⁵² because a prior conviction is a sentencing factor and not a separate element of a crime.⁵³

One year later, in *Jones v. United States*, the Court further explained the reason for allowing a prior conviction to serve as a sentence enhancement, rather than an element of the crime that must be proven to a jury.⁵⁴ Nathaniel Jones was indicted for a violation of 18 U.S.C. section 2119,⁵⁵ which stated that a person possessing a firearm who takes a motor vehicle from another person by force will receive a sentence of not more than fifteen years in prison.⁵⁶ However, Section 2119(2) states that if serious bodily injury resulted, the punishment was not to exceed twenty-five years.⁵⁷

arm, torture, kidnapping for ransom, etc.

⁴⁵ 523 U.S. 224, 246–47 (1998).

⁴⁶ *Id.* at 227; 8 U.S.C. § 1326(a) (2006).

⁴⁷ 8 U.S.C. § 1326(a) (2006).

⁴⁸ *Id.* § 1326(b)(2).

⁴⁹ *Almendarez-Torres*, 523 U.S. at 227.

⁵⁰ *Id.*; see also *Hamling v. United States*, 418 U.S. 87, 117 (1974) (holding that an indictment must set forth each element of the crime).

⁵¹ *Almendarez-Torres*, 523 U.S. at 227.

⁵² *Id.* at 228.

⁵³ *Id.* at 243.

⁵⁴ 526 U.S. 227, 251–52 (1999).

⁵⁵ *Id.* at 230.

⁵⁶ 18 U.S.C. § 2119 (1988).

⁵⁷ *Id.*

Although Section 2119(2) was not included in the jury instructions defining the offense, the district court sentenced Jones to the full twenty-five years permitted under subsection (2).⁵⁸ The district court held that subsection (2) was a sentencing factor, rejecting Jones' argument that it set out an element of the offense and could not be applied because it had not been charged in his indictment.⁵⁹ The Ninth Circuit affirmed this decision.⁶⁰

The Supreme Court, however, reversed the district court and the Ninth Circuit because the fact of severe bodily harm was not charged in the indictment and tried before the jury.⁶¹ In this particular case, the aggravating factor was not a prior conviction but the presence of severe bodily harm resulting from carjacking. The Court explained that prior convictions are constitutionally distinct from other sentence-enhancing factors, and therefore could be used under *Almendarez-Torres* to increase the penalty for an offense without treating them as an element of the current offense.⁶² It clarified that, "unlike virtually any other consideration used to enlarge the possible penalty for an offense, and certainly unlike the factor before us in this case, a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees."⁶³

One year later in *Apprendi*, the Supreme Court further clarified the rationale in *Almendarez-Torres* and *Jones*.⁶⁴ On December 22, 1994, Charles Apprendi fired several bullets into the home of an African-American family that had recently moved into an all-white neighborhood.⁶⁵ Apprendi made a statement, which he later retracted, that suggested that his motive was race-based.⁶⁶ Apprendi pleaded guilty to two counts of "second-degree possession of a firearm for an unlawful purpose, and one count of the third-degree offense of unlawful possession of an antipersonnel bomb."⁶⁷ As a part of the plea agreement, the prosecution reserved the right to request the court to impose an enhanced sentence if the crime was committed with a biased purpose pursuant to a state hate-crime statute.⁶⁸ After accepting the pleas, the prosecutor filed a motion to enhance the sentence and the court held an evidentiary hearing to determine if the shooting was committed with a biased purpose.⁶⁹ The court found "that the crime was motivated by racial bias" and applied the hate crime enhancement.⁷⁰

⁵⁸ *Jones*, 526 U.S. at 231.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 231-33.

⁶² *Id.* at 249.

⁶³ *Id.*

⁶⁴ 530 U.S. 466, 487-90 (2000).

⁶⁵ *Id.* at 469.

⁶⁶ *Id.*

⁶⁷ *Id.* at 469-70 (internal citations omitted).

⁶⁸ *Id.* at 470.

⁶⁹ *Id.*

⁷⁰ *Id.* at 471 (internal quotations omitted).

The Appellate Division and New Jersey Supreme Court affirmed.⁷¹

The U.S. Supreme Court reversed the New Jersey courts because the issue of whether Apprendi had a racial motive in committing the crime had not been submitted to a jury and proven beyond a reasonable doubt.⁷² The Court explained that the reason the judge in *Almendarez-Torres* could consider the prior conviction as a sentence enhancer without violating due process and Sixth Amendment concerns was because procedural safeguards attached to the fact of the prior conviction.⁷³ The Court established the following rule: “*Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.*”⁷⁴

D. How Federal and California Courts Have Approached the Problem of Whether it is Appropriate to Include Prior Juvenile Adjudications Under the *Apprendi* Exception

In California, the Three Strikes Law allows judges to enhance sentences beyond the statutory maximum because of prior convictions.⁷⁵ Previously, courts in California held that the use of juvenile adjudications as strikes complies with *Apprendi*’s rule.⁷⁶ However, there is now disagreement among the California courts of appeal on this issue.⁷⁷ There is also disagreement among the federal circuit courts. Six federal circuit courts have now ruled on the issue of whether juvenile adjudications qualify as convictions for purposes of the *Apprendi* exception.⁷⁸ The U.S. Supreme Court has yet to decide the issue.⁷⁹

The Ninth Circuit was the first to decide the issue. In *United States v. Tighe*, the Ninth Circuit held that a juvenile adjudication does not fall under the *Apprendi* exception unless it was proved to a jury beyond a reasonable doubt.⁸⁰ The court relied on the following language from *Jones*: “[U]nlike virtually any other consideration used to enlarge the possible penalty for an

⁷¹ *Id.* at 471–72.

