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## Virginia's Interpretation of *Ake v. Oklahoma*: A Hollow Right

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# Virginia’s Interpretation of *Ake v. Oklahoma*: A Hollow Right

Andrew Monaghan Higgins\*

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## I. Introduction

Defendants in criminal trials in the United States have the right to due process under the law.<sup>1</sup> The broad protection of the Due Process Clause has been used to give defendants several rights, and to protect the innocent and ensure that the guilty are

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1. See U.S. CONST. amend. XIV (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .”); see also U.S. CONST. amend. V (“[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law . . . .”).

not given a harsher punishment than our society deems appropriate.<sup>2</sup> The United States has chosen the adversarial system to determine truth and justice.<sup>3</sup> In the criminal context a prosecutor puts forth inculpatory evidence in an effort to convince a judge or jury that a defendant is guilty of the accused crime.<sup>4</sup> Courts grant the defendant the right to cross examine and disprove any evidence that the prosecution has put forward.<sup>5</sup> In this context the government wields enormous power and resources, and the defendant is afforded certain rights, including the presumption of innocence.<sup>6</sup>

Due to modern advances in science, the use of evidence in criminal trials has evolved.<sup>7</sup> Particularly in rape and murder trials, the prosecution often presents scientific evidence.<sup>8</sup> The government has the resources at its disposal to hire scientists to present and explain the evidence to the court, but defendants often lack the means to hire their own scientists to challenge the prosecution's evidence.<sup>9</sup> The adversarial nature of trial and the

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2. See *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (finding that the Constitution requires state courts to appoint an attorney for criminal defendants who cannot afford one on their own).

3. See U.S. CONST. amend. VI (granting defendants the right to confront witnesses against him, compelling witness in his favor, and have counsel to assist in defense); David A. Harris, *Criminal Law, the Constitution, and Truth Seeking: A New Theory on Expert Services for Indigent Defendants*, 83 J. CRIM. L. & CRIMINOLOGY 469, 512 (1992) (“[T]he constitutional rights designed to make real the assumptions of the adversary system—that the prosecution and defense present the strongest, relevant available evidence to the factfinder, which can then arrive at the most accurate decision possible.”).

4. See Harris, *supra* note 3, at 496–97 (explaining the fundamentals of criminal trials and how they are influenced by money).

5. See *id.* at 505–06 (detailing the right of criminal defendants to engage in cross-examination).

6. See *Coffin v. United States*, 156 U.S. 432, 453 (1895) (establishing the presumption of innocence of persons accused of crimes).

7. See EDWARD CONNORS ET AL., U.S. DEPT’ OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL 4 (1996), <https://www.ncjrs.gov/pdffiles/dnaevid.pdf> (“Perhaps the most significant advance in criminal investigation since the advent of fingerprint identification is the use of DNA technology to help convict criminals or eliminate persons as suspects.”).

8. See *id.* at 12 (explaining that forensic evidence used in convictions is usually used in rapes, sometimes resulting in murder, due to the nature of the crime).

9. See Harris, *supra* note 3, at 469 (“Despite the constitutional requirement

highly technical nature of this evidence creates a presumption of guilt if the defendant is unable to impeach the prosecution's evidence with his or her own expert.<sup>10</sup> Yet, indigent defendants that meet certain criteria are permitted experts. The *Ake v. Oklahoma* "basic tools" principle, helps defendants to provide a defense by supplying them with expert aid.<sup>11</sup> That being said, thousands of defendants are convicted based on scientific evidence every year without being afforded an expert to help prepare his or her defense.<sup>12</sup> Additionally, a recent trend in exonerations has seen that a significant portion of these conditions are based on improper evidence.<sup>13</sup>

While defendants unable to afford expert witnesses, including forensic experts, are facially allowed to request one provided by the state, the high level of showing required by the defendant effectively destroys this right.<sup>14</sup> By effectively denying defendants the means to refute technical evidence presented against them, the current criminal trial process effectively creates a presumption of guilt.<sup>15</sup> This trend is especially apparent in Virginia, where defendants have been systematically denied forensic experts in rape and murder cases where there is any witness or testimonial

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that the state supply indigent defendants with counsel, other resources critical to a defense—the services of investigators, scientists and other experts—remain luxuries for indigent defendants.”).

10. See Alice B. Lustere, Annotation, *Post-Daubert Standards for Admissibility of Scientific and Other Expert Evidence in State Courts*, 90 A.L.R. 5th 453 (2004) (explaining how separate states have developed systems for judges to act as gatekeepers in determining whether DNA evidence is more prejudicial than probative).

11. See *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (“[F]undamental fairness entitles indigent defendants to ‘an adequate opportunity to present their claims fairly within the adversary system’ . . . we have focused on identifying the ‘basic tools of an adequate defense or appeal,’ and . . . have required that such tools be provided to . . . defendants who cannot afford to pay for them”) (internal citations omitted).

12. See JOSEPH PETERSON ET AL., NAT’L INST. OF JUSTICE, *THE ROLE AND IMPACT OF FORENSIC EVIDENCE IN THE CRIMINAL JUSTICE PROCESS* 1 (2006), <https://www.ncjrs.gov/pdffiles1/nij/grants/231977.pdf> (analyzing the impact of forensic evidence on criminal convictions).

13. *Id.*

14. See Paul C. Giannelli, *Ake v. Oklahoma: The Right to Expert Assistance in a Post-Daubert, Post-DNA World*, 89 CORNELL L. REV. 1305, 1363 (2004) (“If the [*Ake*] standard is too demanding, the right is gutted.”).

15. *Id.*

evidence brought against them in addition to the forensic evidence.<sup>16</sup> The standard in Virginia stems from the ambiguity of *Ake* and the Supreme Court's subsequent case law heightening the standard within the state.<sup>17</sup>

## II. Background

### A. Forensic Evidence and Convictions

Forensic evidence is evidence that is considered scientific in nature and is provided to the court during trial to create a record.<sup>18</sup> Forensic evidence is different from eye witness testimony evidence or confessions from defendants in that it is often provided to the court by an expert witness, usually a scientist.<sup>19</sup> Forensic evidence used in convictions has increased in the past twenty years, and this is due to the advances in science, especially in DNA analyses.<sup>20</sup> In the late 1980s, courts in the United States began using deoxyribonucleic acid (DNA) as forensic evidence to convict suspects in criminal trials.<sup>21</sup> The use of broad forensic evidence, particularly DNA evidence, heralded a new era of convictions where forensic evidence was more commonly used to convict, even going so far as to be the only evidence against a defendant.<sup>22</sup>

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16. See, e.g., *Husske v. Commonwealth*, 476 S.E.2d 920, 928–29 (Va. 1996) (denying the indigent defendant accused of rape a DNA expert at the Commonwealth's expense because the defendant failed to show a particularized need since he confessed to the crime).

17. See *id.* at 924 (“The indigent defendant who seeks the appointment of an expert must show a particularized need.”).

18. See COLIN AITKEN & FRANCO TARONI, *STATISTICS AND THE EVALUATION OF EVIDENCE FOR FORENSIC SCIENTISTS* 1–3 (2004) (explaining that forensic evidence is evidence that is “transfer” or “trace” evidence that is brought by the criminal to the crime and can be traced back to the criminal using various scientific methods).

19. *Id.*

20. See CONNORS ET AL., *supra* note 7, at 8 (highlighting how the increased use of DNA has helped convict the guilty and exonerate the innocent).

21. *Id.*; see also *id.* at 1 (explaining how the use of DNA has led to a higher rate of accuracy in identifying criminal defendants).

22. See Andrea Roth, *Safety in Numbers? Deciding When DNA Alone is Enough to Convict*, 85 N.Y.U. L. REV. 1130, 1131–33 (2010) (discussing how statistics and probability have allowed juries to convict defendants solely using DNA evidence that is less than a perfect match of the defendant's DNA, but is so close that it is a significant individualized showing).

Defendants could be convicted based on DNA analyses of saliva, blood, hair, skin tissue, and semen.<sup>23</sup> These advances in scientific techniques allowed states and the federal government to connect criminals to their crimes, usually in the context of rapes and murders, in ways not before possible.<sup>24</sup> Forensic evidence also became useful by allowing government investigators to exclude suspects whose DNA did not match.<sup>25</sup> In total, forty-six states and the federal government currently allow DNA as admissible evidence.<sup>26</sup>

Forensic evidence—including hair microscopy, bite mark comparisons, firearm tool mark analysis, and shoe print comparisons—is highly technical and cannot be admitted without an expert witness.<sup>27</sup>

Forensic evidence, and all scientific evidence for that matter, presented in Court must meet the *Daubert* Standard, which was created by the Supreme Court in *Daubert v. Merrell Dow Pharms.*<sup>28</sup> In *Daubert* the Supreme Court determined that contrary to prior case precedent, a “general acceptance” of scientific standards is not a necessary precondition to admitting scientific evidence under the Federal Rules of Evidence.<sup>29</sup> The Supreme Court created a flexible standard for judges to assess the admissibility of scientific evidence by looking at the “potential rate of error” and “existence and maintenance of standards controlling the techniques

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23. See CONNORS ET AL., *supra* note 7, at 4 (listing evidence that could be traced back to criminals either through DNA or other scientific methods).

