COMMONWEALTH of VIRGINIA

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May 23, 2014

The Honorable A. Donald McEachin
Member, Senate of Virginia
4719 Nine Mile Road
Richmond, Virginia 23223

Dear Senator McEachin:

I am responding to your request for an official advisory Opinion in accordance with § 2.2-505 of the *Code of Virginia.*

Issue Presented

You ask whether a parent or caretaker who leaves a child alone in the same room with a sexually violent offender, yet remains within the residence, would be in violation of § 18.2-371, which incorporates by reference the provisions of § 16.1-228(6).

Response

It is my opinion that a parent or caretaker who leaves a child alone in the same room with a sexually violent offender, yet remains within the residence, has not violated § 18.2-371 by leaving the child "alone in the same dwelling" with an offender within the meaning of § 16.1-228(6).

Background

In your request, you present a hypothetical set of facts in which a parent or caretaker leaves a child alone in the same room of a residence with a person known by the parent to be required to register as a sexually violent offender, while the parent or caretaker remains elsewhere within the residence. You inquire whether such actions would violate § 18.2-371, which incorporates by reference the provisions of § 16.1-228(6) with respect to the definition of an "abused or neglected child."

Applicable Law and Discussion

Section 18.2-371 provides, in relevant part, that

> Any person 18 years of age or older, including the parent of any child, who . . . willfully contributes to, encourages, or causes any act, omission, or condition which renders a child delinquent, in need of services, in need of supervision, or abused or neglected as defined in § 16.1-228 . . . shall be guilty of a Class 1 misdemeanor.

According to § 16.1-228(6), an "abused or neglected" child includes a child

> [w]hose parents or other person responsible for his care creates a substantial risk of physical or mental injury by knowingly leaving the child *alone in the same dwelling*, including an apartment as defined in § 55-79.2, with a person to whom the child is not related by blood or marriage and who the parent or other person responsible for his care knows has been convicted of an offense against a minor for which registration is required as a violent sexual offender pursuant to § 9.1-902 [emphasis added].

I note first that, "[w]hen construing a statute, our primary objective is 'to ascertain and give effect to legislative intent,' as expressed by the language used in the statute."[1] Moreover, "the plain, obvious, and rational meaning of a statute is to be preferred over any curious, narrow, or strained construction, and a statute should never be construed in a way that leads to absurd results."[2] Further, "[w]e 'assume that the legislature chose, with care, the words it used when it enacted the relevant statute.'"[3] Finally, undefined terms in a statute must be given their ordinary meaning, given the context in which they are used.[4]

The *Code of Virginia* does not define the term "dwelling" for purposes of § 16.1-228(6); however, a "dwelling" commonly is defined as a "habitation," "place of residence," or "abode."[5] This term is distinct from the narrower term "room," which is defined as "[a]n area separated by walls or partitions from other similar parts of the structure or building in which it is located."[6] Had the General Assembly intended to enlarge the scope of § 16.1-228(6) by adding the term "room," it could have done so.[7] Accordingly, the reach of § 16.1-228(6) does not include a child who is left alone in the same room as a sexually violent offender, provided the child's parent or caretaker remains within the residence.

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[1] Cuccinelli v. Rector & Visitors of the Univ. of Va., 283 Va. 420, 425, 722 S.E.2d 626, 629 (2012) (quoting Commonwealth v. Amerson, 281 Va. 414, 418, 706 S.E.2d 879, 882 (2011)) (further citation and internal quotation marks omitted).

[2] Meeks v. Commonwealth, 274 Va. 798, 802, 651 S.E.2d 637, 639 (2007) (internal quotation marks and citations omitted).

[3] Alger v. Commonwealth, 267 Va. 255, 261, 590 S.E.2d 563, 556 (2004) (quoting Barr v. Town & Country Props., Inc., 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990)).

[4] *See* Moyer v. Commonwealth, 33 Va. App. 8, 35, 531 S.E.2d 580, 593 (2000) (citing McKeon v. Commonwealth, 211 Va. 24, 27, 175 S.E.2d 282, 284 (1970)).

[5] THE WEBSTER ENCYCLOPEDIC DICTIONARY OF THE ENGLISH LANGUAGE 271 (Virginia S. Thatcher & Alexander McQueen eds., 1967); *see also* THE AMERICAN HERITAGE DICTIONARY: SECOND COLLEGE EDITION 431 (Pamela B. DeVinne et al. eds., 1985) (defining a "dwelling" as "a place to live in" or "abode").

[6] THE AMERICAN HERITAGE DICTIONARY: SECOND COLLEGE EDITION, *supra* note 6, at 1070; *see also* THE WEBSTER ENCYCLOPEDIC DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 6, at 730 (defining a "room" as "an apartment in a house" or "any division separated from the rest by a partition").

In addition, Virginia's common law of burglary draws a clear distinction between the terms "dwelling" and "room." *See* Lacey v. Commonwealth, 54 Va. App. 32, 40, 675 S.E.2d 846, 850 (2009); Hitt v. Commonwealth, 43 Va. App. 473, 483, 598 S.E.2d 783, 788 (2004).

[7] I note that this Opinion does not address a scenario in which a parent or caretaker leaves his child alone in a room that *independently* might constitute a separate "dwelling" (such as a rented room), as your inquiry does not present such a scenario. *See Hitt*, 43 Va. App. at 481-82, 598 S.E.2d at 787 (indicating that rooms within a larger residence may constitute independent "dwelling houses" if they serve as the discrete habitation of individuals who reside therein); Clarke v. Commonwealth, 66 Va. (Gratt) 908, 917, 919 (1874) (noting that a rented room may constitute an individual "dwelling house" by construction of law); *see also* VA. CODE ANN. § 36-96.1:1 (2011) (defining a "dwelling," for purposes of Virginia's Fair Housing Law, as "any building, structure, *or portion thereof*, that is occupied as, or designated or intended for occupancy as, a residence by one or more families" (emphasis added)).

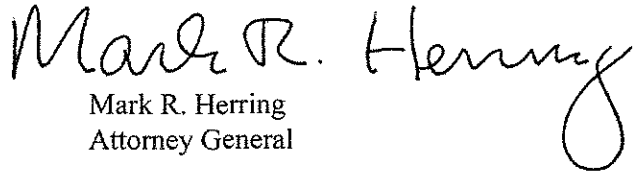
Moreover, it is well-established that "[p]enal statutes must be 'strictly construed against the State,' and . . . 'cannot be extended by implication or construction, or be made to embrace cases which are not within their letter and spirit.'"[8] Based on the definitions above, a strict construction of § 16.1-228(6) requires that the subsection be limited to instances in which a parent or caretaker leaves the dwelling itself, rather than a room within the dwelling.

Conclusion

Accordingly, it is my opinion that a parent or caretaker who leaves a child alone in the same room with a sexually violent offender, yet who remains within the residence, has not violated § 18.2-371 by leaving the child "alone in the same dwelling" with an offender within the meaning of § 16.1-228(6).

With kindest regards, I am

Very truly yours,



Mark R. Herring
Attorney General

[8] Armstrong v. Commonwealth, 263 Va. 573, 581, 562 S.E.2d 139, 144 (2002) (quoting Dep't of Motor Vehicles v. Athey, 261 Va. 385, 388, 542 S.E.2d 764, 766 (2001)) (further citation omitted).