

23-6137 NO. 23- ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

*In re: Ronald Boyajian*

Petitioner

Supreme Court, U.S.  
FILED

OCT 18 2023

OFFICE OF THE CLERK

Ronald Boyajian,

Petitioner,

v.

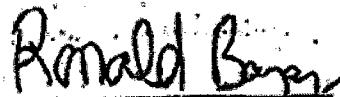
Mary Helen Murguia, Chief Circuit Judge, Susan Soong, Circuit Executive,  
Molly C. Dwyer, Clerk of the Court, Ryan Douglas Nelson, Circuit Judge,  
Andrew David Hurwitz, Circuit Judge, Andrew Jay Kleinfeld, Circuit Judge,

Respondents.

Of the United States Court of Appeals for the Ninth Circuit

Ninth Circuit Case No. 16-50327

PETITION FOR WRIT OF MANDAMUS



Ronald Gerard Boyajian  
Register no. 33900-112  
United States Penitentiary  
USP Terre Haute  
P.O. Box 33  
Terre Haute, Indiana 47808

Petitioner, Pro Se

## QUESTIONS PRESENTED

1. In an only appeal of right of a criminal judgment, did Respondents deny defendant-appellant Ronald Boyajian's ("Petitioner") Due Process in failing to provide a three-judge panel in deciding the merits?
2. Did Respondents further prejudice Petitioner on his only appeal of right in a *de facto* life sentence appeal by excluding from the panel an assigned judge whose *vote is known* favorable to as Petitioner?
3. Does a circuit judge's automatic recusal from a proceedings triggered by his failure to make arrangements to attend oral argument violate Petitioner's rights when Respondents knew the judge has elected not to attend hearing but fails to draw a replacement judge to reconstitute the statutory three judge panel?

## PARTIES TO THE PROCEEDING

Petitioner Ronald Boyajian is defendant-appellant below.

Respondents, each in their official capacity, are Ninth Circuit Court of Appeals Chief Judge Mary Helen Murguia, Circuit Judge Ryan Douglas Nelson, Senior Circuit Judge Andrew David Hurwitz, Senior Circuit Judge Andrew Jay Kleinfeld, Circuit Executive Susan Soong, Clerk of the Court Molly C. Dwyer.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

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## **TABLE OF AUTHORITIES**

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### **Cases**

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## **PETITION FOR WRIT OF MANDAMUS**

The Petitioner, Ronald Boyajian, Defendant-Appellant below, hereinafter “Petitioner” respectfully petitions, pursuant to Section 1651, Title 28, United States Code, and Rule 20.3 of the Supreme Court Rules, for a writ of mandamus, directed to the Ninth Circuit Court of Appeals over direct criminal appeal Case No. 16-50327. Petitioner seeks writ relief vacating an impermissible two-judge merits disposition (affirming the criminal judgment and 70 years sentence), and ordering a freshly constituted three-judge merits panel to hear his criminal appeal following *Nguyen v. United States*, 539 U.S. 69 (2003)., reaffirmed *Yovino v. Rizo*, 139 S. Ct. 706 (2019).

The Supreme Court has explained that “[t]he peremptory writ of mandamus has traditionally been used in the federal courts only ‘to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.’” *Will v. United States*, 389 U.S. 90, 95 (1967)(quoting *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26, 63 S.Ct. 938, 87 L.Ed. 1185 (1943)). The Court has stated further that “it is clear that only exceptional circumstances amounting to a judicial ‘usurpation of power’ will justify the invocation of this extraordinary remedy.” Id. (quoting *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 217, 65 S.Ct. 1130, 89 L.Ed. 1566 (1945)).

Petitioner requests enforcement of the statutory three-judge panel decide the merits of his criminal appeal. Respondents impermissibly arranged for a two-judge panel to decide and did decide his only appeal of right involving a judgment with 70 year prison sentence (which due to Petitioner's age is a *de facto* life sentence).

Further, the entire administration of justice process is corrupted in Petitioner's case and, to date, *in five additional cases* thus far identified involving the same Respondents. First, the Court's removal, exclusion or automatic recusal of the missing assigned judge was done in secret. Second, there is obvious covering over using fraudulent orders falsely stating the case is ordered submitted to an already recused judge (see sections below on automatic recusal) and fraudulent entries falsely stating the decision issued from the missing third judge. In fact, the two-judge so-called 'quorum' decision shows on its face this judge, whose name appears nowhere, had no part in the decision or its antecedent process. And, contrary to practice and norms of the circuit, the disappeared judge is nowhere referenced in the decision as having dropped out nor the category of the cause for dropping out of the case.