⁷² *Id.* at 497.

⁷³ *Id.* at 488.

⁷⁴ *Id.* at 490 (emphasis added).

⁷⁵ CAL. PENAL CODE § 1170.12 (West 2004).

⁷⁶ See *Apprendi*, 530 U.S. at 490.

⁷⁷ See *People v. Nguyen*, 62 Cal. Rptr. 3d 255, 280 (2007).

⁷⁸ See *United States v. Burge*, 407 F.3d 1183, 1191 (11th Cir. 2005) (allowing juvenile adjudications to be used as sentence-enhancing prior convictions); *United States v. Jones*, 332 F.3d 688, 696 (3d Cir. 2003) (same); *United States v. Smalley*, 294 F.3d 1030, 1033 (8th Cir. 2002) (same); *United States v. Crowell*, 493 F.3d 744, 750 (6th Cir. 2007) (same); *United States v. Matthews*, 498 F.3d 25, 36 (1st Cir. 2007) (same); *United States v. Tighe*, 266 F.3d 1187, 1194–95 (9th Cir. 2001) (excluding “[j]uvenile adjudications that do not afford the right to a jury trial and a beyond-a-reasonable-doubt burden of proof” from use as sentence-enhancing prior convictions).

⁷⁹ See *Burge*, 407 F.3d 1183, *cert. denied*, 546 U.S. 981 (2005); *Jones*, 332 F.3d 688, *cert. denied*, 540 U.S. 1150 (2004); *Smalley*, 294 F.3d 1030, *cert. denied*, 537 U.S. 1114 (2003); *Crowell*, 493 F.3d 744, *cert. denied*, 128 S.Ct. 880 (2008); *Matthews*, 498 F.3d 25, *cert. denied*, 128 S.Ct. 1463 (2008).

⁸⁰ 266 F.3d at 1194.

offense . . . a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.”⁸¹ The court reasoned that the Supreme Court created an exception for prior convictions because those prior convictions were themselves established through procedural safeguards.⁸² The court then concluded that because of the language of *Jones*, a right to a jury trial is indispensable for a prior conviction to be used to enhance a sentence beyond the statutory maximum.⁸³ To date, the Ninth Circuit is the only circuit court to hold this view.

The Eighth Circuit was the next circuit court to decide the issue. In 2002, it held in *U.S. v. Smalley* that juvenile adjudications fall under the *Apprendi* exception.⁸⁴ The court relied on the following language from *Apprendi*:

[T]here is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof.⁸⁵

The court noted that the Supreme Court clearly stated what falls within the *Apprendi* exception, but the Court did not take a clear position on other possibilities.⁸⁶ The Eighth Circuit also found it significant that the Supreme Court in *Apprendi* didn’t quote the *Jones* decision relied on by the Ninth Circuit in *Tighe*.⁸⁷ The Eighth Circuit observed that the Supreme Court in *Apprendi* only discussed the right to a trial by jury and proof beyond a reasonable doubt as *examples* of procedural protections, not mandatory indicators of reliability.⁸⁸ The Eighth Circuit then stated that the question “should not turn on the narrow parsing of words, but on an examination of whether juvenile adjudications, like adult convictions, are so reliable that due process of law is not offended by such an exemption.”⁸⁹ The court then listed the procedural protections that juveniles do enjoy in juvenile proceedings: “The right to notice, the right to counsel, the right to confront and cross-examine witnesses, and the privilege against self-incrimination.”⁹⁰ The court further observed that judges in juvenile proceedings have to find guilt beyond a reasonable doubt,⁹¹ concluding that the combination of these protections is sufficient to provide the reliability that

⁸¹ *Id.* at 1193 (quoting *Jones*, 526 U.S. at 249) (emphasis removed to match original opinion of *Jones*).

⁸² *Id.* at 1194.

⁸³ *Id.*

⁸⁴ *Smalley*, 294 F.3d at 1033.

⁸⁵ *Id.* at 1032; *Apprendi*, 530 U.S. at 496.

⁸⁶ *Smalley*, 294 F.3d at 1032.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 1033.

