

No. _____

IN THE
Supreme Court of the United States

JAN ROUVEN FUECHTENER,
Petitioner,

v.

UNITED STATES OF AMERICA.
Respondent.

**On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Due Process Clause of the Fifth Amendment is violated when an appeal as of right is heard and disposed of by a motions panel, rather than a merits panel.

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PETITION FOR A WRIT OF CERTIORARI

Jan Rouven Fuechtener respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The order of the court of appeals, App. 1, is unreported. The order of the court of appeals denying reconsideration of its order dismissing Fuecthener's appeal, App. 2, is also unreported.

JURISDICTION

The order of the court of appeals dismissing Fuecthener's appeal was entered March 9, 2020. App. 1. The order of the court of appeals denying reconsideration of its order dismissing Fuecthener's appeal was entered May 15, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

No person shall be ... deprived of life, liberty, or property, without due process of law.

U.S. Const. Amend. V.

STATEMENT OF THE CASE

Jan Rouven Fuechtener was convicted following the entry of a guilty plea. Fuechtener timely appealed from the district court's judgment.

Fuechtener argued in his appeal that, *inter alia*, the United States had breached the plea agreement by seeking the imposition of a fine. The United States moved for dismissal of Fuechtener's appeal, arguing that there was no breach of his plea agreement and that Fuechtener's other appellate claims were encompassed by his appeal waiver.

The court of appeals, over Fuechtener's objection, dismissed Fuechtener's appeal. The court of appeals' order was entered by a "motions panel" instead of a "merits" panel.

Fuechtener sought reconsideration of the Court's order dismissing his appeal. Fuechtener argued that it was inappropriate for a motions panel, as opposed to a merits panel, to fully adjudicate whether the United States had breached its plea agreement with Fuechtener. Fuechtener also argued that because his appeal was disposed of by a motions panel instead of a merits panel, he was now being deprived of the opportunity to seek rehearing en banc under Fed. R. App. P. 35.

The court of appeals denied Fuechtener's reconsideration motion without explanation.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's Practice Of Hearing & Disposing of Appeals by Motions Panels, Instead of Merits Panels, Violates Due Process

The Ninth Circuit has itself recognized that "Motions panels' orders are generally issued without [oral argument, on limited timelines, and in reliance on limited briefing." *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1263 (9th Cir. 2020). Additionally, the Ninth Circuit has also recognized that:

Reconsideration of a motions panel's decision by a merits panel also "differs in a significant way" from reconsideration of a merits panel's decision. A party that receives an unfavorable decision by a merits panel will have the opportunity to file a petition for panel rehearing, rehearing en banc, or petition for certiorari. Motions for reconsideration or modification of a motions panel's order are "discouraged," "disfavored by the court[,] and rarely granted." Ninth Circuit Rule 27-1 advisory committee note. For this reason, motions panel decisions are "rarely subjected" to a thorough reconsideration process; "[f]ull review of a motions panel decision will more likely occur only after the merits panel has acted." *Unilaterally binding later merits panels to the preliminary decisions made by motions panels prevents litigants from fully vindicating their appellate rights.*

E. Bay Sanctuary Covenant, 950 F.3d at 1263.

By virtue of 18 U.S.C. § 3742, 28 U.S.C. § 1291, and Fed. R. App. P. 35, Fuechtener had a Due Process right to have his appeal considered by a merits panel.

The Ninth Circuit's existing practice of adjudicating certain criminal appeals, like Fuechtener's, by motions panels instead merits panels violates the Fifth Amendment's guarantee to Due Process.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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