Finally, although Respondent Chief Judge and Respondent Circuit Executive were asked to investigate, neither did so. But far worse, Respondent Chief Judge having been requisitioned to conduct an inquiry instead joined the same panel (to break the tie in another 'quorum' case again after automatic recusal of the same

missing judge). Respondent Chief Judge who should have recused herself from this duty or at least disclosed the appearance of if not actual conflict of interest instead jumped to cede her administrative oversight duty by joining in the panel's ongoing wrongdoing as the new third judge.

Respondent Circuit Executive -- also asked to investigate-- (a) failed to caution Respondent Chief Judge to refrain from conduct appearing to sanction and perpetuate the panel misconduct and (b) failed to audit and correct the mishandling by Respondent Clerk authorizing coverup styled docket entries enabling the panel misconduct to fly under the radar. The term coverup is understatement. Even the Clerk's staff repeatedly quizzed about the missing judge insisted the judge was on the impacted case(s) citing as proof the order entries submitting the case to three judges and filing the three-judge issued decision and that in any event there was no indication anywhere in the CM/ECF system judge Kleinfeld is off the case but rather shows judge Kleinfeld is actively on the case nearly two months after the quorum decision issued without the third judge. In one instance, a cooperative staff of Respondent Clerk opened Petitioner's memorandum decision, when challenged to do so, and was surprised to see on the actual decision a two-judge quorum and not a three-judge decision as 'their' filing order erroneously states and their system erroneously indicates Judge Kleinfeld is on the case. In none of these quorum cases has Respondent Clerk of the Court corrected 'sua sponte' of the docket entries –not

in Petitioner's case where it was specifically advised of the error in the manner just described, nor in any of the impacted cases of the same panel. The erroneous docket entries are included in text of this petition in following sections.

This Petition has not been previously considered by the Court. However, while previously represented by appointed counsel below, on July 12, 2023, Petitioner submitted a pro se Emergency Application seeking a Stay of proceedings referencing the broken two judge merits panel so he could prepare and submit a Petition for Writ of Mandamus to this Court, case no. 23A112. The Court denied the Application for Stay on October 2. This Petition for Writ of Mandamus follows.

The Petition includes new facts and claims, including the new enlarged context of six cases including Petitioner conclusively identified as similarly deprived Due Process in their appeals before the same panel. Another development is Petitioner's status. On July 31, the usurping two-judge 'quorum' ordered Petitioner to proceed pro se on any petition for rehearing Dkt. 240 (denying motion for substitution of appointed counsel which motion was joined by then appointed counsel, and on August 31, denying appointment of counsel. Dkt. 248).

The Court should direct Respondents to vacate the improperly constituted 'quorum' Memorandum Disposition (affirmance unpublished, Dkt. 222-1 attached at Appendix A) and order a statutory three-judge panel to hear his only appeal of right, as it required in *Nguyen* and reaffirmed in passing in *Yovino v. Rizo*, 139 S.

Ct. 706 (2019)(citations) holdings it enforced against the Ninth Circuit.

## **OPINIONS AND ORDERS ENTERED**

On June 9, 2023, the Ninth Circuit issued a quorum Memorandum Decision NOT FOR PUBLICATION [Dkt. 222-1], attached at Appendix A.

## **JURISDICTION**

The United States Supreme Court has jurisdiction to hear and determine this Petition For Writ Of Mandamus under 28 U.S.C. § 1651(a) and Supreme Court Rule 20.3.

## **RELEVANT LEGAL PROVISIONS**

- I. Due Process Clause of the Fifth Amendment: "... nor be deprived of life, liberty, or property, without due process of law ...."
- II. Equal Protection Clause of the U.S. Constitution
- III. 28 U.S.C. 46(b) right to merits disposition by three-judge panel

## **RULE 20.1 STATEMENT**

Grant of the writ will be in aid of the Court's appellate jurisdiction. The Court previously intervened in the Ninth Circuit's mishandling of judicial panels of on the basis of protection of the judiciary in *Nguyen* and *Yovino*. The writ is necessary in order for the Court to reach this issue because Respondents sought to insulate from review by (a) not publishing decision, (b) docketing false and misleading order entries, and (c) secret automatic judicial recusal without notice to

Petitioner (or to any litigants in a growing total of six cases thus far uncovered of illicitly constituted two-judge merits panel with details shown in sections below.

Without the writ, the Court cannot reach this problem. The Court's discretionary review parameters for certiorari do not *nonpublished* direct criminal appeal cases particularly pro se case as Petitioner's is regrettably forcibly styled. Accordingly, the writ is necessary to allow the Court to act to protect the judiciary as explained in *Nguyen* and *Yovino*.