24. See PETERSON ET AL., *supra* note 12, at 7 (acknowledging that in most crimes there is no forensic evidence, but due to the nature of rape and murder, there are often traces of the criminal at the crime scene).

25. *Id.*

26. See CONNORS ET AL., *supra* note 7, at 7 (showing which states allow DNA as admissible evidence).

27. See *id.* at 6 (“The state of the profiling technology and the methods for estimating frequencies and related statistics have progressed to the point where the admissibility of properly collected and analyzed DNA data should not be in doubt.”).

28. See *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 592 (1993) (“Unlike an ordinary witness, see Rule 701, an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation.”).

29. See *id.* at 587 (determining that “general acceptance” standard was superseded by the Federal Rules of Evidence).

operation[.]”<sup>30</sup> Upon admission of scientific evidence, the opposing side’s cross examination and precise instruction on the burden of proof are the two means to attack shaky evidence.<sup>31</sup>

Courts have acknowledged that forensic evidence is questionably accurate as the results of forensic testing and analyses are often based on probability.<sup>32</sup> It is the state and the federal governments that will most often present forensic and DNA evidence at trial.<sup>33</sup> Courts have allowed defendants to challenge expert witnesses and the tests used during cross examination, but this adversarial technique to divulge truth and accuracy is not always useful to the defendant if the defendant does not have the means to hire their own forensic expert to challenge the government’s expert testimony and DNA evidence.<sup>34</sup>

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30. *See id.* at 592 (allowing the judge to make a finding about the admissibility of scientific evidence that can be challenged on cross examination).

31. *Id.* at 596.

32. *See generally* Andrea Roth, *Denying DNA: Rethinking the Role of the Jury in the Age of Scientific Proof and Innocence*, 93 B.U.L. REV. 1643 (2013); *see also Unvalidated or Improper Forensic Science*, INNOCENCE PROJECT, <http://www.innocenceproject.org/causes/unvalidated-or-improper-forensic-science/> (last visited Feb. 28, 2016) (“Unlike DNA testing, many forensic disciplines . . . were developed solely to solve crime. These disciplines have evolved primarily through their use in individual cases. Without the benefit of sufficient foundational research or adequate financial resources, applied research has also been minimal”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

33. *See* Brandon L. Garrett & Peter J. Neufield, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 3 (2009) (exploring forensic science testimony by prosecution experts in the trials of innocent persons all convicted of serious crimes).

34. *See, e.g.,* *Andrews v. State*, 533 So. 2d 841, 850 (Fla. Dist. Ct. App. 5th Dist. 1988) (“In contrast to evidence derived from hypnosis, truth serum and polygraph, evidence derived from DNA print identification appears based on proven scientific principles. Indeed, there was testimony that such evidence has been used to exonerate those suspected of criminal activity.”); *see also State v. Woodall*, 182 W. Va. 15, 23 (W. Va. 1989) (allowing that “[b]lood type and enzyme tests have general scientific acceptance, and the distribution of particular blood traits in the population is ascertainable,” and that the defendant has the opportunity to impeach such forensic tests through cross examination of the expert witness); *Spencer v. Commonwealth*, 384 S.E.2d 775, 783 (Va. 1989) (“[U]ndisputed evidence supports the trial court’s conclusion that DNA testing is a reliable scientific technique and that the tests performed in the present case were properly conducted, we hold that the trial court did not err in admitting this evidence.”).

The flaws in the adversarial system when it comes to forensic evidence can be seen in the wave of exonerations that began in 1989.<sup>35</sup> According to the Innocence Project, there have been more than 333 post-conviction exonerations in the United States since 1989.<sup>36</sup> In a bulk of these convictions the jury or judge relied on forensic evidence that misstated or was unsupported by empirical data.<sup>37</sup>

In each case where forensic evidence and testimony were presented against the defendant, the defendant was protected by the Fifth and Fourteenth Amendments which afford the defendant the due process of law.<sup>38</sup> Due process governs a defendant's right to cross examine the witnesses, but this is not any use without the help of an expert witness due to the technical nature of the evidence.<sup>39</sup> Since the evidence is scientific in nature and indigent defendants often lack the means to hire an expert witness, the practical effect of forensic evidence is that the prosecution has highly prejudicial evidence and the defendant lacks the means to counter either the probative or prejudicial value of the evidence.<sup>40</sup> Though defendants have had the right to ask the state to provide an independent expert witness for them since 1985, it has not changed the convictions based on improper forensic evidence.<sup>41</sup>

There are several systemic and policy breakdowns in the chain of determining guilt. A major failure of the system is inherent to the adversarial nature of criminal procedure when forensic evidence is presented against indigent defendants who are unable

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35. *Unvalidated or Improper Forensic Science*, *supra* note 32.

36. *Id.*

37. *See* Garrett & Neufield, *supra* note 33 (indicating that scientific identifiers of defendants were being misused).

38. U.S. CONST. amend. V.

39. *See Ake v. Oklahoma*, 470 U.S. 68, 76–77 (1985) (explaining that due process provides for “meaningful access to justice.”); *see also* NAT'L RESEARCH COUNCIL, THE EVALUATION OF FORENSIC DNA EVIDENCE 204 (1996) [hereinafter NRC II] (explaining that because the National Research Council recognized the potential of misuse of DNA evidence from the jurors' perspective, it recommended a study to reduce the prejudicial nature of DNA evidence).

40. *See Ake*, 470 U.S. at 70 (finding that an indigent defendant was entitled to a psychiatrist as an expert as a matter of due process during the defendant's capital sentencing); *see also* NRC II, *supra* note 39 (explaining the scientific nature of DNA evidence).

41. *See generally* Roth, *supra* note 22.



to afford the means to fight such evidence.<sup>42</sup> The guarantee of expert witnesses to indigent defendants, and the failure to deliver on that guarantee, is a denial of these defendants' Fifth and Fourteenth Amendment rights.

### *B. Indigent's Right to Expert Witnesses*

Indigent defendants occupy a vulnerable position in both state and federal criminal justice systems. Though the Constitution grants defendants broad rights, many of these rights are useless unless the defendant has the means or the knowledge to actually implement them.<sup>43</sup> As was determined by the Supreme Court in *Gideon v. Wainwright*,<sup>44</sup> an indigent defendant, like a lay-defendant, lacks the knowledge of how to procedurally assert his or her rights at trial, without the effective assistance of counsel.<sup>45</sup> The Supreme Court therefore held that federal and state governments are both required to provide an attorney to those who lack the means to hire their own.<sup>46</sup> The right to an attorney for an indigent defendant is required under the Sixth and Fifth Amendments because an attorney is necessary in unlocking many other rights at trial, and defending against the state who is provided with attorneys of its own.<sup>47</sup>

Along the same lines as the decision in *Gideon v. Wainwright*, the Supreme Court decided in *Ake v. Oklahoma* that an indigent

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42. See *Ake*, 470 U.S. at 77 (“[A] criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.”).

43. See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (“Even the intelligent and educated layman has small and sometimes no skill in the science of law. He is unfamiliar with the rules of evidence. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one.”).

44. See *id.* (holding that an indigent defendant in a criminal trial has a right to be represented by counsel under the Sixth Amendment).

45. *Id.* at 345.

46. See *id.* at 344 (“[A]ny person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”).

47. See *Ake v. Oklahoma*, 470 U.S. 68, 70 (1985) (acknowledging that the federal and state constitutions create procedural and substantive safeguards so that all defendants are created equal before the law, and the indigent require state provided attorneys in order to ensure this equality).

defendant is entitled to an expert witness if he or she can make a proper showing to the government.<sup>48</sup> In *Ake*, the defendant was denied a psychiatric expert witness provided by the government.<sup>49</sup> The defendant had been charged with the murder of a couple and of injuring their two children.<sup>50</sup> The defendant informed the court that he would be presenting the defense of insanity, and requested that the state provide an expert witness: a court appointed psychiatrist.<sup>51</sup> The court denied Ake's request, and Ake's sole defense during the trial was insanity, but no expert witness was brought forward to provide the psychiatric evidence needed.<sup>52</sup> Ake was convicted, which he appealed.<sup>53</sup>

The Supreme Court determined that Ake's insanity defense was a significant factor in both the guilt and sentencing phases of the trial, and that according to due process a defendant should be afforded "basic tools" necessary to present a defense.<sup>54</sup> The Supreme Court held that when a defendant in a criminal prosecution makes a preliminary showing that his or her defense, such as insanity at the time of the offense, is likely to be a significant factor at trial the Constitution requires that the state provide the defendant access to a psychiatrist if the defendant cannot otherwise afford one.<sup>55</sup>

In *Ake* the Supreme Court provided defendants with a narrow right, but one that is invaluable, especially as science has pushed evidence to new levels.<sup>56</sup> While *Ake* did not allow for defendants to

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48. *See id.* at 69 (listing factors considered for witness entitlement, such as private interest affected by the action of the state, government interest if the safeguard is provided, and the probable value of these safeguards and the risk or erroneous deprivation of the affected interest if safeguards are not provided).

49. *Id.* at 68.

50. *Id.*

51. *Id.*

52. *See id.* (explaining that the trial court denied a psychiatric witness that the petitioner requested to support his insanity defense).

53. *Id.*

54. *Id.* at 77.

55. *See id.* at 85 (acknowledging a trend to recognized elemental constitutional rights such as the right of an indigent defendant to attain a fair hearing and access to the judicial process).

