REPORT OF THE
JOINT SUBCOMMITTEE STUDYING

MENTAL INCAPACITY AND CONSENT TO SEXUAL ACTIVITY

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

HOUSE DOCUMENT NO. 87

COMMONWEALTH OF VIRGINIA
RICHMOND
1997

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EXECUTIVE SUMMARY

This study was conducted under the authority of a resolution offered by Del. Robert F. McDonnell to investigate the worthiness of Virginia law to protect those who are mentally incapacitated from rape and sexual assault. The resolution was offered largely in response to an occurrence in Virginia Beach involving sexual activity between a mentally retarded young woman and three men, one of whom the young woman knew. The men were not prosecuted for rape. The victim and her parents believed that the incident should have been considered a rape. This raised the issue of whether the law as it exists is sufficient to protect the mentally incapacitated.

The subcommittee considered the possibility of a "bright line" test to be used with mentally retarded victims. The line would be a number representing the mental age of a mentally retarded person below which he or she could not legally assent to sexual activity. The members heard a great deal of testimony on this subject from the legal and medical community and learned that there are many variables in determining a "mental age," including the person(s) making the evaluation. They concluded, in agreement with the Court of Appeals decision in Adkins v. Commonwealth, that a determination of capacity to consent to sexual activity should be made on a case-by-case basis and that the adoption of an arbitrary "bright line" mental age would in some cases certainly result in the criminalization of consensual, noncriminal sexual behavior.

The members also investigated the protection afforded the mentally incapacitated by current statutory law on rape and sexual assault. The subcommittee concluded that those laws as they currently exist are adequate and properly written.

Report of the Joint Subcommittee
Studying Mental Incapacity and
Consent to Sexual Activity
To
The Governor and the
General Assembly of Virginia
Richmond, Virginia
1997

TO: The Honorable George F. Allen, Governor,
and
The General Assembly of Virginia

I. INTRODUCTION

House Joint Resolution 80 (Appendix A) was offered by Del. Robert F. McDonnell in response to both a recent appellate court decision on the subject of consent to sex by a mentally retarded girl and an occurrence in Virginia Beach involving sexual activity between a mentally retarded young woman and three men, one of whom the young woman knew. Despite some question of her consent to the sexual activity, there was no prosecution of the men for rape. The incident raised the general issue of the sufficiency of Virginia law to protect mentally incapacitated citizens from sexual assault. Today, as many mentally retarded people are living largely on their own--working, shopping, paying rent, etc.--with minimal assistance from others, they are nevertheless subject to manipulation by people they trust. The subcommittee was asked to decide whether current Virginia law is adequate to both protect mentally incapacitated persons from sexual abuse and at the same time preserve their right to engage in voluntary sexual activity. To carry out its purpose, the subcommittee met four times: September 4, 1996; October 1, 1996; November 25, 1996; and January 7, 1997.

II. DISCUSSION

A. CONTROLLING LAW IN VIRGINIA

At the first meeting, the subcommittee heard a presentation by Legislative Services staff on laws governing consent to sex by persons with mental disabilities. The presentation encompassed a discussion of the statutes which contemplate lack of consent resulting from mental disability and the recent (and only) Virginia appellate case on the subject--Adkins v. Commonwealth (Appendix B).

The current state of the law in Virginia based on the Adkins court's interpretation of consent is as follows.

1. Virginia Statutes

Section 18.2-61 defines rape as "sexual intercourse...accomplished...through the use of the complaining witness's mental incapacity or physical helplessness.

Section 18.2-67.10 defines "mental incapacity" as "that condition of the complaining witness existing at the time of an offense under this article which prevents the complaining witness from understanding the nature or consequences of the sexual act involved in such offense and about which the accused knew or should have known" (Appendix C).

Thus, the attorney for the Commonwealth, in a rape case involving a mentally incapacitated victim, would have to prove the following:

a. The defendant had intercourse with the complaining witness.
b. Intercourse was accomplished "through the use of" the complaining witness' mental incapacity.
c. The complainant had a "condition" at the time of the offense.
d. The condition prevented him or her from understanding either the nature or the consequences of the sexual act.
e. The defendant knew or should have known of the complaining witness' condition.

The same definition of mental incapacity (as a determinant of consent to the act) is also used in the definitions of forcible sodomy (§ 18.2-67.1), object sexual penetration (§ 18.2-67.2), aggravated sexual battery (§ 18.2-67.3) and sexual battery (§ 18.2-67.4).

2. Virginia Case Law.

The sole Virginia case interpreting mental incapacity of a rape victim is Adkins v. Commonwealth, 20 Va. App. 332 (1995) (Appendix B).