There exist truly exceptional circumstances that mandate the issuance of the writ. Here, the problem is aggravated, featuring a combination of the faults this Court found exceptional in *Nguyen* and in *Yovino*. First, Respondents committed *Nguyen* error in failing to provide and denying Petitioner a three-judge panel though no assigned judge is dead or resigned. Second, the usurping two judge 'quorum' barricaded the third judge (who is alive, well and judicially active) whose vote in Petitioner's case is known, being controlled by precedent the excluded judge himself decided. This is a variant of *Yovino* error. *Yovino* found unlawful inserting a dead judge's known vote. Here, Respondents excluded a known vote similarly 'gerrymandering' the electoral composition of the merits panel to predictably alter outcome.

In sum, mandamus is both warranted and necessary to enable the Court to reach the issues and which require confining the inferior court (Ninth Circuit) to

the lawful exercise of its jurisdiction.

## **STATEMENT OF THE CASE**

This case is Petitioner's only appeal of right in a wrongful conviction<sup>1</sup> with 70-year imprisonment which, given his age, is a sentence of gradual death by incarceration. Petitioner has been detained over 14 years in federal custody, the last seven of which were on direct appeal. Petitioner has asserted and maintains his factual innocence in all tribunals, from the originating courts of Cambodia where the conduct is alleged and in all U.S. courts where the Cambodian court case was transferred under pressure of the U.S. government.

Respondents' denying Petitioner his right of competent access to the courts—here by failing to provide a mandatory three-judge merits panel—is completed. On whatever pretense an alive judicially active and well Judge Kleinfeld was not allowed or accommodated to perform his assigned oral argument, conference, and decisional obligations toward Petitioner.

Respondents' denial of Petitioner's right of access to the courts compels use

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<sup>1</sup> Petitioner should never have been prosecuted, indicted, or convicted. With regard to the trial court, it was due to government misconduct that Petitioner was (a) blocked from putting on an affirmative (exculpatory) DNA defense based on the government's own evidence that pointed to another man, and (b) blocked from presenting his (2016) jury evidence that the only charged victim in this case, SL, had previously testified exonerating him before a three-judge tribunal in his December 2009 trial in absentia facilitated by the U.S. Department of State in a Cambodian courtroom with U.S. officials in attendance.

of the Extraordinary Writ. Petitioner asserts the Due Process claim meriting writ relief is broader than right of access to the court(s) as meant here the right to a statutory three-judge panel to decide the merits, where the disappeared judge is not dead or resigned after case submission as required by this Court, see *Yovino* (citations).

The two-judge panel invalidly clothes itself with judicial authority as ‘quorum’ but the facts show no basis for invocation of quorum power under 20 U.S.C. § 46(d) or Ninth Circuit General Order 3.2(h) both cited in the two-judge issued memorandum of decision. Again, the excluded Judge Kleinfeld is neither dead, disabled nor resigned. The problem intensifies as the missing Judge Kleinfeld’s vote is “known”, bound by law (precedent Judge Kleinfeld decided), requiring vacating Petitioner’s judgment on the very claim Judge Kleinfeld had decided in an earlier case.

Petitioner is uniquely prejudiced by the dysfunction of the judiciary here. The exclusion of Judge Kleinfeld and the proper application his controlling precedent which his participation would have ensured vacated judgment and sentence instead allowed the usurping two-judge quorum to affirm (Dkt. 222-1. Appendix. A). At least a dissent potentially forcing publication and a path to en banc review or flipping the panel 3-0 in Petitioner’s favor vacating conviction are all cards taken off the table when Judge Kleinfeld disappeared.

### **A. Chief Judge Is Compromised**

Petitioner immediately objected pro se to the broken panel excluding Judge Kleinfeld Dkt. 224, see June 15 correspondence attached at Appendix B, writing to Respondent Chief Judge Mary Murguia and separately to Circuit Executive Susan Soong requesting they each open an investigation into this panel irregularities. This correspondence was mailed in care of Respondent Clerk of the Court Molly Dwyer and for purposes of this Petition is presumed delivered to addressees. Moreover, in an abundance of caution, Petitioner published his correspondence, Dkt. 227 attached at Appendix C.

There was neither administrative response nor action following his objection and request for investigation. To the contrary, Respondent Chief Judge joined the panel to decide on July 7 another ‘quorum’ case but in which Judge Nelson and Judge Hurwitz disagreed (see referenced below case 19-70527 *Yan Jin v. Merrick Garland*), rather than properly recuse herself in the wake of Petitioner’s *weeks earlier* June 15 request she investigate this panel for irregularities.