56. *See id.* at 86 (granting indigent defendants the right to make a showing that they need an expert witness to prepare a defense that will be "a significant factor" in his or her trial).

request any expert witness be provided by the state, it did set an important guide that federal appellate and state courts have expanded.<sup>57</sup> Additionally, it should be noted that in *Caldwell v. Mississippi*<sup>58</sup> the Supreme Court refused to reverse the trial court's decision not to appoint two non-psychiatric witnesses, which subsequent courts have called the "significant factor" standard and has been read together with the *Ake* standard to create a new standard.<sup>59</sup> Several subsequent cases, including some Supreme Court dicta, have shown that an indigent defendant's right to due process includes a right to an expert witness if he or she is able to show that they wish to provide a defense and need an expert to construct it, which is both costly but shows the prosecution the defendant's case.<sup>60</sup>

Currently the rights in *Ake* have mostly been codified, both at the federal and the state level.<sup>61</sup> Because the Supreme Court has left the scope of *Ake* undefined, there are significant disparities in what rights indigents have under *Ake* depending on which court hears the case.<sup>62</sup> Some courts have attempted to limit an indigent's rights under *Ake* only regarding the right to a psychiatrist, while other courts have attempted to limit the case only to capital cases.<sup>63</sup> The major trend has been to incorporate the principle in *Ake* into criminal statutes; many courts have adopted a procedural showing that a defendant must perform in order to be granted an expert provided by the government.<sup>64</sup> Because the showing

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57. See Giannelli, *supra* note 14, at 1316 (showing how *Daubert* and its progeny expanded the use of expert witnesses, which created the need for the states and federal government to provide non-psychiatric expert witnesses to indigents).

58. 472 U.S. 320 (1985).

59. See *id.* at 323 (determining that the petitioner's circumstance do not warrant the appointment of a non-psychiatric expert witness by the court, but does not state that the court could not do so for an indigent in different circumstances); see also *Husske v. Commonwealth*, 476 S.E.2d 920, 925–26 (Va. 1996) (articulating the "significant factor" standard as applied to an indigent defendant who seeks an expert in his or her defense).

60. Giannelli, *supra* note 14, at 1364.

61. *Id.*

62. See *id.* at 1365 (listing the various constructions of the tests within the federal circuits).

63. *Id.* at 1364.

64. See *id.* at 1338 (explaining how usually an indigent's right to an expert witness is codified in state criminal statutes, but also acknowledging that these

depends on the type of defense the defendant intends to present, the type of expert is determined by the type of evidence that needs to be analyzed.<sup>65</sup>

### C. State's Access to Expert Witnesses

Paul C. Giannelli, in *Ake v. Oklahoma: The Right to Expert Assistance in a Post-Daubert, Post-DNA World*, puts forth several compelling policy arguments as to why the Supreme Court and states have developed an indigent's rights to expert witnesses under *Ake*.<sup>66</sup> Giannelli argues that states and the federal government have access to expert witnesses, which are sometimes even institutionalized, such as state funded forensic labs.<sup>67</sup> These expert witnesses are often in the government's employment.<sup>68</sup> Giannelli explains that when the government brings forward technical evidence, the courts and defendants lack the expertise to be able to properly challenge evidence.<sup>69</sup> Additionally, in some cases government expert witnesses are thought to be biased, so that the government has come to expect certain results from forensic or DNA tests provided to a particular expert.<sup>70</sup>

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provisions widely differ as to what type of services are available, and what the cost cap or reimbursement for services should entail).

65. *See id.* at 1367–68 (describing the types of expertise *Ake* has been extend to, including toxicologists, pathologists, fingerprint experts, hypnotists, DNA analysts, serologists, ballistics experts, handwriting examiners, blood spatter specialists, forensic dentists for bite-mark comparisons, and psychologists on the battered wife syndrome).

66. *See generally id.*

67. *See id.* at 1327 (explaining that there are over three hundred crime laboratories in the country, and state prosecutors have access to labs at the state, county, regional, and metropolitan levels, while federal prosecutors have access to several top labs including the FBI and the DEA labs).

68. *See id.* at 1328 (showing that state and federal prosecutors can hire independent labs as well as use the labs in the state employment, which include such experts as local coroners); *see generally* Garrett & Neufield, *supra* note 33.

69. *See id.* (indicating that the Courts and defendants lack the technical and scientific sophistication to challenge the Prosecution's evidence).

70. *See id.* at 1390 (showing how the West Virginia Police Crime Laboratory was caught using techniques to achieve improper results, and that even after the improper actor moved to another state West Virginia prosecutors would send evidence to him).

There is ample evidence of forensic scientists working with state prosecutors to achieve the prosecution's ends, which is usually the conviction of an indigent lay person unable to mount a cogent defense.<sup>71</sup> Some of the more obvious cases of experts presenting unchallenged testimony with a certainty that they did not possess include state police laboratory scientist Joyce Gilchrist.<sup>72</sup> Gilchrist testified and performed DNA examinations in roughly three thousand cases in Oklahoma City.<sup>73</sup> Former Oklahoma Governor Frank Keating opened an investigation when post-conviction FBI evidence directly contradicted Gilchrist's evidence.<sup>74</sup> The state investigators found that Gilchrist had misidentified evidence or given improper courtroom testimony in several cases where the defendant had been convicted, which was disconcerting considering that eight of those cases were capital cases.<sup>75</sup>

Similarly, forensic scientist Arnold Melnikoff worked for state forensic labs in both Washington and Montana.<sup>76</sup> The FBI later discovered that his testimony was entirely fabricated in a rape trial, and the federal government urged Montana to reexamine every case in which Melnikoff had presented testimony.<sup>77</sup> The governor of Montana refused because Melnikoff had not said that the DNA evidence did not show it was the defendant "exclusively"; Melnikoff had said it was only a sixty percent chance, and therefore there was little evidence of misconduct.<sup>78</sup> Washington was forced to investigate over one hundred cases where Melnikoff had presented evidence.<sup>79</sup>

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71. *Id.* at 1318.

72. Jim Yardley, *Inquiry Focuses on Scientist Employed by Prosecutors*, N.Y. TIMES (May 2, 2009), <https://nyti.ms/2jEh5RG> (last visited Apr. 19, 2017) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

73. *Id.*

74. *Id.*

75. *Id.*

76. Adam Liptak, *Two States to Review Lab Work of Expert Who Erred on ID*, N.Y. TIMES (Dec. 19, 2002), <https://nyti.ms/2jEeAyA> (last visited Apr. 19, 2017) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

77. *Id.*

78. *Id.*

79. *Id.*

In the Houston Police Department's Crime Laboratory it was not a rogue forensic scientist who wanted to help prosecutors; the problems were more systemic.<sup>80</sup> There was evidence of poor record keeping, improper procedures, and a lack of maintenance of equipment.<sup>81</sup> The audit found this disconcerting as the lab had presented testimony in several rape and murder trials that they assured the court were precise matches to the defendants on trial.<sup>82</sup> The doubt raised by the audit led the Texas Attorney General's office to investigate all the cases from the previous year where the lab had provided evidence.<sup>83</sup> Later, the DNA and toxicology labs were shut down and a lead detective was shot in his cubicle, it was implied that the wound was self-inflicted.<sup>84</sup> An audit of every case where the lab had provided evidence was conducted.<sup>85</sup>

The concerns over impartiality, ineffective labs and procedures, and the lack of expertise outside of the government's prosecution have led to courts expanding *Ake* to beyond just the right to expert witnesses for psychiatric purposes, especially in the context of forensic and DNA evidence.<sup>86</sup>

#### *D. DNA Alone to Convict*

In a few cases, state and federal courts have found that DNA alone is sufficient to convict without corroborating evidence, but this is currently the exception rather than the rule.<sup>87</sup> DNA

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80. Nick Madigan, *Houston's Troubled DNA Crime Lab Faces Growing Scrutiny*, N.Y. TIMES (Feb. 9, 2003), <https://nyti.ms/2k5T1nH> (last visited Apr. 19, 2017) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

81. *Id.*

82. *Id.*

83. See Ralph Blumenthal, *Double Blow, One Fatal, Strikes Police In Houston*, N.Y. TIMES (Oct. 30, 2003), <https://nyti.ms/2k5HsN9> (last visited Apr. 19, 2017) (elucidating the issues facing the Houston police and their forensic labs) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

84. *Id.*

85. *Id.*

86. See 18 U.S.C. § 3006A (1964) ("Representation under each plan shall include counsel and investigative, expert, and other services necessary for adequate representation.").

87. See generally *People v. Rush*, 242 A.D.2d 108, 109 (N.Y. App. Div. 2d Dep't 1998).

evidence and the standards of proof are a contentious subject, especially because DNA evidence appears infallible, and even when the court or jury is warned otherwise the evidence itself is often enough to impute some level of guilt.<sup>88</sup> One of the more extreme examples where DNA alone was enough to convict was *People v. Rush*, where an FBI agent testified that the probability of selecting another individual at random from the population with the same DNA profile was 1 in 500 million.<sup>89</sup> The court held that this was sufficient to make a finding of guilt.<sup>90</sup>

Scholars find the lack of corroborating evidence in these “cold hit” cases, where DNA evidence is the only evidence presented, to be disturbing.<sup>91</sup> The lack of protocols, standardized practices, quality control, and the possibility of improper interpretation or conscious guiding of inferences is dangerous.<sup>92</sup> Forensic experts present DNA evidence using probabilities of a match to the defendant.<sup>93</sup> Some scholars are concerned that the use of probabilities inspire confidence in the jury that does not meet the beyond a reasonable doubt standard.<sup>94</sup> Scholars acknowledge that such safeguards include corroborating evidence, but also include the defendant’s right to their own expert witnesses.<sup>95</sup>

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88. See Roth, *supra* note 22, at 1358 (explaining that the use of DNA matching evidence makes it difficult for jurors to separate probability of innocence or guilt from certainty).