In this case, the 16-year-old complainant was diagnosed as mentally retarded with IQ scores ranging between 58 and 70. At her request, she and the defendant (described as a 27-year-old who lived with his father and whose social security check was handled by his sister because he was not capable of handling his own money) had sex against her mother's wishes, at the defendant's home. The complainant testified that she and Adkins had "made love," that sex was mostly her idea, and that she told defendant she was 18 years old.

The defendant was convicted of rape and appealed his conviction. The Court of Appeals reversed the decision.

On the issue of whether there was sufficient evidence to convict the defendant, the Court of Appeals said that the purpose of the statute

> . . . is to protect persons who are mentally impaired or retarded from being sexually exploited due to their mental incapacity...[but] must not be interpreted and applied in a manner that creates an unintended rule that would prohibit all mentally impaired or retarded persons from engaging in consensual intercourse without having their partners commit a felony. Id., at 342, 343.

After defining the terms within the definition of "mental incapacity" in accordance with Black's Law Dictionary and Webster's Third New International Dictionary, the court explained what it found to be the Commonwealth's burden as follows:

> The fact finder cannot infer from proof of general mental incapacity or retardation or an IQ range or mental age that a victim is prevented or unable to understand the nature and consequences of a sexual act, unless the evidence proves that the victim lacks the ability to comprehend or appreciate either the distinguishing characteristics or physical qualities of the sexual act or the future natural behavioral or societal results or effects which may flow from the sexual act. The Commonwealth has the burden to prove every element of the offense in order to prove guilt beyond a reasonable doubt. Id., at 346.

(In this case, the Commonwealth had offered expert opinion evidence that the complainant had an IQ of 59 and a mental age of 10.4 years. The complainant's mother testified that complainant was "severely retarded.")

Ultimately, the court held that while "a person may passively or suggestively take advantage of a mentally retarded or incapacitated individual, the fact that a victim may have diminished mental capacity does not relieve the Commonwealth of its burden of proving that the "mental incapacity" is that defined by Code § 18.2-67.10(3)," and found that the Commonwealth failed to meet its burden. Id., at 347.

B. Public Testimony

Though the Court of Appeals has established the foundation for further interpretation of this legal subject, it was the desire of the subcommittee that the current state of the law be interpreted also by legal practitioners and mental health professionals whose jobs brought them into contact with the issues described in the study resolution. Thus, over the course of the study, a number of interested and

involved lawyers and doctors addressed the study committee. Additionally, persons who were the objects of sexual activity or close to victims of such sexual activity addressed the subcommittee.

At the first meeting, the members heard from Mr. And Mrs. Dan Richardson and their daughter Betsy.

Ms. Betsy Richardson, who is mentally retarded but lives alone with the help of a support program, testified that in April 1994, at the age of 28, she was coerced into having sex with three men against her will. Her IQ is 70. She has a boyfriend but he was not one of the three men. Of those three, Ms. Richardson knew only one but had sex with all of them. The prosecutor in Virginia Beach, where the incident occurred, charged but did not prosecute the known perpetrator for rape; instead the man was prosecuted for grand larceny for taking a VCR with him when he left Ms. Richardson's home. She and her parents consider the sex act to have been criminal, however, and were part of the impetus for the study.

The subcommittee was confronted with multiple issues raised by the Richardson case:

1. Protecting the right of a mentally retarded person to enjoy life's activities (including sex) while also protecting that person from manipulation into engaging in sex. (Ms. Richardson has a boyfriend and relishes all of the components of the relationship.)

2. Determining if there is a way to create a "bright line" on one side of which sexual activity with a retarded person would be criminal and the other noncriminal (based upon mental age or other factors). (Ms. Richardson is retarded and is subject to being manipulated into sex but should have the opportunity to engage in it willingly without making a felon of her partner.)

3. Identifying the reasons for an apparent reluctance to prosecute cases considered by non-lawyers to be sexual assault cases. (One of the perpetrators-- the one Ms. Richardson knew-- was charged with rape but the charge was never prosecuted.)

The subcommittee also heard from Laurie Shadowen, former representative of the Henrico County Victim/Witness Program, and Ginny Duvall, assistant Commonwealth's attorney in Chesterfield County.

Ms. Shadowen's comments derived from a unique perspective: she has not only dealt with the subject at hand by virtue of her former position but has a family member who is mildly retarded and has suffered an incident similar to that suffered

by Betsy Richardson. Ms. Shadowen suggested that, if possible, the law might be reformed to regard a mentally retarded victim as unable to give consent to a sex act if his or her mental age would, by definition, preclude it (i.e., a "bright line" based on mental age). She also suggested that reporting incidents of possible sexual abuse involving a mentally retarded person be made mandatory for persons in positions of authority. Ms. Shadowen acknowledged that the mental age "bright line" would mean that a person with a mental age below the threshold would never be able to participate in a legal, volitional sex act.