⁹⁰ *Id.*

⁹¹ *Id.*

Apprendi requires.⁹² Finally, the court noted that “the use of a jury in the juvenile context would ‘not strengthen greatly, if at all, the factfinding function’ and is not constitutionally required.”⁹³ Four circuit courts have followed the reasoning in *Smalley*.⁹⁴

The California courts have followed the pattern of their federal counterparts. The California Supreme Court, like the United States Supreme Court, has not decided the issue.⁹⁵ The California appellate courts agree with the reasoning in *Smalley*, with one exception.⁹⁶ The first California appellate court to decide the issue was the Second District. In *People v. Bowden*, the court held that non-jury trial juvenile adjudications can be used to enhance a sentence in an adult proceeding beyond the statutory maximum.⁹⁷ The court cited to the dissent in *Tighe*:

We agree with the *Tighe* dissent that this language in *Jones* does not support such a broad conclusion. The dissent stated, “In my view, the language in *Jones* stands for the basic proposition that Congress has the constitutional power to treat prior convictions as sentencing factors subject to a lesser standard of proof because the defendant presumably received all the process that was due when he was convicted of the predicate crime. For adults, this would indeed include the right to a jury trial. For juveniles, it does not. Extending *Jones*’ logic to juvenile adjudications, when a juvenile receives all the process constitutionally due at the juvenile stage, there is no constitutional problem (on which *Apprendi* focused) in using that adjudication to support a later sentencing enhancement.”⁹⁸

Subsequent California courts of appeal have agreed with *Bowden*.⁹⁹

However, in *People v. Nguyen*, the Sixth District of the California Court of Appeal held that a juvenile adjudication is not a prior conviction within the *Apprendi* exception.¹⁰⁰ The court noted that, while all the appellate courts to consider the issue have held that juvenile adjudications fall within the *Apprendi* exception, “a growing number of state courts have taken the view that *Apprendi* bars the use of juvenile adjudications to enhance adult sentences over and above the otherwise statutorily set maximum.”¹⁰¹

⁹² *Id.*

⁹³ *Id.* (quoting *McKeiver v. Pennsylvania*, 403 U.S. 528, 547 (1971) (plurality opinion)).

⁹⁴ See *United States v. Jones*, 332 F.3d 688, 696 (3rd Cir. 2003); *United States v. Burge*, 407 F.3d 1183, 1190 (11th Cir. 2005); *United States v. Crowell*, 493 F.3d 744, 750 (6th Cir. 2007); *United States v. Matthews*, 498 F.3d 25, 35 (1st Cir. 2007).

⁹⁵ See *People v. Nguyen*, 62 Cal. Rptr. 3d 255 (Ct. App. 2007), review granted, 169 P.3d 882 (Cal. 2007).

⁹⁶ *Id.* at 269–70.

⁹⁷ *People v. Bowden*, 125 Cal. Rptr. 2d 513, 518 (Ct. App. 2002).

⁹⁸ *Id.* (citing *United States v. Tighe*, 266 F.3d 1187, 1200 (9th Cir. 2001) (Brunetti, J., dissenting)).

⁹⁹ See *People v. Linarez*, 66 Cal. Rptr. 3d 762, 766 (Ct. App. 2007); *People v. Grayson*, 66 Cal. Rptr. 3d 603, 610–11 (Ct. App. 2007); *People v. Tu*, 64 Cal. Rptr. 3d 878, 888 (Ct. App. 2007); *People v. Palmer*, 47 Cal. Rptr. 3d 864, 870–71 (Ct. App. 2006); *People v. Buchanan*, 49 Cal. Rptr. 3d 137, 145 (Ct. App. 2006); *People v. Superior Court*, 7 Cal. Rptr. 3d 74, 82 (Ct. App. 2003), review denied 2004 Cal. LEXIS 2034 (Mar. 3, 2004), cert. denied, 543 U.S. 884 (2004); *People v. Lee*, 4 Cal. Rptr. 3d 642, 647 (Ct. App. 2003); *People v. Smith*, 1 Cal. Rptr. 3d 901, 905–06 (Ct. App. 2003).

¹⁰⁰ 62 Cal. Rptr. 3d at 256–57.

¹⁰¹ *Id.* at 269 (citing *State v. Brown*, 879 So. 2d 1276, 1290 (La. 2004); *Pinkston v. State*, 836

The court also stated that “[c]ommentators are virtually unanimous in that view.”¹⁰²

The court justified its holding by rejecting three of the most common arguments in favor of including prior juvenile adjudications in the *Apprendi* exception. First, the court rejected the argument that recidivism is different than other facts that enhance sentences.¹⁰³ The court observed that *Apprendi* does not specifically except recidivism, but only prior convictions.¹⁰⁴ Moreover, the court stressed that there is a difference between using recidivism to enhance a sentence *within* the statutory limits, and using it to enhance *beyond* those limits.¹⁰⁵ Additionally, the court objected to what it saw as an unwarranted assumption that juvenile adjudications prove recidivism.¹⁰⁶

The court rejected the second argument that juvenile adjudications are reliable enough to be included within *Apprendi*’s exception.¹⁰⁷ First, the court responded to the argument that, because juries in juvenile adjudications were deemed to be unnecessary in *McKeiver*, they do not increase reliability for *Apprendi* purposes.¹⁰⁸ The court stated that the inability of the jury to add additional accuracy in fact-finding is not the real reason there is no constitutional right to a jury trial in juvenile adjudications.¹⁰⁹ The court explained that juries would destroy the rehabilitative function and intimate atmosphere of juvenile adjudications.¹¹⁰ Second, the court cited statistical reports included in *Ballew v. Georgia*,¹¹¹ which suggested that the lower the number of jurors, the lower the reliability of the verdict.¹¹² The court implied, contrary to the Supreme Court’s holding in *McKeiver*, that juries would add reliability and accuracy to fact-finding in a juvenile proceeding.¹¹³

Third, the court rejected the view that juries are not indispensable to due process in the context of sentencing above the statutory maximum.¹¹⁴ The court discussed various ways in which the trial by jury is a fundamental part of the American criminal justice system.¹¹⁵ In the context of en-

N.E.2d 453 (Ind. Ct. App. 2005) (unpublished); *State v. Chatman*, 2005 WL 901138 (Tenn. Crim. App. 2005)).

