Supplementary Material

Chapter 11: The Contemporary Era—Criminal Justice/Juries and Lawyers/Lawyers

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Husske v. Commonwealth, 252 Va. 203 (1996)

Paul Josef Husske was arrested and charged with rape, robbery, and breaking and entering. Before his trial, Hussey asked the trial judge to appoint an expert to help his attorneys challenge the DNA evidence that the prosecution planned to use at the trial. This request was refused. At trial, two prosecution experts testified that Husske's DNA profile was a near perfect match with the DNA of the person who actually committed the rape. The judge in the bench trial found Husske guilty and sentenced him to ninety years in prison. Husske appealed that sentence, claiming that the refusal to provide him with a DNA expert violated the due process and equal protection clauses of the Fourteenth Amendment. The Virginia Court of Appeals agreed that he was constitutionally entitled to a DNA expert. Virginia appealed to the Supreme Court of Virginia.

The Virginia Supreme Court by a 5–1 vote reinstated Husske's conviction. Justice Hassell's majority opinion ruled that Husske had not demonstrated a particularized need for expert assistance. Under what conditions did Justice Hassell maintain that an indigent had a constitutional right to experts financed by the state? Why did he think Husske did not demonstrate those conditions? Why did Justice Poff disagree? When do you believe a state has a constitutional duty to pay for a defense expert? In every case when the prosecution relies on expert testimony?

JUSTICE HASSELL, delivered the opinion of the Court.

The primary issue we consider in this appeal is whether an indigent defendant has made the particularized showing necessary to require the Commonwealth, under the Due Process and Equal Protection clauses of the Fourteenth Amendment of the federal Constitution, to supply at its expense a DNA expert to assist the defendant.

The defendant, relying principally upon *Ake v. Oklahoma* (1985), asserts that the Due Process and Equal Protection clauses of the Fourteenth Amendment required that the trial court appoint, at the Commonwealth's expense, an expert to help him challenge the Commonwealth's forensic DNA evidence. The Commonwealth asserts that the defendant has no constitutional right under the Due Process or Equal Protection clauses for the appointment, at the Commonwealth's expense, of a DNA expert.

. . . The Supreme Court in [*Ake*] concluded that the Due Process clause's guarantee of fundamental fairness is implicated

> when [an indigent] defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, [and that in such circumstances] the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

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Our research reveals that most courts which have considered the question whether an indigent defendant is entitled to the appointment of a non-psychiatric expert have applied the rationale articulated in *Ake*, and, those courts have held that the Due Process and Equal Protection clauses require the

appointment of non-psychiatric experts to indigent defendants depending upon whether the defendants made a particularized showing of the need for the assistance of such experts.

We are of opinion that *Ake* . . . require[s] that the Commonwealth of Virginia, upon request, provide indigent defendants with "the basic tools of an adequate defense," and, that in certain instances, these basic tools may include the appointment of non-psychiatric experts. This Due Process requirement, however, does not confer a right upon an indigent defendant to receive, at the Commonwealth's expense, all assistance that a non-indigent defendant may purchase. Rather, the Due Process clause merely requires that the defendant may not be denied "an adequate opportunity to present [his] claims fairly within the adversary system."

Moreover, an indigent defendant's constitutional right to the appointment of an expert, at the Commonwealth's expense, is not absolute. We hold that an indigent defendant who seeks the appointment of an expert witness, at the Commonwealth's expense, must demonstrate that the subject which necessitates the assistance of the expert is "likely to be a significant factor in his defense," and that he will be prejudiced by the lack of expert assistance. An indigent defendant may satisfy this burden by demonstrating that the services of an expert would materially assist him in the preparation of his defense and that the denial of such services would result in a fundamentally unfair trial. The indigent defendant who seeks the appointment of an expert must show a particularized need:

> 'Mere hope or suspicion that favorable evidence is available is not enough to require that such help be provided.' . . . 'This particularized showing demanded . . . is a flexible one and must be determined on a case-by-case basis.' . . . The determination . . . whether a defendant has made an adequate showing of particularized necessity lies within the discretion of the trial judge.
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> . . .

