MAY 2010 – ADI NEWS ALERT

by
Elaine A. Alexander, Executive Director

This alert[1] covers: (1) reminders from the court on augment motions (showing good cause and filing early), shorter statements of the facts, and identification of client on cover of filings in multi-appellant cases; (2) update on the recent amendment to Penal Code section 4019; (3) apparent end of *Nguyen* issue.

Reminders from the Court

Accompanied by the ADI "ambassadors,"[2] I recently traveled to Divisions Two and Three to tour the courthouses and talk with the justices and managing attorneys. We came back with some reminders from the court about recurring matters. These include (with references to the ADI Criminal Appellate Practice Manual[3] for elaboration and to applicable rules of court or other authorities):

State why an augmentation for voir dire or opening statements is necessary or relevant to the appeal: In the Fourth District motions to augment with transcripts of voir dire or opening statements, or other matters, require a showing of good cause – reasons why the transcripts may be relevant to possible appellate issues. (ADI Manual, § 3.20; Cal. Rules of Court, rules 8.155, 8.50, 8.54, 8.340; *People v. Hagan* (1962) 203 Cal.App.2d 34, 39-40 [defendant not entitled to augmentation of record in absence of showing of good cause].) Counsel who also practice in the Second District may become confused, because that district's local rule 1 provides for automatic augmentation of jury voir dire and opening statements. The Fourth does not have such a rule, and so augmentations for these matters require case-specific justification.

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[1]My usual reminder: Counsel are responsible for all matters covered in e-mail alerts, newsletters, and other information made available to the panel. Past alerts and newsletters are at http://www.adi-sandiego.com/news_alerts.html and http://www.adi-sandiego.com/news_newsletters.html.

[2]Lynelle Hee and David Rankin visit Division Two on a regular basis; Neil Auwarter goes to Division Three. They are available to review the superior court file and exhibits in those counties on request of a panel attorney. See Anna Jauregui's article on the exhibit review process in the Fourth District, January 2010: http://www.adi-sandiego.com/articles.html.

[3]http://www.adi-sandiego.com/manual.html.

File augmentation requests promptly: Requests to augment or complete the record should be filed as soon as possible after receiving the record and determining that the additional material is needed – usually before a first extension request and certainly before a second. (ADI Manual, § 3.18.) Thus appellate counsel should attend to record completion early in the appeal, even if workload or other factors require extensions before the AOB can be filed. In dependency fast-track cases, the request must be filed within 15 days after receiving the record. (Cal. Rules of Court, rule 8.416(d)(2).)

Shorten the statement of the facts: This is an old refrain (complaint), especially in dependency cases, but worth repeating. A shorter statement of facts was the first thing one justice mentioned. Short, punchy statements that highlight the material facts, set a theme, and tell a story, eschewing unnecessary detail, are much more compelling than a tedious recitation of everything that witnesses said. As the ADI Manual says, § 5.16:

> The overall goal in presenting the facts is to start the job of persuading the court to reach the desired result. The facts offer a chance to tell a coherent story, to humanize the client, to set forth the basis for the legal arguments, and to build both counsel's and the client's credibility.

In other words, a statement should not be a mechanical regurgitation of the record but part of the job of persuasion. (It must of course comply with the usual rules for appellate briefs, as set out in the ADI Manual, § 5.17 et seq.)

Identify the client on the cover or first page: The cover – or first page if there is no cover – of documents filed should name the client on whose behalf it is submitted. (ADI Manual, § 5.3; rules 8.204(b)(10)(E), 8.360(a), 8.412(a), 8.416(a)(2).) This is especially important in multi-appellant cases; readers faced with a file containing several green-covered briefs need to know which brief goes with which client.

Amendment to Penal Code section 4019

Published cases on the retroactivity of the amendments to Penal Code section 4019 enacted in SBx3 18 are coming in quickly now. Thus far, two cases, including one from the Fourth District,[4] have agreed with the Attorney General that the change is prospective only. The rest have found it retroactive to cases not yet final before the effective date of the law, January 25, 2010. The cases are being collected on our website.[5] Further guidance is on the ADI homepage and in the news alerts of February 2 and 26.

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[4] *People v. Otubuah*, E047271, decided May 6, 2010, certified for publication.

[5] http://www.adi-sandiego.com/PDFs/4019_cases.pdf.

People v. Nguyen and 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. On April 19, the court denied certiorari in *Nguyen*. It 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 are now calling off the earlier advice. We no longer recommend the issue routinely be pursued in order to preserve it for federal review.[6] 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.

[6]In my opinion, certiorari in the Supreme Court was the most realistic federal remedy. Federal habeas corpus requires the state decision be 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).) Most federal circuits courts have reached the same conclusion as *Nguyen*. Accordingly, *Boyd v. Newland* (9th Cir. 2006) 467 F.3d 1139 held the Ninth Circuit's decision in *United States v. Tighe* (9th Cir. 2001) 266 F.3d 1187, reaching the opposite conclusion on the merits in a direct federal appeal, does not warrant habeas corpus relief from a state conviction.