¹⁰² *Id.* The court then observed that only one law review article argues in support of the inclusion of juvenile adjudications within the *Apprendi* exception. *Id.* at n.9; see Holman, *supra* note 8, at 54–55.

¹⁰³ *Nguyen*, 62 Cal. Rptr. 3d at 270.

¹⁰⁴ *Id.* at 271.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 272–73.

¹⁰⁷ *Id.* at 273.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ 435 U.S. 223 (1978).

¹¹² *Nguyen*, 62 Cal. Rptr. 3d at 274.

¹¹³ *Id.* at 275. In *McKeiver v. Pennsylvania*, the U.S. Supreme Court held that juries would add little reliability and accuracy in fact-finding in a juvenile proceeding. 403 U.S. 528, 553 (1971).

¹¹⁴ *Nguyen*, 62 Cal. Rptr. 3d at 276–77.

¹¹⁵ *Id.*

hancing a sentence beyond the statutory maximum, the court, like the Ninth Circuit in *Tighe*, relied on the language from *Jones* that discusses the right to a trial by jury and proof beyond a reasonable doubt.¹¹⁶ The court concluded that, because juvenile adjudications are not prior convictions within the *Apprendi* exception, they cannot be used pursuant to the Three Strikes Law to enhance a sentence in an adult proceeding beyond the statutory maximum.¹¹⁷

Since *Nguyen*, three other California courts of appeal have criticized its reasoning.¹¹⁸ Thus, there is a split among both the federal and California appellate courts concerning whether a prior juvenile adjudication can be used to enhance a sentence in an adult proceeding beyond the statutory maximum. The split among the California courts will soon be resolved, as the California Supreme Court has granted review.¹¹⁹

II. JUDGES ACT IN ACCORDANCE WITH *APPRENDI* BY USING JUVENILE ADJUDICATIONS AS STRIKES IN CALIFORNIA

The California Supreme Court should reverse *Nguyen* and hold that juvenile adjudications are appropriately included within the *Apprendi* exception. Recidivism continues to be the most traditional reason for sentence enhancement.¹²⁰ Juvenile adjudications are sufficiently reliable to indicate recidivism and are accompanied by a multiplicity of procedural protections.¹²¹ Furthermore, using juvenile adjudications to enhance adult sentences promotes the rehabilitative purpose of the juvenile justice system and has a positive impact on society through the deterrence of future crimes and incarceration of recidivists.¹²²

A. Juvenile Adjudications Can Be Included Within *Apprendi*'s Exception Because Recidivism is a Traditional Basis for Sentence Enhancement

Juvenile adjudications can be used to enhance a sentence in an adult criminal proceeding because they indicate recidivism and recidivism is the most traditional basis for sentence enhancement.¹²³ Recidivism “demonstrates beyond a reasonable doubt that a defendant has engaged in serious criminal behavior in the past.”¹²⁴ Recidivism “is a traditional, if not the most traditional, basis for a sentencing court’s increasing an offender’s sen-

¹¹⁶ *Id.* at 277.

¹¹⁷ *Id.* at 278–79.

¹¹⁸ *People v. Tu*, 64 Cal. Rptr. 3d 878, 888 (Ct. App. 2007); *People v. Grayson*, 66 Cal. Rptr. 3d 603, 609–10 (Ct. App. 2007); *People v. Linarez*, 66 Cal. Rptr. 3d 762, 766 (Ct. App. 2007).

¹¹⁹ *People v. Nguyen*, 67 Cal. Rptr. 3d 460 (2007).

¹²⁰ *Almendarez-Torres v. United States*, 523 U.S. 224, 243 (1998).

¹²¹ *E.g.*, *People v. Grayson*, 66 Cal. Rptr. 3d 603, 610–11 (Ct. App. 2007).

¹²² See discussion *infra* Part III.C.

¹²³ *People v. Nguyen*, 62 Cal. Rptr. 3d 255, 271 (Ct. App. 2007) (citing *People v. Fowler*, 84 Cal. Rptr. 2d 874, 877 n.2 (Ct. App. 1999)).

¹²⁴ *Fowler*, 84 Cal. Rptr. 2d at 877. (internal citations omitted).

tence.”¹²⁵ It is therefore “distinguishable for constitutional purposes from other facts that might extend the range of possible sentencing.”¹²⁶ Recidivism is appropriately considered for sentencing because it “demonstrates the defendant’s character and the likelihood of future criminality.”¹²⁷

However, *Nguyen* observes that there is a difference between using recidivism to enhance a sentence *within* the statutory limits and using recidivism to enhance a sentence *beyond* the statutory limits.¹²⁸ *Apprendi*’s general rule against letting a judge use a fact to enhance a sentence beyond the statutory maximum contains an exception for prior convictions.¹²⁹ *Nguyen* found that the critical issue is how narrowly *Apprendi*’s exception should be interpreted—whether the offense being used to enhance beyond statutory limits has to be a conviction in name, or whether it can be another offense found by a reasonable doubt (such as a juvenile adjudication) that indicates recidivism.¹³⁰ Prior convictions are excepted from *Apprendi*’s rule, not because they are called convictions, but because of what they represent—a finding of guilt following all procedural protections due to the defendant. Therefore, so long as judgments indicating recidivism carry with them sufficient procedural protections, judges may use them to enhance a sentence beyond the statutory maximum.

