

# District of Columbia Court of Appeals

No. 02-CF-1197

ARNELL W. SHELTON,

Appellant,

FEL847-01

v.

UNITED STATES,

Appellee.

BEFORE: Washington, Chief Judge; \*Ruiz, Glickman, \*\*Fisher, Blackburne-Rigsby, Thompson, and Oberly, Associate Judges; \*\*\*Reid, Associate Judge Retired; \*Schwelb and \*King, Senior Judges.

## ORDER

On consideration of appellee's petition for rehearing or rehearing en banc, and the opposition thereto, it is

ORDERED by the merits division\* that the petition for rehearing is granted, the opinion of the court (reported at 983 A. 2d 363) is vacated, and the amended opinion, which omits the discussion of "admission by conduct", and which is appended to this order, is substituted therefor. A majority<sup>1</sup> of the division concludes as follows:

1. Whether proof of the prosecutor's Brady violation at appellant's first trial should have been received in evidence as an "admission by conduct", *i.e.*, as evidence of the government's consciousness that its case was weak, is a difficult question of first impression as to which reasonable judges may disagree;
2. Resolution of that question is unnecessary to the disposition of this appeal, since all members of the division agree that any error in excluding such evidence was harmless, and that appellant's conviction must be affirmed;
3. There is substantial doubt whether this claim of error was preserved.

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<sup>1</sup>Associate Judge Ruiz dissents and adheres to the original opinion of the court. She has filed a concurrence to the amended opinion.

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Under these circumstances, and upon reflection, a majority of the division is of the opinion that resolution of the above-described question of first impression should not be undertaken in a case in which any discussion of that question has no effect on the disposition of the appeal. It is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

\*\*Judge Fisher is recused from this case.

\*\*\*Judge Reid was an Associate Judge of the court at the time of argument. Her status changed to Associate Judge, Retired, on April 7, 2011.

Copies to:

Honorable Frederick H. Weisberg

Clerk, Superior Court

James Klein, Esquire  
Public Defender Service

Roy W. McLeese, III, Esquire  
Assistant United States Attorney

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