89. *Id.*

90. See *Roberson v. State*, 16 S.W.3d 156, 172 (Tex. Crim. App. 2000) (“Giving due deference to the jury’s verdict, we conclude that the verdict [based only on a DNA match] is not so contrary to the overwhelming weight of evidence as to be clearly wrong and unjust[.]”); Katharine C. Lester, Note, *The Affects of Apprendi v. New Jersey on the Use of DNA Evidence at Sentencing—Can DNA Alone Convict of Unadjudicated Prior Acts?*, 17 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 267, 288 (2010) (“Nonetheless, the trial court placed ‘unfettered faith in the reliability of DNA evidence.’”); see also *State v. Toomes*, 191 S.W.3d 122, 131 (Tenn. Crim. App. 2005) (finding that DNA evidence, without corroborating evidence, was sufficient to support conviction).

91. See Roth, *supra* note 22, at 1138–39 (showing that relying on cold hits alone is risky without corroborating evidence due to the risk of probable matches).

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

### *III. Ake Leads to Disparity*

#### *A. Federal Interpretation*

The Criminal Justice Act of 1964 provides expert assistance for indigents in federal trials, thus codifying *Ake* at the federal level.<sup>96</sup> The problem with this codification is that federal circuits vary when it comes to the standard for appointing an expert witness in an indigent's trial.<sup>97</sup> The Fifth Circuit determined that "where the government's case rests heavily on a theory most competently addressed by expert testimony, an indigent defendant must be afforded the opportunity to prepare and present his defense to such a theory with the assistance of his own expert pursuant to section 3006A(e)[.]"<sup>98</sup> Unlike the Fifth Circuit, the Ninth Circuit requires expert services when "a reasonable attorney would engage such services for a client having the independent financial means to pay for them[.]"<sup>99</sup> This "private attorney' standard for determining necessity is based on the equal protection rationale."<sup>100</sup> In addition, the "relative strictness of the standard is sometimes difficult to discern" not only because the language of *Ake* is already ambiguous, but also because it is often read together with other subsequent case law that might or might not be dicta.<sup>101</sup> The First Circuit requires that the proffered expert testimony be "pivotal" or "critical" to the defense.<sup>102</sup> In contrast to this stringent test, the Eleventh Circuit has held that the trial court may reject an application for appointment if the accused "does not have a plausible claim or defense[.]"<sup>103</sup> The Eleventh Circuit's interpretation is a much less demanding test for the indigent to

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96. See Giannelli, *supra* note 14, at 1332 (indicating that indigent defendants in Federal Court will be provided with their own expert witnesses if they meet the necessary standard).

97. *Id.* at 1336.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*



meet.<sup>104</sup> The differences across the federal districts illustrate the lack of guidance from the *Ake* standard.

### *B. Virginia's Interpretation*

This confusion stemming from the *Ake* standard has been seen in state courts as well.<sup>105</sup> This has been especially true in Virginia. Virginia has not adopted a codified recognition of *Ake* in its criminal statutes, but instead relies solely on case law.<sup>106</sup> *Husske v. Commonwealth* is Virginia's seminal case on an indigent's rights to an expert witness.<sup>107</sup> Criticized by many, the case grants indigent defendants in the Commonwealth the opportunity to make an *Ake* showing about the necessity of an expert witness to develop a defense that will be a significant factor in their trial.<sup>108</sup> However, an indigent defendant's right to an expert witness is not an explicit Constitutional right.<sup>109</sup> The Supreme Court in Virginia interprets *Ake* interestingly; it reads reading *Ake* with *Caldwell* to create a level of showing not explained in either case.<sup>110</sup> As mentioned before, *Caldwell* was a Supreme Court case with a footnote that seemed to establish a "significant factor" showing for granting the appointment of an indigent defendant.<sup>111</sup> *Caldwell*

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104. *Id.*

105. *See id.* at 1338–39 (showing how state criminal statutes or rulings providing an expert witness to a defendant vary widely).

106. *See* VA. CODE ANN. §§ 19.2-332 (allowing compensation for counsel or expert witnesses for indigent witnesses not mandated).

107. *See* *Husske v. Commonwealth*, 476 S.E.2d 920, 924 (Va. 1996) ("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.").

108. *Id.*

109. *See id.* at 925 (explaining that the Due Process Clause of the Constitution merely requires, "an adequate opportunity [for defendant] to present [his] claims fairly within the adversary system.").

110. *See id.* ("We are of opinion that *Ake* and *Caldwell*, when read together, require 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") (internal citations omitted).

111. *See* *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985) ("But petitioner also requested appointment of a criminal investigator, a fingerprint expert, and a ballistics expert, and those requests were denied. The State Supreme Court

was a capital murder case that dealt primarily with appellate review, but the Supreme Court mentioned in a footnote that the trial court did not err in not appointing a state funded ballistics expert.<sup>112</sup> The trial court had provided the defendant a psychiatric expert.<sup>113</sup> The Supreme Court stated “[g]iven that petitioner offered little more than undeveloped assertions that the requested assistance would be beneficial, we find no deprivation of due process in the trial judge’s decision [to deny.]”<sup>114</sup> The Supreme Court of Virginia determined that indigent defendants must make a showing of a “particularized need,” much like the “significant factor” showing in *Ake*.<sup>115</sup> Unlike the Supreme Court in *Ake*, Virginia’s particularized need showing incorporates a reasonableness element from *Caldwell*.<sup>116</sup> The reasonableness and significant factor requirements allow a court to determine the case as a whole, and the relevance of the evidence that the defendant has requested an expert to develop.<sup>117</sup>

Virginia’s interpretation of *Ake* and *Caldwell*, especially including the reasonableness element, has created such a high standard that indigent defendants have rarely been able to meet it.<sup>118</sup> As subsequent Virginia case law has shown, indigent defendants are usually denied the right to an expert witness, especially a forensic expert in rape and murder cases, unless DNA evidence is the only type of evidence presented against them.<sup>119</sup>

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affirmed the denials because the requests were accompanied by no showing as to their reasonableness.”).

112. *Id.*

113. *Id.*

114. *Id.*

115. *See Husske v. Commonwealth*, 476 S.E.2d 920, 925–26 (Va. 1996) (explaining that a particularized need analysis includes looking and the probability of impact on the outcome of the trial, as well as the cost of the expert witness).

116. *Id.*

117. *See id.* at 211 (“[A]n 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”) (citing *State v. Mills*, 420 S.E.2d 114, 117 (N.C. 1992)).

118. *See Giannelli, supra* note 14, at 1366 (analyzing the disparity between prosecution and defense resources, especially for indigent defendants).

119. *See generally Branche v. Commonwealth*, No. 0912-05-2, 2006 WL 1222400 (Va. Ct. App. May 9, 2006).

This is a departure from the Supreme Court's interpretation of due process, yet its vague ruling in *Ake* has essentially destroyed the right that it intended to create.<sup>120</sup> Virginia has created a more stringent standard than the "basic tools" standard from *Ake* by adding an element of reasonableness from the footnotes of *Caldwell*.<sup>121</sup> Additionally, Virginia's particularized need exception to an indigent defendant's right to an expert witness is inherently flawed, in that a defendant will not be able to show the particularized need for the expert witness because the very reason they need the witness is to produce the evidence that would be the substance of the particularized need.

#### IV. Virginia's Standard Applied

##### A. Standard Not Met

Virginia has not strayed away from the particularized need that the Virginia Supreme Court established in *Husske v. Commonwealth*.<sup>122</sup> In many cases Virginia has provided expert witnesses to indigent defendants charged with murder or rape and the state only provided DNA or forensic evidence to convict.<sup>123</sup> Virginia courts have established the particularized need rule from *Husske*, but in many cases Virginia seems to only grant indigent defendants expert witnesses in murder and rape cases where the particularized need is that the prosecutors' only evidence against the defendant is DNA forensic in nature.<sup>124</sup> Virginia courts seem

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120. See generally *Ake v. Oklahoma*, 470 U.S. 68, 73 (1985).

121. See *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985) ("But petitioner also requested appointment of a criminal investigator, a fingerprint expert, and a ballistics expert, and those requests were denied. The State Supreme Court affirmed the denials because the requests were accompanied by no showing as to their reasonableness.").

122. See *Husske v. Commonwealth*, 476 S.E.2d 920, 925–26 (Va. 1996) (crafting the particularized need standard); *Branche v. Commonwealth*, No. 0912-05-2, 2006 WL 1222400, at \*3 (utilizing the particularized need standard); *Juniper v. Commonwealth*, 626 S.E.2d 383, 393 (Va. 2006) (deciding that the defendant had not met the particularized need standard).