Do juvenile adjudications indicate recidivism? The court in *Nguyen* had a problem with using juvenile adjudications as strikes because it believes that juvenile adjudications do not carry sufficient procedural protections to reliably indicate recidivism.¹³¹ But if juvenile adjudications are found to be sufficiently reliable, then they indicate recidivism because they show evidence of prior criminal wrongdoing by the defendant. Therefore, the next issue to be considered is whether juvenile adjudications are reliable enough to indicate recidivism.

¹²⁵ *Almendarez-Torres*, 523 U.S. at 243.

¹²⁶ *Jones v. United States*, 526 U.S. 227, 249 (1999).

¹²⁷ Ellen Marrus, “*That Isn’t Fair, Judge*”: *The Costs of Using Prior Juvenile Delinquency Adjudications in Criminal Court Sentencing*, 40 HOUS. L. REV. 1323, 1339 (2004). At times, defendants will argue that using a prior conviction to enhance the penalty for the current offense violates the constitutional protection against double jeopardy. The United States Supreme Court has explained that it is not the former offense that the defendant is being punished for again, but rather the current offense. See *Gryger v. Burke*, 334 U.S. 728, 732 (1948) (explaining that the enhancement on the subsequent offense “is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because [it is] a repetitive one”).

¹²⁸ *Nguyen*, 62 Cal. Rptr. 3d at 271 (finding a distinction between “‘factors relating both to offense and the offender’ that judges may constitutionally consider ‘in imposing a judgment *within the range* prescribed by statute’ and unconstitutional consideration of factors that mandate imposition of a sentence greater than the maximum sentence authorized by the jury’s verdict” (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 481 (2000) (internal citations omitted) (emphasis in original)).

¹²⁹ *Apprendi*, 530 U.S. at 490.

¹³⁰ *Nguyen*, 62 Cal. Rptr. 3d at 271 (“[W]e see the question before us as whether ‘prior convictions’ ought to be interpreted expansively to include other judgments, which are by definition *not* criminal or convictions, but which do reflect recidivism.”).

¹³¹ *Id.* at 272–73.

B. Juvenile Adjudications are Sufficiently Reliable to Indicate Recidivism and be Included Under *Apprendi*'s Exception Because They Contain Sufficient Procedural Safeguards

A majority of the California courts of appeal that have decided the issue agree that juvenile adjudications are sufficiently reliable to be used as a prior conviction within the *Apprendi* exception.¹³² Likewise, a majority of the federal circuits that have decided the issue also agree that juvenile adjudications are sufficiently reliable for sentence enhancement beyond the statutory maximum.¹³³

Juvenile adjudications carry with them a full range of procedural protections. Therefore, they are reliable enough to indicate recidivism and enhance a sentence beyond the statutory maximum.¹³⁴ Juveniles have the right to counsel, the right to confront and cross-examine witnesses, and the privilege against self-incrimination.¹³⁵ Especially noteworthy is that the standard of proof in a juvenile proceeding is guilt beyond a reasonable doubt.¹³⁶ *Apprendi* mentions this as one of the reasons adult convictions are reliable enough to be excepted from the general rule for sentence enhancers.¹³⁷ Additionally, juveniles are protected from double jeopardy.¹³⁸ These are all important protections that make juvenile adjudications more reliable.

¹³² See *People v. Smith*, 1 Cal. Rptr. 3d 901, 905 (Ct. App. 2003); *People v. Lee*, 4 Cal. Rptr. 3d 642, 647 (Ct. App. 2003); *People v. Superior Court (Andrades)*, 7 Cal. Rptr. 3d 74, 86 (Ct. App. 2003); *People v. Buchanan*, 49 Cal. Rptr. 3d 137, 145 (Ct. App. 2006); *People v. Palmer*, 47 Cal. Rptr. 3d 864, 871 (Ct. App. 2006); *People v. Tu*, 64 Cal. Rptr. 3d 878, 887–88 (Ct. App. 2007); *People v. Grayson*, 66 Cal. Rptr. 3d 603, 610–11 (Ct. App. 2007); *People v. Linarez*, 66 Cal. Rptr. 3d 762, 766–67 (Ct. App. 2007).

¹³³ See *United States v. Smalley*, 294 F.3d 1030, 1033 (8th Cir. 2002); *United States v. Jones*, 332 F.3d 688, 696 (3d Cir. 2003); *United States v. Burge*, 407 F.3d 1183, 1190–91 (11th Cir. 2005); *United States v. Crowell*, 493 F.3d 744, 750 (6th Cir. 2007); *United States v. Matthews*, 498 F.3d 25, 35–36 (1st Cir. 2007).