### **B. Automatic secret recusal does not comport with Rule of Law**

On May 10, 2023, at oral argument and, again, on June 9 a quorum of two judges deprived Petitioner the participation of the third panel member, Judge Andrew Kleinfeld (Fairbanks, Alaska). Judge Kleinfeld being the majority judge in the precedent requiring unconditionally vacating Petitioner’s judgment is therefore

a judge whose vote may be considered “known” as he is bound as a matter of law to follow his own precedent (as are the two rebelling ‘quorum’ judges).

The panel met on Monday, May 8, and on Wednesday, May 10, 2023. At each session Judge Kleinfeld was absent for all cases. At the outset of each session the presiding judge announced that Judge Kleinfeld is not present but he is fully prepared and will listen to the arguments of this hearing and participate in conference and in the decision. For example, Judge Nelson opened the May 10 hearing thus:

Well, Good afternoon and welcome to the Ninth Circuit.

We’re glad to have you here in person.

Judge Hurwitz and I are glad to be with you.

Judge Kleinfeld as you know is the third member of our panel.

He’s fully prepared for these cases.

Unfortunately, he is unable to attend argument but he will participate in full.

He’ll listen to the arguments and participate in full in the decision in the case.

So, we’ll go ahead and proceed with the docket set for today. ...

Judge Nelson’s May 10 introductory remarks have been excised from the Court’s website archived version of the hearing’s video and audio files. Petitioner is informed that several lawyers representing different clients at hearing on May 8 report the same introductory remarks. These introductory remarks similarly are excised from the May 8 video and audio files archived on Ninth Circuit Website.

On May 11, the day following hearing, his then counsel wrote to Petitioner:

“Yesterday oral argument was held in your case. Judge Kleinfeld did not participate, but will listen to oral argument. Apparently, he was unable to connect electronically to the Court's system (he did the same in an argument held the previous day).

The docket entry for the order submitting the case shows the case was submitted to three judges including Judge Kleinfeld:

05/10/2023 218 ARGUED AND SUBMITTED TO ANDREW J. **KLEINFELD**, ANDREW D. HURWITZ and RYAN D. NELSON. The audio and video recordings of this hearing are available on our website at <http://www.ca9.uscourts.gov/media/>. [12713355] (BG) [Entered: 05/10/2023 03:33 PM]

Similarly, the docket also shows the decision issued from the three judges including Judge Kleinfeld.

06/09/2023 222 FILED MEMORANDUM DISPOSITION (ANDREW J. **KLEINFELD**, ANDREW D. HURWITZ and RYAN D. NELSON) AFFIRMED. FILED AND ENTERED JUDGMENT. 12732264] (EHC) [Entered: 06/09/2023 08:06 AM]

Contrary to the above order filing the memorandum by three judges, Judge Kleinfeld in fact had no part in the decision. In their Memorandum Disposition caption page Judges Nelson and Hurwitz invoked the quorum power. Judge Kleinfeld's name appears nowhere.

Judges Nelson and Hurwitz invoke jurisdiction to decide the case by two

judges under the quorum power citing General Order 3.2(h) and 28 U.S.C. 46(d) Memorandum Decision see p.1 footnote by asterisk. Both provisions specifically address when a judge dies or resigns *after* submission of the case.

**C. Judge Kleinfeld is not dead, disabled or resigned**

The Ninth Circuit website shows Judge Kleinfeld is judicially active signing dispositions with the same panel --and another panel-- through the relevant period. See attached Kleinfeld signed decisions at Appendix D. Judge Kleinfeld is also livestreamed socially engaging in public among his professional peers. See attached event announcements for Tanana Valley Bar Association “hosted roasted toasted” Judge Kleinfeld at Bobby’s Downtown in Fairbanks on September 22, Appendix E.

**D. Judge Kleinfeld automatically recused from all argued cases**

The reasonable inference from the record is that Judge Kleinfeld recused from all argued cases on this panel. This amounts to automatic recusal. It was the fact of his nonattendance at oral argument that controlled his recusal, bearing in mind that Judge Kleinfeld is judicially active signing the disposition of the other concurrently disposed panel cases which were submitted on those hearing dates without oral argument.

This automatic recusal driven by nonparticipation at oral argument implies it was inappropriate for the panel to order the case submitted to Judge Kleinfeld at

the end of the oral argument in Petitioner's case and in the other five below referenced cases Judge Kleinfeld missed oral argument from which Judge Kleinfeld automatically recused, i.e., not actually on the panel at the time of submission being the end of the hearings he missed. For example, Judge Kleinfeld's disappearance for Petitioner's case is completed prior to the submission of the case but certainly no later than before issuance of the quorum decision—as in the other five below referenced cases. This means the order filing the decision as issued by Judge Kleinfeld is false as the quorum decision nowhere bears Judge Kleinfeld's name.