123. See generally *Lawlor v. Commonwealth*, 738 S.E.2d 847 (Va. 2013); *Dowdy v. Commonwealth*, 686 S.E.2d 710 (Va. 2009).

124. See *Husske*, 476 S.E.2d at 925 (detailing that "[t]he indigent defendant who seeks the appointment of an expert must show a particularized need"); see

to determine that a defendant has a particularized need when the prosecutor is relying solely on DNA or forensic evidence, against which a defendant would not be able to present a successful defense without any help from a DNA expert.<sup>125</sup> In such cases the Commonwealth has given the defendant the means to hire an expert witness to rebut the Commonwealth's claims, but often even the stipend the defendant is given to hire an independent expert witness is not enough to properly rebut the Commonwealth's claims.<sup>126</sup>

The Supreme Court of Virginia has created a standard that combined elements from *Ake* and *Caldwell* to create a standard that is more stringent than either standard used by itself.<sup>127</sup> The practical effect is that indigent defendants must meet a standard that the Virginia Supreme Court created using two already ambiguous standards from separate cases with materially distinguishable facts.<sup>128</sup>

The Supreme Court of Virginia determined that a defendant who wants to have the Commonwealth provide an expert witness must show a particularized need so that the Commonwealth does not waste time and resources on every defendant asking for an expert.<sup>129</sup> In order to demonstrate a particularized need, the defendant must show that there is relevant evidence requiring an impartial expert qualified to bring the evidence to trial.<sup>130</sup> An unacknowledged trend in Virginia is that Courts will refuse expert witnesses—particularly DNA and forensic analysts—if there is evidence other than DNA and forensics that indicate a defendant's

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also *Angel v. Commonwealth*, 704 S.E.2d 386, 396 (Va. 2011) (“The only physical evidence linking Angel to the crime . . . was the DNA evidence.”).

125. See generally *Lawlor*, 738 S.E.2d; *Dowdy*, 686 S.E.2d.

126. *Id.*

127. See *Husske*, 476 S.E.2d at 925–26 (showing that Virginia has departed from the basic tools principles of *Ake* and has created a heightened standard of “particularized need” (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985))).

128. See *Giannelli*, *supra* note 14, at 1364 (discussing the difficulties indigent defendants face when trying to secure expert witnesses).

129. *Id.*

130. See *Husske v. Commonwealth*, 476 S.E.2d 920, 926 (Va. 1996) (“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.”).

guilt.<sup>131</sup> In effect, Virginia's heightened standard creates a more difficult showing than that which the Supreme Court required in *Ake*, which means that the particularized need showing violates a defendant's "basic tools of an adequate defense[.]"<sup>132</sup>

*Husske* first established this heightened standard. Husske, the defendant, was arrested on "peeping tom" charges and taken to a Henrico County Mental Health and Retardation Services office.<sup>133</sup> The woman he was observing had been raped a few months earlier, but the assailant had fled.<sup>134</sup> While at the facility with his wife, the facility staff asked Husske if he had been involved in rape in addition to the voyeurism.<sup>135</sup> Husske denied being involved in a rape, but after his wife left the room and he was questioned further Husske stated that even though this was his first arrest on such a charge, he had been engaging in this behavior for 20 years and had gone "one step further."<sup>136</sup> Husske was convicted of the "peeping tom" charges.<sup>137</sup> After an attempted suicide and while he was serving time Husske confessed to Dr. Elwood that he had completed a rape at the facility where he was caught peeping a few months earlier.<sup>138</sup> Husske described some elements of the victim's initial rape, but some elements that differed.<sup>139</sup>

The court declared Husske indigent when brought to trial, and his counsel moved prior to and at trial that the Commonwealth provide the defendant an expert witness for the DNA and forensic evidence that would be presented by the prosecution.<sup>140</sup> Instead

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131. See *id.* at 922–24 (describing the defendant's crimes and subsequent confession); *Branche v. Commonwealth*, No. 0912-05-2, 2006 WL 1222400, at \*1, \*8 (Va. Ct. App. May 9, 2006) (affirming the denial of an expert witness for a defendant in a case where the defendant had stated the victim's race before police mentioned it).

132. See *Husske*, 476 S.E.2d 920, 929 (Poff, J., dissenting) (arguing that the defendant had met the showing under *Ake*, but the majority requires a two-part showing).

133. *Id.* at 922.

134. *Id.*

135. *Id.* at 923.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

the Commonwealth appointed a respected attorney co-counsel because he was “the most knowledgeable member of the local bar in the area of forensic DNA application[.]”<sup>141</sup> The Commonwealth brought an employee of the Commonwealth’s Division of Forensic Science, and a professor of statistics and genetics at North Carolina State University to present the forensic DNA evidence against Husske.<sup>142</sup>

Husske was ultimately convicted of the rape, and on appeal the Supreme Court of Virginia took the words “particularized necessity” from the footnotes of the United States Supreme Court case *Caldwell* in order to create the particularized need standard in Virginia.<sup>143</sup> The *Caldwell* standard required that an indigent defendant must show reasonableness when requesting a Court appointed expert witness.<sup>144</sup> First, the Supreme Court of Virginia determined that the defendant, Husske, made no showing of a particularized need.<sup>145</sup> Husske had only asked for an expert witness to address the Commonwealth’s DNA evidence.<sup>146</sup> He had not shown how the evidence would factor into his defense at trial.<sup>147</sup> Second, the Supreme Court of Virginia also determined that even if Husske had shown that the expert testimony would factor into his defense that it would not be a significant factor.<sup>148</sup> Husske had confessed to the rape, which meant that he would be unable to show that he had been prejudiced because a

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141. *See id.* at 924–25 (showing how the motion for an expert witness was dismissed, but the lower court acknowledged the DNA evidence as relevant and attempted to resolve the inequitable state of expertise by appointing an attorney well-read on DNA as co-counsel).

142. *Id.* at 923–24.

143. *See id.* at 926 (“[T]he determination . . . whether a defendant has made an adequate showing of particularized necessity lies within the discretion of the trial judge.”).

144. *Id.* at 925.

145. *Id.*

146. *Id.*

147. *See id.* at 924–26 (demonstrating that the Supreme Court of Virginia acknowledges both the “basic tools” and “significant factor” standards from *Ake*, but uses the more obscure and less applicable “particularized necessity” language from *Caldwell*).

148. *See id.* (illustrating that *Husske* would have failed the *Ake* standard of showing that the evidence for which he needed the expert would be a significant factor in his defense).

particularized need to his defense would have to address both the confession and the DNA evidence.<sup>149</sup>

The Supreme Court of Virginia took the reasonableness standard when appointing experts from *Caldwell* and combined it with the *Ake* standard.<sup>150</sup> The Supreme Court of Virginia created a new standard outside of the Fifth and Fourteenth Amendment principles articulated by the Supreme Court in *Ake* by reading the two standards of showing together.<sup>151</sup> The heightened standard makes it difficult for indigent defendants in Virginia to successfully motion for appointment of an expert witness.<sup>152</sup>

Virginia Courts have tended to deny an indigent's motion of an expert witness where other evidence is presented outside of just the DNA evidence.<sup>153</sup> In *Angel v. Commonwealth*<sup>154</sup> an assailant in

149. *See id.* at 926 (“[H]e confessed to the crimes, and he described the details of his offenses with great specificity.”).

150. *See id.* at 925. The Supreme Court of Virginia explained their reading of *Ake* and *Caldwell* as follows:

We are of opinion that *Ake* and *Caldwell*, when read together, require 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.”

*Id.*

151. *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985).

152. *See Husske v. Commonwealth*, 476 S.E.2d 920, 929 (Va. 1996) (Poff, R., dissenting) (criticizing the court's adoption of a two-fold showing, especially when the defendant had moved five separate times for an appointment of an expert witness).

153. *See infra* text accompanying notes 156–211.

154. *See Angel v. Commonwealth*, 704 S.E.2d 386, 402 (Va. 2011) (affirming the lower court). The Supreme Court of Virginia held that:

there was no reversible error in denying Angel's motion to suppress his custodial interrogation, in denying Angel's appeal of the order of the JDR court certifying the charges against him to the grand jury . . . in denying his motion to dismiss the indictments, in denying his motion for appointment and compensation for a DNA expert and denying his motion for a continuance, in joining the trials of separate offenses and admitting evidence of other crimes, and in denying Angel's motion for mistrial[, and] the imposition of life sentences without parole in this case is not cruel and unusual.

2006 committed a series of rapes and sexual assaults all within two miles of the same location in Arlington, Virginia.<sup>155</sup> The victims and witnesses told law enforcement that the assailant was a young Hispanic man that escaped on a green motorbike.<sup>156</sup> The defendant in the case was picked up by law enforcement in the same geographical area that the assaults occurred, and he was walking a green motorbike.<sup>157</sup> The defendant did not speak any English; he was read his *Miranda* rights in Spanish and an interview was conducted in Spanish.<sup>158</sup> The defendant was ultimately charged and brought to trial.<sup>159</sup>

The defendant made a motion to have an expert witness analyze the DNA evidence produced against him, but the trial court denied the motion.<sup>160</sup> The trial court reasoned that the other circumstantial evidence, such as the witnesses, the bike, and the geographical location, meant that under the *Husske* standard of particularized need the defendant did not need an expert witness.<sup>161</sup> According to the court, the Commonwealth did not need to provide the defendant an expert witness for the prosecution's DNA evidence when it would be unreasonable; the court found that it would be unreasonable considering the fact that the DNA would likely play an insignificant part of the evidence presented against the defendant.<sup>162</sup>

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*Id.*

155. *See id.* at 389–90 (explaining there was one brutal rape and a series of attempted rapes all involving a Hispanic man with a green dirt bike).