¹³⁴ *Apprendi*, 530 U.S. at 488; *Smalley*, 294 F.3d at 1033 (concluding that the question is “whether juvenile adjudications, like adult convictions, are so reliable that due process of law is not offended by such an exception [to *Apprendi*'s general rule].”). In his dissenting opinion in *Tighe*, Justice Brunetti explained:

In my view, the language in *Jones* stands for the basic proposition that Congress has the constitutional power to treat prior convictions as sentencing factors subject to a lesser standard of proof because the defendant presumably received all the process that was due when he was convicted of the predicate crime. For adults, this would indeed include the right to a jury trial. For juveniles, it does not.

United States v. Tighe, 266 F.3d 1187, 1200 (9th Cir. 2001) (Brunetti, J., dissenting). Even the majority opinion in *Tighe* recognized that it is the reliability of the prior conviction that makes it the exception to *Apprendi*'s rule:

Thus, *Jones*' recognition of prior convictions as a constitutionally permissible sentencing factor was rooted in the concept that prior convictions have been, by their very nature, subject to the fundamental triumvirate of procedural protections intended to guarantee the reliability of criminal convictions: fair notice, reasonable doubt and the right to a jury trial.

Id. at 1193 (emphasis added).

¹³⁵ *Smalley*, 294 F.3d at 1033.

¹³⁶ *In re Winship*, 397 U.S. 358, 367 (1970).

¹³⁷ *Apprendi*, 530 U.S. at 488.

¹³⁸ *Breed v. Jones*, 421 U.S. 519, 541 (1975).

Opponents of using juvenile adjudications as strikes often cite the Supreme Court's language in *Jones* that discusses the right to a trial by jury.¹³⁹ For example, the Ninth Circuit held that the "exception to *Apprendi*'s general rule must be limited to prior convictions that were themselves obtained through proceedings that included the right to a jury trial and proof beyond a reasonable doubt."¹⁴⁰ However, the Supreme Court in *Apprendi* only stated that the right to a trial by jury and proof beyond a reasonable doubt constitute sufficient procedural safeguards, while judge-made findings under a lesser standard of proof do not.¹⁴¹ The Court did not determine the reliability of situations that are between these two poles.¹⁴² The Eighth Circuit explained: "In other words, we think that it is incorrect to assume that it is not only sufficient but necessary that the 'fundamental triumvirate of procedural protections . . . underly an adjudication before it can qualify for the *Apprendi* exemption."¹⁴³ Furthermore, the United States Supreme Court has held that juries are not necessary in juvenile proceedings because they add little to the reliability of the verdict:

*The imposition of the jury trial on the juvenile court system would not strengthen greatly, if at all, the factfinding function, and would, contrarily, provide an attrition of the juvenile court's assumed ability to function in a unique manner. It would not remedy the defects of the system. Meager as has been the hoped-for advance in the juvenile field, the alternative would be regressive, would lose what has been gained, and would tend once again to place the juvenile squarely in the routine of the criminal process.*¹⁴⁴

Despite the holding in *McKeiver*, the Sixth District California Court of Appeal in *Nguyen* attempts to cast doubt on it by citing *Ballew v. Georgia*.¹⁴⁵ In *Ballew*, the Court discussed studies showing that the smaller the number of jurors, the less reliable the verdict.¹⁴⁶ The studies, published in 1963, concern reliability based on the number of *jurors* in *adult proceedings*, not the reliability of a verdict in a *bench trial* in *juvenile proceedings*.¹⁴⁷ *Nguyen* also attempts to distinguish *McKeiver*:

¹³⁹ *Tighe*, 266 F.3d at 1193 ("[U]nlike virtually any other consideration used to enlarge the possible penalty for an offense . . . a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.") (quoting *Jones*, 526 U.S. at 249); see also *People v. Nguyen*, 62 Cal. Rptr. 3d 255, 280–81 (Ct. App. 2007) (holding "that a juvenile adjudication is not a prior conviction within the meaning of *Apprendi* because the juvenile offender does not have the right to a jury trial.").

¹⁴⁰ *Tighe*, 266 F.3d at 1194.

¹⁴¹ *United States v. Smalley*, 294 F.3d 1030, 1032 (8th Cir. 2002) (citing *Apprendi*, 530 U.S. at 488).

¹⁴² *Id.*

¹⁴³ *Id.* This so-called "triumvirate of procedural protections" is only a list of examples, and the Ninth Circuit has stated that "[t]he right to counsel [which juveniles have in juvenile proceedings] is more fundamental than the right to a jury trial." *United States v. Williams*, 891 F.2d 212, 215 (9th Cir. 1989).

¹⁴⁴ *McKeiver v. Pennsylvania*, 403 U.S. 528, 547 (1971) (emphasis added).

¹⁴⁵ *People v. Nguyen*, 62 Cal. Rptr. 3d 255, 274–75 (Ct. App. 2007) (citing *Ballew v. Georgia*, 435 U.S. 223, 232–33 (1978)).

¹⁴⁶ *Ballew*, 435 U.S. at 232–33.

¹⁴⁷ *Id.* at 232 n.11 (citing Edwin J. Thomas & Clinton F. Fink, *Effects of Group Size*, 60 PSYCHOL.

