

Tuesday 19th

September, 1995.

Paul J. Husske, s/k/a  
Paul Josef Husske, Appellant,  
against Record No. 0829-92-2  
Circuit Court Nos. CR-91-0943-00F through  
CR-91-0943-02F and CR-91-1361-00F  
Commonwealth of Virginia, Appellee.

Upon Rehearing En Banc

Before Chief Judge Moon, Judges Baker, Benton, Koontz\*,  
Willis, Elder, Bray and Fitzpatrick

Steven D. Benjamin (Betty Layne DesPortes;  
Steven D. Benjamin and Associates, on  
brief), for appellant.

Michael T. Judge, Assistant Attorney General  
(James S. Gilmore, III, Attorney General;  
Marla Lynn Graff, Assistant Attorney  
General, on briefs), for appellee.

By opinion issued September 20, 1994, in Husske v.  
Commonwealth, 19 Va. App. 30, 448 S.E.2d 331 (1994), a panel of this  
Court reversed and remanded for retrial Husske's convictions of  
forcible sodomy, rape, robbery, and breaking and entering with intent  
to commit rape. On the Commonwealth's motion, we stayed the mandate  
of that decision and granted rehearing en banc. Upon rehearing en  
banc, the judgment of the trial court is affirmed by an evenly divided  
court.<sup>1</sup>

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<sup>1</sup>Judge Barrow sat for the argument in this case and participated in the initial conference, but died prior to decision without casting a vote.

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Benton, and Koontz, J.J., dissenting.

Although the Court has determined that eight current members of this Court are evenly divided in their votes on the merits of this case, we believe that because Judge Barrow participated at the oral argument and conference of this case decision before his death the entire Court should rehear this appeal en banc before making a final disposition.

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Accordingly, the opinion previously rendered by a panel of this Court on September 20, 1994 is withdrawn, the mandate entered on that date is vacated and the judgment of the trial court is affirmed.

The appellant shall pay to the Commonwealth of Virginia thirty dollars damages.

It is ordered that the trial court allow counsel for the appellant a total fee of \$800 for services rendered the appellant on this appeal, in addition to counsel's costs and necessary direct out-of-pocket expenses.

The Commonwealth shall recover of the appellant the amount paid court-appointed counsel to represent him in this proceeding, counsel's costs and necessary direct out-of-pocket expenses, and the fees and costs to be assessed by the clerk of this Court and the clerk of the trial court.

This order shall be published and certified to the trial court.

Costs due the Commonwealth  
by appellant in Court of  
Appeals of Virginia:

Attorney's fee	\$800.00	plus costs and expenses
Filing fee	25.00	

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\*Justice Koontz participated in the hearing and decision of  
this case prior to his investiture as a Justice of the Supreme Court  
of Virginia.

A Copy,

Teste:

By: Richard R. James, Clerk

Deputy Clerk