(i). Factual support to draw inference of automatic recusal

The calendar for the panel session which took place on May 8 and May 10, 2023, is attached at Appendix F. Judge Kleinfeld listed for each panel session on both days was absent from all panel hearings May 8, fully two days *preceding* his absence from Petitioner's May 10 oral argument and all other oral arguments that date. Screenshots from the hearings show that Judge Kleinfeld is not present at all five cases with oral arguments over the panel's two days of sessions, attached at Appendix G.

Judge Kleinfeld is excluded from the resulting dispositions on all six oral argument cases he did not attend. See quorum invocation uniformly across these case dispositions, quorum dispositions attached at Appendix H. Tellingly, Judge

Kleinfeld joined disposition in all four cases submitted without argument.

The following chart summarizes Judge Kleinfeld's actions with this panel:

Date	Case no.	Case Name	Oral Argument	Kleinfeld signed disposition (y/n)
May 8	18-71255	Maria Guardado v. Merrick Garland	no	yes
May 8	20-70469	Elmer Hernandez-Tovar v. Merrick Garland	no	yes
May 8	19-70527	Yan Jin v. Merrick Garland	yes	No ( <b>quorum</b> )
May 8	20-50182	USA v. Sylvia Olivas	yes	No ( <b>quorum</b> )
May 8	22-55614	Roger Parker v. County of Riverside	yes	No ( <b>quorum</b> )
May 10	20-72055	Pedro Cortez-Arreola v. Merrick Garland	no	yes
May 10	21-50094	USA v. Robert Cota, Jr.	no	yes
May 10	16-50327	USA v. Ronald Boyajian	yes	No ( <b>quorum</b> )
May 10	20-50144 21-50175	USA v. Yi-Chi Shih	yes	No ( <b>quorum</b> )

The chart shows a pattern – in all five cases Judge Kleinfeld was not present for oral argument the quorum power is invoked. This shows Judge Kleinfeld automatically recused for cases he did not hear. Automatic recusal is not consistent with the docketed entries that the case at the end of oral argument was submitted to all three judges. See above Dkt. 218 clerk's text entry. That is a fraudulent order on its face. Similarly, there is a fraudulent order filing the disposition specifying it issued by Judge Kleinfeld, Nelson and Hurwitz when in fact the disposition is a

quorum decision by only two judges without Judge Kleinfeld.

Similar misleading and apparently fraudulent orders for case submission and orders for issuance of the disposition were placed on the dockets of all five 'quorum' cases. The fake orders in these other automatic recusal / quorum cases are shown below with some additional orders provided for context where useful:

19-70527 Yan Jin v. Merrick Garland

- 05/08/2023 49 ARGUED AND SUBMITTED TO ANDREW J. **KLEINFELD**, ANDREW D. HURWITZ and RYAN D. NELSON. The audio and video recordings of this hearing are available on our website at <http://www.ca9.uscourts.gov/media/>. [12711367] (BG) [Entered: 05/08/2023 04:17 PM]
- 07/07/2023 51 FILED MEMORANDUM DISPOSITION WITH DISSENT (MARY H. MURGUIA, ANDREW D. HURWITZ and RYAN D. NELSON) PETITION GRANTED and REMANDED. FILED AND ENTERED JUDGMENT. [12750285] (AKM) [Entered: 07/07/2023 08:53 AM]
- 08/29/2023 52 MANDATE ISSUED.(MHM, ADH and RDN) [12782421] (HH) [Entered: 08/29/2023 09:31 AM]

20-50182 United States v. Sylvia Olivas

- 05/08/2023 69 ARGUED AND SUBMITTED TO ANDREW J. **KLEINFELD**, ANDREW D. HURWITZ and RYAN D. NELSON. The audio and video recordings of this hearing are available on our website at <http://www.ca9.uscourts.gov/media/>. [12711370] [20-50182, 21-50270] (BG) [Entered: 05/08/2023 04:18 PM]
- 06/21/2023 70 FILED MEMORANDUM DISPOSITION (ANDREW J. **KLEINFELD**, ANDREW D. HURWITZ and RYAN D. NELSON) AFFIRMED. FILED AND ENTERED JUDGMENT. [12739744] [20-50182, 21-50270] (MM) [Entered: 06/21/2023 08:28 AM]
- 09/27/2023 77 Filed order (ANDREW D. HURWITZ and RYAN D. NELSON): The panel has voted to deny the petition for panel rehearing. Judge R. Nelson voted to deny the petition for rehearing en banc and Judge Hurwitz so recommended. The full court was advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear

the matter en banc. The petitions for panel rehearing and rehearing en banc are DENIED. No further petitions for rehearing will be accepted.  
[12799663] [20-50182, 21-50270] (AF) [Entered: 09/27/2023 10:02 AM]