The lesson we draw from *Ballew* and *McKeiver* is *not* that judicial fact-finding is unreliable—clearly, it is reliable enough to afford due process where juvenile *dispositions* are the outcome of the adjudicative process—but that, in the absence of a jury waiver, *only* jury fact-finding by six or more persons deliberating together is reliable enough to afford due process in non-petty criminal cases, where the outcome of the adjudicative process is imprisonment.¹⁴⁸

However, because judicial fact-finding is sufficiently reliable to deprive juveniles of their physical liberty, it is also sufficiently reliable to enhance an adult's sentence so long as it was accompanied by the procedural protections due in a juvenile proceeding.¹⁴⁹

Nguyen next declares, “[w]henver the length of a sentence imposed on an adult offender is involved, the case is by definition criminal, and it implicates the Sixth Amendment’s right to a jury trial.”¹⁵⁰ The court further states that “a criminal sentence must reflect the judgment of a jury of at least six members, even if it is a prior conviction, unless that jury is waived.”¹⁵¹ Other California courts of appeal disagree with this assertion and argue that the Three Strikes Law does not convert a juvenile adjudication into an adult criminal conviction: “The three strikes law’s use of juvenile adjudications affects only the length of the sentence imposed on an adult offender, not the finding of guilt in the adult court nor the adjudication process in the juvenile court.”¹⁵² Moreover, “[t]he [United States Supreme] Court specifically has recognized by dictum that a jury is not a necessary part even of every criminal process that is fair and equitable.”¹⁵³

Not only is judicial fact-finding generally reliable, it is accompanied by a wide range of other procedural protections in a juvenile proceeding, including a burden of proof of guilt beyond a reasonable doubt. Therefore, juvenile adjudications are sufficiently reliable for *Apprendi* purposes.

BULL. 371, 373 (1963)).

¹⁴⁸ *Nguyen*, 62 Cal. Rptr. 3d at 275.

¹⁴⁹ The Ninth Circuit also came to this conclusion with regard to enhancing a sentence *within* the statutory limits. *United States v. Williams*, 891 F.2d 212, 215 (9th Cir. 1989) (“If it does not violate due process for a juvenile to be deprived of his or her liberty without a jury trial, we fail to find a violation of due process when a later deprivation of liberty is enhanced due to this juvenile adjudication.”).

¹⁵⁰ *Nguyen*, 62 Cal. Rptr. 3d at 275. The court continued:

When the Three Strikes law uses the fact of a prior juvenile adjudication to enhance a sentence, it is doing so for the purpose of enhancing an adult defendant's sentence, and it is bound by the rules that govern criminal cases. . . . By letting a juvenile adjudication “stand in” for “evidence of past criminal conduct” the law is relying on the judgment of a fact finder that is constitutionally unacceptable in a criminal case in the absence of the defendant's waiver.

Id.

¹⁵¹ *Id.* at 276. Of course, judges issue sentences every day based on facts not tried before a jury. This includes the use of juvenile adjudications to enhance a sentence *within* the statutory limits. *See supra* note 10. Whatever the court means by this statement, California law allows for a jury to decide if the accused actually suffered the prior conviction or juvenile adjudication at all. CAL. PENAL CODE § 1025; *see People v. Bowden*, 125 Cal. Rptr. 2d 513, 517 (Ct. App. 2002) (“[T]he defendant has a statutory right to a jury trial, at least on the issue whether the defendant suffered the prior conviction”).

¹⁵² *People v. Fowler*, 84 Cal. Rptr. 2d 874, 877 (Ct. App. 1999).

¹⁵³ *McKeiver v. Pennsylvania*, 403 U.S. 528, 547 (citing *Duncan v. Louisiana*, 391 U.S. 145, 149–50 n.14, 158 (1968)).

C. The Use of Juvenile Adjudications as Strikes has a Positive Effect on the Juvenile Justice System

The use of juvenile adjudications as strikes provides rehabilitation through a deterrent effect and results in better representation of the juvenile's interests through more aggressive representation. The goal of the juvenile justice system is rehabilitation, rather than punishment.¹⁵⁴ The use of juvenile adjudications as strikes does not frustrate that purpose; rather, it promotes it. As discussed previously, enhancing the sentence of the current offense because of a prior offense does not result in an increased punishment for the former offense, but only an increased punishment for the current offense.¹⁵⁵ Therefore, using juvenile adjudications as strikes will not result in a prospective increase in punishment for the juvenile adjudication. The focus of the juvenile justice system will not shift to punishment. In fact, the juvenile justice system's focus on rehabilitation will be promoted through deterrence. When a juvenile is aware that his juvenile adjudication could be used as a strike in a subsequent adult proceeding, the juvenile will have a very good reason to avoid criminal activity in the future. This is a goal of the Three Strikes Law—not just isolation of criminals from society, but deterring people from committing violent felonies in the first place.¹⁵⁶

Because the use of a juvenile adjudication as a strike provides a deterrent effect and an incentive to rehabilitate, it follows that adequate counsel must be available to inform a juvenile of the ramifications of being found a ward of the court. Juveniles have the right to counsel and the right to be notified that they may have counsel appointed for them if they cannot afford counsel.¹⁵⁷ However, there is a problem with under-representation of juveniles in the juvenile justice system.¹⁵⁸ This raises another argument against using juvenile adjudications to enhance an adult sentence.¹⁵⁹ However, while juvenile adjudications resulting without the aid of counsel or valid waiver of that right cannot be used as strikes, the same cannot be said for adjudications where the juvenile was adequately represented.