Ms. Duvall's presentation centered on the manner in which cases involving mentally incapacitated victims should be tried. She suggested that testimony from a mentally retarded victim might be taken via two-way, closed-circuit television as is done in certain cases involving juveniles. She did not suggest a change in the substantive law involving sexual abuse of a mentally incapacitated person.

There was considerable discussion of the apparent reluctance of prosecutors to pursue cases of sexual abuse of mentally incapacitated persons. This was determined to be for one reason: the victim is not a good witness. In cases of extreme mental incapacity, where ability to consent to sex is clearly nonexistent, the testimony of the complaining witness is not critical. However, where the incapacity is as a result of mild mental retardation, the witness' testimony is critical. Unfortunately, it is also easy to misinterpret. Attempting to convince the finder of fact that when the victim said "yes," she really meant "no" leads prosecutors to abandon the "close ones."

At the meeting on October 1, 1996, Ruth Luckasson discussed mentally retarded sexual abuse victims. Ms. Luckasson, an attorney, is a professor of special education at the University of New Mexico whose special expertise involves the law and the mentally retarded.

Her recommendations were to: (i) create a special task force to investigate improved justice for mentally retarded victims of crime, (ii) mandate continuing education on mental retardation for courts, prosecutors, law-enforcement personnel, and others in the criminal justice system, (iii) mandate criminal background checks for all direct service mental retardation workers, and (iv) permit experts with specific mental retardation expertise to assist and testify in court cases whether or not they are psychologists or psychiatrists. She advised against establishing a bright line division (based on IQ level) between those capable of consenting to sex and those incapable of doing so since such a line could not usefully be established; one could never with certainty say that a person falling "below the line" had been raped or had had consensual intercourse (Appendix D).

Also at the second meeting, the members heard briefly from Dr. Harold Carmel, director of medical affairs for the Office of Mental Retardation Services at the Department of Mental Health, Mental Retardation and Substance Abuse

Services. Dr. Carmel was skeptical of a bright line standard and, in a letter to the subcommittee following this meeting, indicated that no such bright line exists and that the law in Virginia "is appropriate on its face to protect persons with mental retardation from sexual exploitation" (Appendix E).

Having heard ample testimony in opposition to the concept of a bright line separation between those capable and incapable of consenting to sex, the subcommittee shifted its focus to the trial of cases involving mentally incapacitated victims and, at the conclusion of the meeting, requested that at the next meeting evidence be received on the issues of trial of such matters, particularly evidentiary issues.

At the next meeting, on November 11, 1996, the subcommittee heard testimony from Leah A. Darron, Esq., of the Office of the Attorney General and Lawrence D. Gott, Esq., of the Danville Office of the Public Defender. In the argument of the case of Adkins v. Commonwealth before the Court of Appeals, Ms. Darron represented the Commonwealth and Mr. Gott represented the defendant, Mr. Adkins.

Mr. Gott said that the Court of Appeals has properly determined that the degree to which a person is able to consent to sex because of mental incapacity should be decided on a case-by-case basis rather than by a bright line test. He said that under such circumstances, the prosecutor must prove (i) mental incapacity (rather than a degree of retardation which satisfies a bright line test) and (ii) that the victim failed to understand the nature or consequences of the act. He said that it is very important for both the prosecution and defense in such cases to learn how to talk to the mentally incapacitated and how to simplify the legal concepts which are to be proved or disproved by the use of a mentally incapacitated witness. He said that by focusing on questions designed to let the witness demonstrate his degree of understanding of the legal concept in question, the current case-by-case standard is both neutral and fundamentally fair in its application (Appendix F).

C. Neighboring States' Statutes

The statutory law of some neighboring states is similar to that of Virginia's with dissimilarities noted.

Delaware. Requires that the defendant know "victim suffered from a mental illness or mental defect which rendered the victim incapable of appraising the nature of the sexual conduct."

Maryland. Requires that defendant know victim is "mentally defective or mentally incapacitated." "Mentally defective" person defined simply as one who "suffers from mental retardation."

North Carolina. Identical to Maryland.

South Carolina. Requires that defendant know victim is "mentally defective or mentally incapacitated." Defines "mentally defective" to mean "that a person suffers from a mental disease or defect which renders the person . . . incapable of appraising the nature of his or her conduct."

West Virginia. Allows defendant to raise the affirmative defense of lack of knowledge of the victim's mental incapacity. Defines "mentally defective" to mean that "a person suffers from a mental disease or defect which renders such person incapable of appraising the nature of his conduct."

