

**District of Columbia
Court of Appeals**

Nos. 18-CO-0289 & 20-CF-0190

GLENN ARTHUR SMITH, JR.,
Appellant,



v.

2011-CF1-013068

UNITED STATES,
Appellee.

BEFORE: Blackburne-Rigsby,* Chief Judge, and Beckwith, Easterly, Deahl,
Howard, AliKhan,* and Shanker, Associate Judges, and Fisher,*
Senior Judge.

ORDER

On consideration of appellant's petition for rehearing or rehearing en banc, appellee's opposition to appellant's petition, and amicus curiae Public Defender Service's memorandum in support of appellant's petition; and it appearing that the majority of participating judges voted to grant the petition for rehearing en banc, it is

ORDERED by the merits division* that appellant's petition for rehearing is denied. It is

FURTHER ORDERED that appellant's petition for rehearing en banc is granted and that the opinion and judgment of February 2, 2023, are hereby vacated. It is

FURTHER ORDERED that the Clerk shall schedule this matter for argument before the court sitting en banc as soon as the calendar permits. It is

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FURTHER ORDERED that appellant shall file a brief within 30 days from the date of this order; appellee shall file a responsive brief within 30 days after the filing of appellant's opening brief; and any reply brief shall be filed within 21 days thereafter. Any amicus brief shall be filed within 7 days of the opening brief of the party it supports. These new briefs shall be specifically designed for consideration by and addressed to the en banc court and shall supersede all briefs previously filed in these appeals. The parties should focus their briefs on the *Batson* issue addressed in Part II.A of the division's opinion. See *Batson v. Kentucky*, 476 U.S. 79 (1986).

PER CURIAM

Judges Beckwith, Easterly, and McLeese did not cast a vote on this petition and originally did not participate in its consideration. That left just five judges in regular active service to vote on the petition for rehearing en banc, and, while a majority of those judges voted in favor of rehearing en banc, the court stands equally divided on whether it is empowered to grant an en banc petition with fewer than six judges participating in its consideration. Compare D.C. Code § 11-705(d) ("A rehearing before the court in banc may be ordered by a majority of the judges of the court in regular active service."), with D.C. Code § 11-706(c) ("six judges shall constitute a quorum of the court sitting in banc"). In light of that uncertainty, Judges Beckwith and Easterly have decided to participate in considering this petition after having satisfied themselves that they did not have any direct involvement in this case while employed at the Public Defender Service, while Judge McLeese remains recused. See *Spencer v. United States*, Nos. 13-CF-85, 13-CF-96, 13-CF-105 (joint statement of Beckwith, Easterly, and McLeese, JJ., regarding their approaches to recusal) (July 19, 2016). With the participation of Judges Beckwith and Easterly, there remains a majority for granting the petition and the petition is therefore granted.

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Copies emailed to:

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