¹⁵⁴ *In re Charles C.*, 284 Cal. Rptr. 4, 5 (Ct. App. 1991) (“While the aim of adult incarceration is punishment, a juvenile commitment is geared toward treatment and rehabilitation with the state providing substitute parental care for wayward youths.”).

¹⁵⁵ *Almendarez-Torres v. United States*, 523 U.S. 224, 243 (1998).

¹⁵⁶ See *supra* note 14 and accompanying text.

¹⁵⁷ *In re Gault*, 387 U.S. 1, 41 (1967).

¹⁵⁸ Less than fifty percent of juveniles appearing in juvenile court are represented by counsel. Nicole M. Romine, *A Compromised Solution: Balancing the Constitutional Consequences and the Practical Benefits of Using Juvenile Adjudications for Sentence Enhancement Purposes*, 45 WASHBURN L.J. 113, 130 (2005); Richard E. Redding, *Using Juvenile Adjudications for Sentence Enhancement Under the Federal Sentencing Guidelines: Is It Sound Policy?*, 10 VA. J. SOC. POL'Y & L. 231, 247 (2002). Redding also discusses studies that show that juveniles are frequently unable to have effective counsel because of the drain on public defender resources. *Id.* at 250.

¹⁵⁹ Romine, *supra* note 158, at 131. The United States Supreme Court has held that it is unconstitutional to use a felony conviction obtained without the benefit of counsel or a valid waiver of that right to enhance a subsequent conviction. *Burgett v. Texas*, 389 U.S. 109, 114–16 (1967).

This discussion introduces another important impact of the use of juvenile adjudications as strikes on the juvenile justice system—more aggressive representation.¹⁶⁰ Lawyers acting as counsel in the juvenile justice system tend to “act more as a guardian ad litem than a zealous advocate.”¹⁶¹ These attorneys may believe that it is in the best interest of the child to be deemed a ward of the court and, because the adjudications seemingly have little consequence after becoming an adult, that aggressive representation is unnecessary.¹⁶² This is not the case in a system, such as California’s, where juvenile adjudications can have significant importance in adult criminal proceedings. Therefore, lawyers will be more likely to raise more objections, bring more pretrial motions, and appeal more frequently.¹⁶³

Is this a bad thing? Some say it is, arguing that aggressive representation will result in clogged dockets and some guilty juveniles being acquitted.¹⁶⁴ Some might argue that aggressive representation may also eventually turn the juvenile justice system into a shadow of its adult counterpart. However, the benefits of aggressive representation far outweigh any possible negative consequences. The interests of the child will be represented zealously and weighed against the interests of the state. Aggressive representation on behalf of the child will make it more likely that justice will be done.

What would happen if the use of juvenile adjudications as strikes was prohibited? Barring the use of juvenile adjudications as strikes would swamp California courts with resentencing claims, resulting in a waste of judicial resources.¹⁶⁵ Barring the use of juvenile adjudications as strikes would also result in “undeserved lighter sentences” for repeat offenders.¹⁶⁶ Recidivism is recidivism at whatever age. If the California Supreme Court affirms *Nguyen*, the goals of the Three Strikes Law, approved by the people, will be frustrated. Repeat offenders will receive lighter sentences than they deserve, and juveniles will not be deterred from committing subsequent crimes.

CONCLUSION AND OUTLOOK FOR THE FUTURE

Until the summer of 2007, California appellate courts were unanimous in their approval of the use of prior juvenile adjudications as strikes. In *Nguyen*, one of those courts held that prior juvenile adjudications cannot be used as strikes because there is no right to a trial by jury in juvenile proceedings. The court argued that this did not come within the exception to *Apprendi*’s general rule: “*Other than the fact of a prior conviction, any fact*

¹⁶⁰ Marrus, *supra* note 127, at 1354.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 1354–55.

¹⁶⁴ *Id.* at 1355.

¹⁶⁵ *Id.* at 1348.

¹⁶⁶ *Id.*

that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”¹⁶⁷ The decision has been appealed, and the California Supreme Court has granted review.¹⁶⁸

The California Supreme Court should reverse the *Nguyen* decision and restore uniformity and predictability to the juvenile and criminal justice systems. Prior juvenile adjudications have sufficient procedural protections to reliably indicate recidivism, a traditional sentencing factor. Furthermore, using prior juvenile adjudications as strikes promotes the rehabilitative purpose of the juvenile justice system and the purpose of the Three Strikes Law to keep society safe.

This issue’s importance extends beyond California’s borders. In *Nguyen*, the court repeatedly indicates that it sees a rising tide of courts and commentators combining to argue against the use of juvenile adjudications to extend a sentence in an adult proceeding beyond statutory limits. Because California’s Three Strikes Law is a well-known statute that allows for sentence enhancement beyond the statutory maximum, the ruling of the California Supreme Court in *Nguyen* impact this issue nationwide.

¹⁶⁷ *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (emphasis added).

¹⁶⁸ *People v. Nguyen*, 62 Cal. Rptr. 3d 255, *review granted*, 169 P.3d 882 (Cal. 2007).