10/05/2023 78 MANDATE ISSUED.(AJK, ADH and RDN) [12804924] [20-50182, 21-50270] (BJK) [Entered: 10/05/2023 07:45 AM] 22-55614 Roger Parker v. County of Riverside

21-50270 United States v. Michael Salinas

05/08/2023 60 ARGUED AND SUBMITTED TO ANDREW J. KLEINFELD, ANDREW D. HURWITZ and RYAN D. NELSON. The audio and video recordings of this hearing are available on our website at <http://www.ca9.uscourts.gov/media/>. [12711370] [20-50182, 21-50270] (BG) [Entered: 05/08/2023 04:18 PM]

06/21/2023 61 FILED MEMORANDUM DISPOSITION (ANDREW J. KLEINFELD, ANDREW D. HURWITZ and RYAN D. NELSON) AFFIRMED. FILED AND ENTERED JUDGMENT. [12739744] [20-50182, 21-50270] (MM) [Entered: 06/21/2023 08:28 AM]

09/27/2023 68 Filed order (ANDREW D. HURWITZ and RYAN D. NELSON): The panel has voted to deny the petition for panel rehearing. Judge R. Nelson voted to deny the petition for rehearing en banc and Judge Hurwitz so recommended. The full court was advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. The petitions for panel rehearing and rehearing en banc are DENIED. No further petitions for rehearing will be accepted.  
[12799663] [20-50182, 21-50270] (AF) [Entered: 09/27/2023 10:02 AM]

10/05/2023 69 MANDATE ISSUED.(AJK, ADH and RDN) [12804924] [20-50182, 21-50270] (BJK) [Entered: 10/05/2023 07:45 AM]

22-55614 Roger Parker v. County of Riverside, et al

05/08/2023 42 ARGUED AND SUBMITTED TO ANDREW J. KLEINFELD, ANDREW D. HURWITZ and RYAN D. NELSON. The audio and video recordings of this hearing are available on our website at <http://www.ca9.uscourts.gov/media/>. [12711372] (BG) [Entered: 05/08/2023 04:19 PM]

08/15/2023 43 FILED PER CURIAM OPINION (ANDREW D. HURWITZ and RYAN D. NELSON) (Concurrence by Judge R. Nelson) REVERSED AND REMANDED. Each party to bear its own costs. FILED AND ENTERED JUDGMENT. [12774150]--[Edited: Updated docket text to reflect content of filing. 08/15/2023 by SLM] (MM) [Entered: 08/15/2023 09:11 AM]

- 09/06/2023 44 MANDATE ISSUED.(AJK, ADH and RDN) [12787040] (NAC) [Entered: 09/06/2023 07:58 AM]
- 20-50144 (docket entries cross appeal 21-50175 not shown) USA v. Yi-Chi Shih
- 05/10/2023 89 ARGUED AND SUBMITTED TO ANDREW J. **KLEINFELD**, ANDREW D. HURWITZ and RYAN D. NELSON. The audio and video recordings of this hearing are available on our website at <http://www.ca9.uscourts.gov/media/>. [12713358] [20-50144, 21-50175] (BG) [Entered: 05/10/2023 03:34 PM]
- 07/18/2023 95 FILED OPINION (ANDREW J. **KLEINFELD**, ANDREW D. HURWITZ and RYAN D. NELSON) We REVERSE the judgment of acquittal on Count 2 and order reinstatement of the guilty verdict on that count, AFFIRM the convictions on all other counts, and REMAND for further proceedings consistent with this opinion. Shih's motion for judicial notice of two government manuals and two agency specifications, Dkt. 92, is GRANTED. Opinion by Judge Hurwitz. FILED AND ENTERED JUDGMENT. [12756867] [20-50144, 21-50175] (AKM) [Entered: 07/18/2023 09:01 AM]
- 09/25/2023 101 Filed order (ANDREW D. HURWITZ and RYAN D. NELSON) The panel has voted to deny the petition for panel rehearing. Judge Nelson voted to deny the petition for rehearing en banc, and Judge Hurwitz so recommended. The petition for rehearing en banc was circulated to the judges of the Court, and no judge requested a vote for en banc consideration. Fed. R. App. P. 35. The petition for panel rehearing and rehearing en banc, Dkt. [100], is DENIED. [12797951] [20-50144, 21-50175] (WL) [Entered: 09/25/2023 09:39 AM]
- 10/04/2023 106 Filed order (ANDREW D. HURWITZ and RYAN D. NELSON) Shih's motion to stay the mandate, Dkt. [102], was denied by the judges on the panel, who authorized the Clerk to enter an appropriate order. See Ninth Circuit General Order 4.6(c). The motion for reconsideration, Dkt. [105], is DENIED. [12804097] [20-50144, 21-50175] (WL) [Entered: 10/04/2023 10:14 AM]
- 10/12/2023 107 MANDATE ISSUED.(AJK, ADH and RDN) [12808468] [20-50144, 21-50175] (BJK) [Entered: 10/12/2023 09:35 AM]