156. *Id.*

157. *Id.* at 390.

158. *Id.* at 392.

159. *Id.*

160. *See id.* at 395 (describing how the trial court denied Angel's pretrial motion, which he renewed at trial, in addition to asking for a continuance, for an expert to review the DNA evidence).

161. *See id.* (articulating the *Husske* standard, which "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" (quoting *Husske v. Commonwealth*, 476 S.E.2d 920, 925 (Va. 1996))).

162. *See id.* at 396 (applying the *Husske* standard, the court must "determine whether there is a 'reasonable possibility' that the evidence complained of by the defendant 'might have contributed to the conviction'" (quoting *Chapman v. California*, 386 U.S. 18, 23 (1967))). The *Angel* court found that, "[W]hile the DNA evidence is the only physical evidence that linking Angel to V.L., the remaining



On appeal, Angel had five major assignments of error, only three of which are relevant to him being denied an expert witness.<sup>163</sup> Angel's first assignment of error was that his supposed confession to the police was not a confession but a misunderstanding.<sup>164</sup> Angel argued that he did not waive his *Miranda* rights when he assented that he understood what the officer was saying.<sup>165</sup> In addition, Angel argued that he simply answered the officer's questions in the affirmative, but he was unable to understand the questions properly because he did not speak English.<sup>166</sup> Second, Angel argued that because the circumstantial witness evidence was aggregated due to the several rape and sexual assault charges being joined, the jury was able to look at evidence from each of the separate crimes together, which made it seem that Angel was the perpetrator.<sup>167</sup> Finally, Angel also argued that the DNA evidence used at trial was the only physical evidence linking him to the crime, and the DNA evidence showed a purportedly "very high" match to Angel, but it was not a clear match.<sup>168</sup> Angel argued that the circumstantial evidence and supposed confession were ambiguous evidence, and the prosecution's evidence was significantly strengthened by the probative value of the DNA evidence, which Angel could not contest with an expert.<sup>169</sup>

The Supreme Court of Virginia addressed Angel's argument about the appointment of an expert witness by admitting that providing Angel an expert might have been appropriate.<sup>170</sup>

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evidence shows beyond a reasonable doubt that the lack of the DNA evidence would not have altered the verdict." *Id.*

163. *Id.* at 391.

164. *See id.* at 392 (demonstrating how the language barrier had caused confusion).

165. *Id.*

166. *See id.* (acknowledging that, in addition, Angel was seventeen, had a ninth-grade education, hailed from El Salvador, "had been present in this country for only six months," and his parents were not present).

167. *See id.* at 397 ("Angel argues that the admission of proof relating to these crimes was improper because the facts of the incidents were not nearly identical to the crimes for which he was on trial in any distinctive aspect and the admission of these crimes was more prejudicial than probative.").

168. *Id.* at 396.

169. *Id.*

170. *See id.* ("The denial of this motion, if error, was harmless error based on

However, the Supreme Court also stated that the error in denying Angel's motion to be appointed an expert witness was harmless beyond a reasonable doubt.<sup>171</sup> The Supreme Court determined it was a harmless error because the jury could have found that Angel was the guilty party based on the remaining evidence outside of the forensic DNA.<sup>172</sup>

The Supreme Court of Virginia's interpretation of an indigent's right to an expert witness seems flawed here. Angel moved to be appointed an expert witness and was denied because of an apparent lack of a particularized need, though DNA evidence was the only physical evidence presented against him.<sup>173</sup> The Court of Appeals "assumed without deciding" that Angel should have been appointed an expert witness to assess the Commonwealth's DNA evidence; the Virginia Supreme Court upheld the conviction by determining it to be a harmless error.<sup>174</sup> The Court's reasoning is based on what Angel referred to as the Commonwealth's circumstantial evidence that was pieced together only because the charges were brought against Angel jointly.<sup>175</sup> The Court did not address the prejudicial nature of the DNA evidence, and how it made the circumstantial evidence look concrete, and the confession look irrelevant.<sup>176</sup> In *Angel*, the Supreme Court of Virginia reassured other trial courts that they may deny indigents' motions for DNA expert witnesses even

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the remaining evidence of identity recited above.").

171. *Id.*

172. *Id.*

173. *Id.* at 395.

174. *Id.* at 396.

175. *See id.* at 398 ("Angel argues that if the cases had not been joined 'it is less likely that the subsequent July 9 acts would have been permitted to be heard by the [S.P.] jury.'). The Court found that:

[b]ased on this record, we agree with the Court of Appeals' conclusion that the admissible evidence constitutes "overwhelming evidence that [Angel] was the perpetrator of the June 18 misdemeanor sexual battery against S.P., and thus, any error in joining for trial that offense with the offenses against V. L. was harmless on the issue of guilt or innocence."

*Id.*

176. *Id.*

though it may be needed, if there is any other circumstantial evidence available.<sup>177</sup>

A case that focuses more on particularized need but shows Virginia's unwillingness to provide a forensic DNA expert witnesses to indigent defendants is *Branche v. Commonwealth*.<sup>178</sup> In this case the defendant, Branche, was accused of assault and rape.<sup>179</sup> The evidence in the *Branche* case consisted of the testimony of the assailant and victim, Branche's brief statement to the police, and the DNA evidence collected at the crime scene.<sup>180</sup>

Branche moved as an indigent defendant to have the Commonwealth appoint an expert in forensic DNA evidence to help with his defense.<sup>181</sup> The defendant was confused because there was no DNA of a sexual nature.<sup>182</sup> The defendant argued for the Commonwealth to appoint a forensic expert with the following statement:

[The Report's] conclusion is flawed and based on unreliable scientific conclusions that will require expert assistance to demonstrate. In particular defendant needs to employ experts to conduct DNA testing and evaluation of the Commonwealth's evidence. Counsel certifies that if his client had sufficient funds, he would routinely employ an expert in this matter.<sup>183</sup>

Additionally, the defendant's motion stated the following in order to show the particularized need he had in presenting a defense: "[The defendant requests] to have an expert review Dr. Eve Rossi's report, look it over with all supporting documents, and make sure

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177. *Id.*

178. *See Branche v. Commonwealth*, No. 0912-05-2, 2006 WL 1222400, at \*4 (Va. Ct. App. May 9, 2006) (affirming the appellant's convictions because "appellant had such an opportunity and therefore was not denied due process . . . the trial court did not abuse its discretion in refusing to grant . . . a DNA expert at state expense.").

179. *Id.* at \*3.

180. *Id.* at \*5.

181. *See id.* at \*1 (indicating that the defendant made a written motion asserting that his need for a DNA expert was "material in the preparation of his defense and the denial of such would be prejudicial to his case and result in a fundamentally unfair trial.").

182. *See id.* (explaining that the DNA report showed analysis of perspiration, blood and DNA left on a liquor bottle, but that there was no DNA of oral or vaginal swabs matching the defendant or any third party).

183. *Id.*

we have the right person, we have the right DNA, make sure it is consistent[.]”<sup>184</sup>

The Court of Appeals of Virginia determined that Branche’s motion should be denied.<sup>185</sup> The Court of Appeals of Virginia stated that just because understanding the highly technical nature of DNA is difficult, this does not give rise to a particularized need.<sup>186</sup> The court quoted *Husske* stating, “[a] hope or suspicion that favorable evidence may be procured from an expert, however, is not sufficient to require the appointment of an expert[.]”<sup>187</sup> Additionally, the court states that the motion made “generalized statements” and “conclusory assertions.”<sup>188</sup> The court accepted the prosecution’s argument that the DNA evidence was not to prove that Branche had committed the rape, but that he had been in the room, and the prosecution relied on the victim’s testimony to prove the rape.<sup>189</sup> The Court of Appeals of Virginia added “an indigent defendant is not constitutionally entitled, at the state’s expense, to all the experts that a non-indigent defendant might afford[.]”<sup>190</sup>

The Virginia courts took the opportunity to deny an indigent’s motion for a DNA expert by showing that there was additional evidence outside of the DNA to find the need was not particularized.<sup>191</sup> The prosecution’s argument that the DNA was only used to prove the defendant’s presence in the room was effective in that the defendant cannot show enough of a particularized need, or likelihood that the evidence would impact the outcome of the case to show that he needed a DNA expert.<sup>192</sup> The DNA evidence was still prejudicial enough to place the defendant in the room, and once the defendant was placed in the

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184. *Id.* at \*2.

185. *Id.* at \*5.

186. *See id.* at \*3 (stating that with regard to the defendant’s proffer, “his generalized statements’ and ‘conclusory assertions’ did not show a particularized need.”).

187. *Id.* at \*3.

188. *Id.*

189. *See id.* at \*4 (“[T]he Commonwealth sought to introduce incriminating DNA evidence in this case only to prove appellant’s presence in the apartment, not sexual contact.”).

190. *See id.* (“[A]n indigent defendant is not constitutionally entitled, at the state’s expense, to all the experts that a non-indigent defendant might afford.”).