Here, we are of opinion that the trial court did not err by refusing to appoint a DNA expert witness to assist Husske with the preparation of his defense. As we previously stated, an indigent defendant who seeks the appointment of an expert, at the Commonwealth's expense, must show a particularized need for such services and that he will be prejudiced by the lack of expert assistance. The defendant failed to meet these requirements. At best, the defendant asserted, inter alia, that: DNA evidence is "of a highly technical nature;" he thought it was difficult for a lawyer to challenge DNA evidence without expert assistance; and he had concerns about the use of DNA evidence because "the Division of Forensic Science [was] no longer [conducting] paternity testing in [c]riminal cases." The defendant's generalized statements in his motions simply fail to show a particularized need.

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JUSTICE POFF, concurring in part and dissenting in part.

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The *Ake v. Oklahoma* (1985) rule applies only when the defendant makes a "threshold showing" that the assistance of an expert to confront the prosecution will be "a significant factor at trial". In satisfying that requirement, the defendant's burden is twofold. The accused must demonstrate that the expert is required to address a critical issue and that the expert's assistance will contribute to the formulation and perfection of a viable defense. In response to such a showing, "the State must, at a minimum, assure the defendant access to [an expert] who will . . . assist in evaluation, preparation, and presentation of the defense."

The majority of this Court holds that the Commonwealth had no such duty here because, they conclude, Husske failed to "show a particularized need and that he [would] be prejudiced by the lack of expert assistance." My reading of the record compels the opposite conclusion.

Husske made five "threshold" motions for expert assistance. Their cumulative effect was sufficient to show the trial judge that expert knowledge was to become "a significant factor at trial."

In the first motion, counsel advised the court that "[t]he Commonwealth intends to introduce . . . the evidence of DNA analysis" which he characterized as "crucial to the Commonwealth's case." In support of the second motion, he filed the affidavit of an adjunct counsel, a practicing attorney reputed to be the most knowledgeable member of the local bar in the area of forensic DNA application. The affiant opined that "it is impossible for a lay person to successfully challenge the DNA testing and results without the aid of an expert." He explained that he was "concerned about the problems in testing degraded, low molecular weight forensic samples" and by "over 100 possible problem areas in the use of restrictive enzymes that could lead to an erroneous inclusion."

In preparation for the third request for assistance, counsel filed a motion for discovery of the Commonwealth's DNA evidence which resulted in disclosure of "all the protocols, copies of the autorads, as well as a 47–page Certificate of Analysis." In support of the fourth and fifth motions for assistance, counsel pursued the arguments he had advanced earlier.

Renewing the motion at the conclusion of the Commonwealth's evidence, he proffered some 400 pages of court opinions and testimony "taken in various other cases" that dramatized the nature and dimensions of the DNA dispute prevalent at that time in the scientific community. A sampling of the expert testimony adduced in those cases reveals that, in the two years preceding Husske's trial, many learned scientists had concluded that portions of the DNA testing procedure were "badly flawed," "unreliable" and "demonstrably wrong." And, at least one expert characterized the scientific debates as "significant and honestly-held disagreement" over the validity of testing techniques.

Clearly, the Commonwealth's forensic DNA evidence was a critical issue because it was "a significant factor" in the identification of Husske as the criminal agent. Hence, the prevailing scientific controversy created a "particularized need" to challenge the laboratory methodology employed in the DNA analysis, the validity of the conclusions reached by the analysts, and the testimony of the Commonwealth's expert witnesses. Knowledgeable as they were in the law, Husske's attorneys were laymen in the science of forensic chemistry, and as an indigent accused, Husske was prejudiced by his inability to obtain the expert assistance necessary to satisfy that need.

Consequently, under the facts of this case, the denial of the defense motions for expert assistance was a denial of Husske's rights under the Fourteenth Amendment to due process and equal protection of the laws.