Additionally, none of these six quorum case dockets (includes Petitioner's) have any notation of judicial recusal. This is consistent with the complete lack of notice to the litigants of

Judge Kleinfeld's withdrawal or nonparticipation in the case, contrary to Judge Nelson's pronouncements to all litigants at the outset of each day's hearing.

#### **E. Respondents' misconduct prejudiced Petitioner**

Respondents' official misconduct violated Petitioner's Fifth Amendment right to Due Process of Law and his Constitutional right to Equal Protection of the laws. Everyone else in the United States gets a merits decision from a three-judge panel of their respective circuit court of appeals, whether the controversy is civil and other matters not even involving the serious consequences of liberty and death by incarceration. Petitioner is oppressed by the failure of the judiciary and this panel of the Ninth Circuit, and its administrative oversight, to fulfill its obligations.

In Petitioner's case, uniquely, there is an additional compounded impropriety arising from the *Yovino* error component, that is, Respondents' manipulation of the electoral composition of the panel in a manner impacting the outcome adverse to Petitioner. By actively or constructively removing or excluding Judge Kleinfeld with him his 'known' vote from oral augment Respondents clearing their path to an affirmance unclouded by dissent pointing out its contrary to Ninth Circuit precedent.

A scant four years ago, the Court forbade the Ninth Circuit from electoral manipulations impactful of decisions. See *Yovino*, Id. (e.g., 708 "This justification is inconsistent with well-established judicial practice, federal statutory law, and

judicial precedent", 709 "what the Ninth Circuit did here was unlawful").

Two decades earlier, as it recalled in *Yovino*, the Court had admonished Ninth Circuit for commission of irregularities reminiscent of Petitioner's present predicament. The Court required vacating of appellate decisions reached by an improperly constituted panel which though it appeared to provide a 'quorum' nonetheless violated principles fundamental to operation and organization of the judiciary. See *Nguyen*, Id., 82-83 (footnote omitted):

Second, the statutory authority for courts of appeals to sit in panels, 28 U. S. C. § 46(b), **requires the inclusion of at least three judges in the first instance**. Fn. 16 As the Second Circuit has noted, Congress apparently enacted § 46(b) in part "to curtail the prior practice under which some circuits were routinely assigning some cases to two-judge panels." *Murray v. National Broadcasting Co.*, 35 F. 3d 45, 47 (1994). It is "clear that the statute was not intended to preclude disposition by a panel of two judges in the event that one member of a three-judge panel to which the appeal is assigned becomes unable to participate," *ibid.*, but it is less clear whether the quorum statute offers postjudgment absolution for the participation of a judge who was not otherwise competent to be part of the panel under § 292(a).

Thus, **although the two Article III judges who took part in the decision of petitioners' appeals would have constituted a quorum if the original panel had been properly created, it is at least highly doubtful whether they had any authority to serve by themselves as a panel**. In light of that doubt, it is appropriate to return these cases to the Ninth Circuit for fresh consideration of petitioners' appeals by a properly constituted panel organized "comformably to the requirements of the statute."

Fn. 16. Title 28 U. S. C. § 46(b) provides, in pertinent part: "In each circuit the court may authorize the hearing and determination of cases and controversies by separate **panels, each consisting of three judges**, at least a majority of whom shall be judges of that court,

unless such judges cannot sit because recused or disqualified . . . ."

When, as here, *prior* to the submission of a case, an assigned merits panel judge cannot fulfill their obligations, the court substitutes another judge to reconstitute the three-judge panel. The court did not provide a substitute judge. By all measures, this two-judge quorum was unlawfully constituted.

Crucially, in Petitioner's case, the quorum excluding Judge Kleinfeld removed the majority judge who decided *United States v. Pepe*, 895 F.3d 679 (9th Cir. 2018). *Pepe* is a precedential decision holding that relief for *Pepe* error is the unconditional vacating of judgment, that is, relief is *not* subject to harmless error review. Petitioner presents a claim informed and controlled by *Pepe*'s holding. Therefore, Judge Kleinfeld's participation and influence on the panel is of paramount importance to the rendering of justice for Petitioner. Judge Kleinfeld must stand for, as a matter of law that precedent including his own be followed, unconditionally vacating the conviction on Petitioner's principal charge which would unravel the entire judgment.