191. *Id.* at \*3.

192. *Id.*

room of the victim, the victim's testimony was enough to establish that the defendant was the rapist, essentially making the DNA evidence the only evidence necessary to convict.<sup>193</sup>

In a similar case, involving a car-jacking and murder, *Sanchez v. Commonwealth*, the defendant was convicted based on two items of evidence.<sup>194</sup> The first was an ambiguous description provided by an eyewitness: the woman who was carjacked.<sup>195</sup> The reliability of the eyewitness's testimony was incomplete as she was only able to identify one of her two attackers.<sup>196</sup> The other evidence the prosecution brought against the defendant was DNA from blood found on the inside driver's side door of the car.<sup>197</sup>

Prior to the trial the defendant motioned to have an expert witness appointed to review the DNA evidence and go over the findings.<sup>198</sup> The court granted the defendant's motion agreeing

193. *See id.* (“[The defendant] cannot claim that alternate DNA results would be essential to his defense, as he did not deny being in the apartment in the first place. His strategy at trial was to provide an alternate explanation to the evening's events, not to dispute his presence and involvement.”).

194. *See Sanchez v. Commonwealth*, 585 S.E.2d 337, 345 (Va. Ct. App. 2003) (finding that because the defendant demonstrated a particularized need, it was error for the trial court to deny funds for an expert, and thus, the defendant's ability “to rebut and challenge the Commonwealth's evidence” was frustrated).

195. *See id.* at 339 (demonstrating the inconsistencies found in this witness' testimony). At trial, the witness stated:

At Sanchez's preliminary hearing in March 2001, [the witness] described the carjacking driver as approximately her height with a Hispanic accent. She also identified Sanchez as the driver, although she had earlier identified another individual as the driver while she was at the courthouse for the preliminary hearing of Sanchez's codefendant in Spring 2000. [B]efore trial, the prosecutor told her that [the defendant] confessed to the carjacking. She identified Sanchez as the driver and further testified that both men who carjacked her car had Hispanic accents. She described the driver as “[her] height or a little bit taller,” with a goatee, and “fairly broad, Hispanic type features, [and] a rough voice.” She also stated he was in his mid to late twenties. [A] Police Officer . . . testified that [the witness] described the driver on the date of the carjacking, as Hispanic, between 5'4” and 5'6” in height, with a moustache. [The witness], who is 5'3” in height, conceded at trial that she might have earlier told a police officer that the driver was 5'6” tall and she did not recall saying that he had a moustache.

*Id.*

196. *Id.* at 340.

197. *Id.* at 345.

198. *See id.* at 340 (stating that the defendant made the motion “to evaluate

that there was a particularized need.<sup>199</sup> The defendant made a pretrial motion for additional funds to have the expert witness testify at trial, as the previous funds had been exhausted in having the expert analyze the data.<sup>200</sup> The court denied the motion for additional funds and the defendant was subsequently convicted.<sup>201</sup>

The defendant argued that denying the motion had been erroneous and stated, “[the expert] has noticed that there were errors in the way that the DNA procedures were followed, that there were errors in the way the examination was done, which could have had a significant impact in the results of the DNA[.]”<sup>202</sup> Again, similar to *Angel*, the Court of Appeals determined that the denial of additional funds by the trial court was erroneous.<sup>203</sup> The DNA evidence was the only physical evidence linking the defendant to the crime.<sup>204</sup> Additionally, the proffer that the defendant’s DNA expert had found evidence that the tests performed by the Commonwealth contained errors was likely to impact the outcome of the case.<sup>205</sup>

Regardless of the erroneous deprivation of the funds to hire the expert witness to testify at trial, the Court of Appeals of Virginia determined that the error was harmless and the additional evidence from the eyewitness was sufficient in conjunction with the DNA evidence to convict the defendant.<sup>206</sup>

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the Commonwealth’s DNA evidence and the processes by which it was developed.”).

199. *See id.* (granting the defendant \$3,000 for such an expert).

200. *See id.* at 340 (establishing that Sanchez had been granted \$3,000 to hire an expert witness, but the witness charged \$1,750, which meant that Sanchez did not have enough to bring the expert witness to court to testify about the analysis he had written up).

201. *Id.* at 340–41.

202. *Id.* at 340.

203. *See id.* at 342–43 (“Sanchez’s proffer demonstrated a particularized need . . . Sanchez’s ability to challenge the validity of the Commonwealth’s DNA results was truncated by the trial court’s denial of the additional funds that Sanchez sought.”).

204. *Id.* at 343.

205. *Id.*

206. *See id.* at 344 (finding harmless error in light of the evidence: his confession, his description of “his actions on the date in question in detail . . . corroborat[ion]” of a witness’ testimony, as well as the shoe impression on the driver’s window).

Virginia's particularized need standard has created a standard of showing that is more difficult to meet than is required by the Supreme Court in *Ake*.<sup>207</sup> This creates a system where the majority of indigent defendants granted expert DNA witnesses at the trial will be defendants where the only evidence or only material evidence brought against them is DNA or forensic.

### *B. Standard Met*

While Virginia courts are likely to deny an indigent defendant's motion for a DNA expert witness for a defendant if there is any evidence in addition to the DNA, the opposite is true if the defendant is faced with only DNA evidence.<sup>208</sup> Two cases in particular illustrate Virginia courts applying *Ake* and *Husske* to indigent defendant cases, and in those cases the only evidence presented against the defendants was DNA.<sup>209</sup> The first case is *Lawlor v. Commonwealth*,<sup>210</sup> in which the defendant was charged with capital murder subsequent to rape or attempted rape.<sup>211</sup> The victim in the case was raped in her studio apartment and subsequently beaten to death with a metal cooking pot found at the scene of the crime.<sup>212</sup> The only physical evidence found at the crime scene was DNA taken off of the victim's body and off "the wooden

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207. See *Husske v. Commonwealth*, 476 S.E.2d 920, 930 (Va. 1996) (Poff, J., dissenting) (discussing that the *Ake* rule only applies if "the defendant makes a threshold showing that the assistance of an expert to confront the prosecution will be a significant factor at trial."). The *Husske* Court stated that the *Ake* rule "require[s] a State to provide 'the basic tools of an adequate defense' . . . to those defendants who cannot afford to pay for them." See *id.* at 929 (quoting *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985)).

208. See *Lawlor v. Commonwealth*, 738 S.E.2d 847, 895 (Va. 2013) (affirming that the defendant is guilty of capital murder and sentenced to death); *Dowdy v. Commonwealth*, 686 S.E.2d 710, 724 (Va. 2009) (affirming the Court of Appeals in "upholding Dowdy's conviction for the rape and first-degree murder of Judy Jaimie Coate.").

209. See *Lawlor*, 738 S.E.2d at 859 (showing that only DNA evidence linked the defendant to the crime and the trial court appointed an expert witness); *Dowdy*, 686 S.E.2d at 720–21 (illustrating that only DNA evidence linked the defendant to the crime and the trial court appointed an expert witness).

210. See generally *Lawlor*, 738 S.E.2d.

211. *Id.* at 859.

212. *Id.*

pot handle, and the frying pan.”<sup>213</sup> The defendant, Lawlor, was a lease consultant who lived in the victim’s building and had access to each of the apartments.<sup>214</sup> Due to the victim’s unfortunate death, at trial the only evidence that directly linked Lawlor to the crime was the apparent DNA evidence that the Commonwealth brought.<sup>215</sup>

The defendant, Lawlor, motioned for funds for an expert witness to be provided by the Commonwealth.<sup>216</sup> The defendant requested an expert be funded to travel to Uruguay to collect DNA evidence from the individual that Lawlor argued had actually committed the rape, in order to refute the DNA evidence provided by the Commonwealth. The first was an expert DNA analyst that the defendant wanted to use to refute the DNA evidence brought against him by the Commonwealth.<sup>217</sup> The second was a private investigator to travel to Uruguay to collect DNA from the individual that Lawlor argued had actually committed the rape and murder.<sup>218</sup> The trial court granted Lawlor’s motion for a DNA analyst but denied the motion for funds to hire the private investigator.<sup>219</sup> The court cited *Husske*, saying “this Court noted that an indigent defendant is not constitutionally entitled, at the state’s expense, to all the experts that a non-indigent defendant might afford[.]”<sup>220</sup> By citing *Husske*, the court explicitly illustrated that it in fact employed the particularized need standard of showing for an indigent defendant who requested funds for an expert witness.<sup>221</sup>

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213. *Id.*

214. *Id.*

215. *Id.* at 859–60.

216. *See id.* at 872–73 (demonstrating that Lawlor made a motion for funding to “send an investigator to Uruguay” which he renewed on January 13, 2011).

217. *Id.*

218. *Id.*

219. *See id.* at 873 (“The court then ruled that Lawlor had a right to call Delgado at trial and that it would provide funds to make Delgado available as a defense witness. However, it denied the request for funds to send the investigator to Uruguay.”).

220. *See id.* at 872 (stating that “an indigent defendant is not constitutionally entitled, at the state’s expense, to all the experts that a non-indigent defendant might afford”) (quoting *Crawford v. Commonwealth*, 704 S.E.2d 107, 115 (Va. 2011)).

221. *See id.* (“It is the defendant’s burden to demonstrate this ‘particularized



Additionally, Lawlor made several subsequent funding requests for the DNA expert as the DNA evidence became more important.<sup>222</sup> The court repeatedly granted the requests until the final request was for the analysis of single hair found in the apartment that had been present for an indeterminate amount of time.<sup>223</sup> Unlike *Husske*, *Angel*, *Branche*, or *Sanchez*, the only evidence directly linking Lawlor to the rape and murder was the DNA evidence, which meant that the court had to provide a DNA expert in order to afford Lawlor the “basic tools” necessary to preserve a fair trial.<sup>224</sup>

A second case that illustrates the particularized need rule is *Dowdy v. Commonwealth*.<sup>225</sup> Like *Lawlor*, *Dowdy* involves the brutal rape and murder of a woman in Virginia.<sup>226</sup> The defendant, like Lawlor, lived in close proximity to the victim and even admitted to having intercourse with the victim a few days prior to the rape and murder.<sup>227</sup> Also like Lawlor, because the unfortunate victim had been murdered and there was little circumstantial evidence beyond the fact that he had intercourse with the victim previously, the only evidence linking the defendant to the crime was the DNA evidence found on the victim’s body.<sup>228</sup>

Also like *Lawlor*, Dowdy moved as an indigent to have the funds to appoint an expert provided by Commonwealth.<sup>229</sup> Dowdy wanted a private investigator hired to interview the victim’s friends to better understand who she had been seen with that

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need’ by establishing that an expert’s services would materially assist him in preparing his defense and that the lack of such assistance would result in a fundamentally unfair trial.”).

222. *Id.* at 873.

223. *See id.* at 874 (“The Defense has asked the Court to test virtually everything that’s there . . . [without] any basis that would produce evidence of a second participant. . .”).

224. *See id.* (finding it was not an abuse of discretion when the court granted the requests for DNA testing, “despite the fact that Lawlor admitted participating in the murder and the overwhelming consistency of the forensic evidence,” and denied a DNA test as to a hair fragment.).

225. 686 S.E.2d 710 (Va. 2009).

226. *Id.* at 712.

227. *Id.*

228. *Id.*

229. *Id.*

day.<sup>230</sup> Also, Dowdy wanted the funds to hire an expert DNA analyst to refute the Commonwealth's DNA and forensic evidence.<sup>231</sup> The Commonwealth had spermatozoa swabs, bloody fingerprints, and hairs collected from the body.<sup>232</sup> The court denied Dowdy's motion for a private investigator, citing *Husske* and arguing that Dowdy had not made a particularized enough showing to warrant appointment of funds for a private investigator.<sup>233</sup> However, the court did provide Dowdy with the funds to hire an expert DNA and forensics analyst.<sup>234</sup>

### V. Problems

The differences between the *Husske* strain of cases, where expert witnesses were denied, and the *Dowdy* and *Lawlor* strain of cases, where expert witnesses were appointed, show that Virginia court's particularized need standard of showing can be met. The distinguishable facts that would cause the differences in the outcome between the two cases are the presence or absence of evidence other than the DNA brought by the prosecution. In the *Husske* strain of cases there was evidence, usually circumstantial, in addition to the DNA evidence.<sup>235</sup> In the *Dowdy* and *Lawlor* strain the evidence was only the DNA type evidence.<sup>236</sup> According to the Supreme Court of the United States in *Ake* the indigent defendant must make a showing that an expert witness will be a significant factor in his defense.<sup>237</sup> The Supreme Court of Virginia determined in *Husske* that an indigent defendant must make a showing that not only would an expert witness play a significant

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230. *Id.*

231. *Id.*

232. *Id.* at 714.

233. *See id.* at 712 (“[T]he circuit court explained that Dowdy needed to demonstrate not only that the subject for which excerpt assistance was sought, i.e., Dowdy’s alleged alibi, would be a significant factor in his defense but also that he would be prejudiced without the services of an investigator.”).

234. *Id.* at 713.

235. *See supra* Section IV(A) (analyzing the particularized need standard in the *Husske* strain of cases).

236. *See supra* Section IV(B) (discussing the particularized need standard in the *Dowdy* and *Lawlor* strain of cases).

237. *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985).

factor in his defense, but that it be reasonable to the defense, which is what the court called a particularized need showing.<sup>238</sup> This determination created a heightened showing that departs from *Ake* and violates an indigent's rights to a fair trial, which is seen when the outcome showing required in *Husske* and progeny are compared to *Ake* on the similar facts where circumstantial evidence was present in addition to evidence which required the testimony of an expert witness.<sup>239</sup>

In the spectrum of indigent defendants in Virginia, only the defendants that are so clearly within the particularized need, because the only evidence brought against them is DNA, will be properly afforded an expert witness to help prepare a defense.<sup>240</sup> These defendants should be granted expert witnesses due to the highly technical and probative nature of DNA. Many juries take DNA results as evidence beyond a reasonable doubt regardless of how the Commonwealth presents it.<sup>241</sup> Additionally if a defendant does not have an expert of his or her own then the defendant will be unable to challenge the DNA evidence at trial.<sup>242</sup> Also, it is

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238. See *Husske v. Commonwealth*, 476 S.E.2d 920, 925 (Va. 1996). The *Husske* court explained:

[T]he Supreme Court [has] noted that a trial court properly denied an indigent defendant's requests for the appointment of a criminal investigator, a fingerprint expert, and a ballistics expert . . . because the defendant's requests were accompanied by no showing of reasonableness . . . . 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[.]

*Id.* (internal citations omitted).

239. See *supra* Section IV (comparing the standard as applied in differing Virginia cases).

240. See *generally* *Lawlor v. Commonwealth*, 738 S.E.2d 847 (Va. 2013); *Dowdy v. Commonwealth*, 686 S.E.2d 710 (Va. 2009).

241. See NRC II, *supra* note 39, at 205 (discussing the bias jurors have towards DNA evidence as demonstrated through a study).

242. See *Giannelli, supra* note 14, at 1364.

possible that some DNA evidence presented might not be produced using proper methods, or might even be fabricated, and there is no way for an indigent defendant to challenge the evidence without an expert.<sup>243</sup>

Every other indigent defendant in Virginia where DNA evidence is presented against them along with other evidence will likely be denied their motion for an expert witness. The circumstantial and witness evidence might not even be the evidence linking the defendant to the crime, yet the DNA evidence, which is probative by nature, will be used and the defendant will not be able to challenge it.<sup>244</sup>

### VI. Solutions

Virginia's adoption of the heightened standard denies indigents the "basic tools" for a fair trial. The lack of basic tools includes the inability to effectively and cogently defend against complex and scientific evidence that requires an expert to impeach and is prejudicial in nature.<sup>245</sup> Additionally, if an indigent defendant is unable to meet Virginia's heightened standard, then he or she has no way to guarantee or impeach the evidence for accuracy or government bias.<sup>246</sup>

Absent legislative action or the Supreme Court of the United States redefining indigent rights to experts, it is up to the Supreme Court of Virginia to overturn the showing standard established in *Husske*, and reinstate the *Ake* standard. This solution seems unlikely because the Supreme Court of Virginia has gone back to *Husske* time and time again. Additionally, there are policy arguments for not overturning the *Husske* standard.<sup>247</sup> The Virginia courts, which are cash-strapped, already have a practical

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243. *Id.*

244. *Id.*

245. *Id.*; see Roth, *supra* note 22, at 1358 (explaining that the use of DNA matching evidence makes it difficult for jurors to separate probability of innocence or guilt from certainty).

246. VA. CODE ANN. § 19.2-163 (2009).

247. See *Husske v. Commonwealth*, 476 S.E.2d 920, 925 (Va. 1996) ("[T]his 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[.]").

interest not to award stipends for expert witnesses for every criminal defendant, especially if there is inculpatory evidence outside of the DNA or forensic evidence presented.<sup>248</sup> Also, granting more expert witnesses increases the time and burden on the courts.<sup>249</sup>

Virginia alternatively could create a DNA and forensic expert witness system akin to the Public Defender institutions.<sup>250</sup> Such a system would alleviate the prosecutorial bias of expert witnesses.<sup>251</sup> Again, the issue of financial and workload burdens would likely make such a system infeasible.<sup>252</sup>

Finances and the amount of cases handled by the courts are a real issue, but they need to be weighed against justice. Virginia is creating a system where indigent defendants are significantly more vulnerable to criminal charges based solely on the type of evidence presented against them.<sup>253</sup> Indigent defendants are being treated differently than wealthy defendants because they now have to make a showing that a wealthy defendant would not need to make.<sup>254</sup>

### VII. Conclusion

The Supreme Court of Virginia incorrectly read two Supreme Court decisions together to create a showing standard not articulated by the Supreme Court. This heightened showing required by indigent defendants creates a potential violation of equal protection, but surely violates the “basic tools required for a fair trial” when DNA and forensic evidence is presented against a criminal defendant.

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248. *Id.*

249. *Id.*

250. See Robin Steinberg, *Heeding Gideon's Call in the Twenty-First Century: Holistic Defense and the New Public Defense Paradigm*, 70 WASH & LEE L. REV. 961, 963–64 (2013) (explaining the benefits of a holistic defense from a public defender).

251. *Id.*

252. *Id.*

253. See Giannelli, *supra* note 14, at 1364 (highlighting the unfair advantage a well-funded prosecution has over an indigent defendant).

254. U.S. CONST. amend. XIV.