Judge Kleinfeld whose vote predetermined by his own precedent presents a clear impediment to affirmance was put a position of automatic recusal. Respondents glossed over this violation of three-judge rule, where, in fact, Judge Kleinfeld is alive, judicially active and *not recused for any reason specific to this case he similarly automatically recused from the other five cases in which he failed*

*to appear for oral argument.*

Petitioner tried to obtain a remedy. He asked [then] counsel --to no avail-- to take the necessary steps to remedy the broken panel. While represented, he filed a pro se “Objection To Oral Argument Before A Broken Panel That Excluded Judge Kleinfeld Deprives Due Process, Equal Protection And Severely Prejudices His Appeal.” Dkt. 224, attached at Appendix B ((see p.1-5, and p. 12 (autonomy rights confer standing to object pro per while represented by counsel) pertinent to this Petition)). As already noted above, while represented he requested assistance from Respondent Chief Judge Mary Murguia and Respondent Circuit Executive Susan Soong for investigation into the *de facto* exclusion of Judge Kleinfeld and his ‘known’ vote from his panel. Dkt. 227, attached at Appendix C. No response or action followed.

### **Reasons for Granting the Writ**

Petitioner, one of six cases he has discovered thus far, shows Respondents disregarded and violated the statutory obligation three judges decide a case on the merits. This departure from the rule practice and norms of the Ninth Circuit, per mention statute and law set by this Court in *Nguyen* and reaffirmed in *Yovino*, took place without notice to Petitioner (or to any of the other half dozen litigants which includes at this point about a dozen parties). Docketing of erroneous if not fraudulent orders falsely submitting the case(s) at end of oral argument he did not

attend to already automatically recused Judge Kleinfeld and then weeks later filing decisions stating falsely they issued from Judge Kleinfeld when actually the quorum decisions lack Judge Kleinfeld's name anywhere constitutes coordinated secrecy and coverup which adds troubling layers to the core impropriety of being impermissibly denied a three-judge merits decision.

Under these extraordinary conditions, the writ is necessary to promote respect for rule of law on matters the Court's already admonished the Ninth Circuit in *Nguyen* and *Yovino*.

#### **A. Petitioner's Due Process Rights**

The writ should be granted because Respondents obstructed Petitioner's Due Process and Equal Protection including right of access to the courts with a three-judge merits decision. Denial of Petitioners right to access jurist Kleinfeld, so clearly vital to Petitioner's appeal, especially prejudiced Petitioner uniquely aggravating the denial of right to Due Process.

### **CONCLUSION**

Due Process in this nation has long settled procedure requiring three-judge panel decide circuit level cases on the merits. Petitioner has presented six cases of apparent automatic recusal of a judge (Kleinfeld) who missed oral argument, in the wake of which the two-judge residuum elected not to draw another judge to replace Judge Kleinfeld but instead straightaway issued merits decisions in all six cases

invoking their quorum power (in one case the Chief Judge joined to break a tie vote in the two-judge quorum).

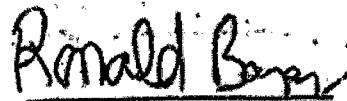
It is noteworthy that the very circuit the Court previously admonished in *Nguyen* and in *Yovino* continues to mishandle its obligations toward six sets of litigants, including Petitioner. The quorum was assisted in shielding its impropriety from scrutiny by faked misleading and false entries on the dockets of all six cases. Though request, oversight was nonexistent and the Chief Judge in fact compromised shown by her joining the panel on a case *after being asked to investigate this panel's irregularities*. Petitioner's criminal case disposition being unpublished discourages if not renders impossible selection for certiorari review under the court's long-prevailing discretionary review parameters.

Accordingly, mandamus provides the only means this Court can exercise its appellate jurisdiction to enforce the three-judge rule for merits decision. Mandamus allows the Court "to confine an inferior court to a lawful exercise of its prescribed jurisdiction." *Will*, Id. By writ, the Court can here enforce its holdings in *Nguyen* and *Yovino* against the same court of appeals it previously admonished for mishandling panel compositions in merits cases. In Petitioner's case, there is a unique feature of the combination of *Nguyen* error (denial of statutory and due process right to three judge panel) and *Yovino* error (gerrymandering electoral composition of the panel). The Court should, following *Nguyen*, vacate the

improperly constituted quorum's Memorandum Disposition and order a properly constituted statutory three-judge panel to hear Petitioner's appeal.

Dated: October 12, 2023

Respectfully submitted,



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