D. COMPARISON OF VIRGINIA LAW AND "THE LAW OF THE LAND"

According to Clarence J. Sundram and Paul F. Stavis, two attorneys working for the New York State Commission on Quality of Care for the Mentally Disabled, the law of the country can be divided generally into three schools of thought:

> 1. Some courts require not only an understanding of the nature of sexual conduct, but also an appreciation that there are moral dimensions to the decision to engage in sexual conduct.
>
> 2. The majority of courts require a showing that the person could understand the nature of the sexual conduct and the possible consequences of that conduct (e.g., pregnancy, disease, etc.).
>
> 3. In New Jersey, the Supreme Court has required only an understanding of the sexual nature of the act and a voluntary decision to participate, and has made it clear that an understanding of the risks and consequences of the act is *not* required.[1]

Virginia, as best it can be determined based upon the holding in Adkins, follows the "New Jersey rule." While on the one hand, the court quotes § 18.2-67.10 correctly and states that a person suffers from mental incapacity if he hasn't the capacity to "understand the nature or consequences of the sexual act involved," it also then twice misquotes the statute, referring to "nature ***and*** consequences." Adkins, at 342, 343.

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[1] Clarence J. Sundram and Paul F. Stavis, "Sexual Behavior and Mental Retardation," Mental and Physical Disability Law Reporter (Vol. 17, No. 4, July-August 1993).

The court acknowledges that the defendant alleges error on the basis of, inter alia, the failure of the Commonwealth to prove the victim lacked the capacity to understand both "nature ***and*** consequences" and later in the opinion states that is the Commonwealth's burden. Id., at 342, 343. However, the statute is clearly in the disjunctive.

The court ultimately concludes that the defendant was not guilty because the victim had a basic understanding of the act and its consequences and could make a volitional choice to engage or not engage in such conduct. (The element of volition is nowhere to be found in the Virginia statute but is arguably a component of the New Jersey statute.)

III. FINDINGS AND CONCLUSIONS

The subcommittee concluded that the statutory law, as currently written and as applied in the Adkins case and the Richardson case, is adequate to protect the rights of the mentally incapacitated. The members fully investigated the idea of a bright line test for mental capacity to consent to sex and determined that such a test would be arbitrary and capricious and would criminalize manifestly non-criminal behavior in some instances.

The subcommittee found that the role of expert witnesses in such cases is extremely important and that such experts were most often psychiatrists. They felt that the experts should not be limited to psychiatrists and psychologists but should be expanded to include all of those with special knowledge of mentally retarded persons.

The subcommittee found that the same circumstances that prevent the use of an arbitrary bright line to establish mental age for consent to sex are the those that result in the failure to prosecute close cases. Only the borderline cases are ever at issue. Victims who are severely mentally incapacitated can never give consent. And it is not difficult to determine whether an unimpaired person consents to sexual activity. Upon interviewing the mildly retarded complaining witness, however, the prosecutor may find that he or she is unable to determine whether consent existed or, even if he or she is convinced that there was no consent, the witness' trial testimony would be so equivocal on that issue that a conviction would be improbable to impossible.

Ultimately the subcommittee concluded that the existing rape and sexual abuse statutes as interpreted by the Court of Appeals need no amendment.

IV. RECOMMENDATIONS

The subcommittee recommended no change in the law involving rape and sexual abuse but at its final meeting discussed and approved two measures related to the subject matter of the study and offered by Del. Robert F. McDonnell and Sen. John S. Edwards (Appendix G). One of the measures changed the reporting requirement of abuse of an adult (HB 2779) and the other created a presumption of intimidation in the case of abuse of an adult by his caregiver or custodian (SB 816 and HB 2780). House Bill 2779 became law. The other measure failed.

Respectfully submitted,

Robert F. McDonnell
W. Roscoe Reynolds
Vivian E. Watts
Joseph B. Benedetti
John S. Edwards

HOUSE JOINT RESOLUTION NO. 80

Establishing a joint subcommittee to study the criminal law relative to the capacity of mentally impaired persons to consent to sexual activity.

Agreed to by the House of Delegates, February 8, 1996
Agreed to by the Senate, February 29, 1996

WHEREAS, generally, there are three elements in establishing competency to provide legal consent: (i) knowledge of the important aspects of a decision and its risks and benefits, (ii) intelligence, reason or understanding showing comprehension in a manner consistent with the person's values or beliefs, and (iii) voluntariness of the decision; and

WHEREAS, determining the capacity of an individual to make a decision regarding consent to sexual activity has developed largely through judicial determinations in criminal prosecutions for sexual assault upon persons allegedly incapable of consenting due to mental impairment; and

WHEREAS, the courts have applied various standards ranging from requiring only an understanding of the nature of sexual conduct to requiring, in addition, an understanding of the possible consequences of sexual activity, making prosecutions for sexual abuse of these particular victims difficult to sustain; and

WHEREAS, the lack of a clear standard brings into question whether persons who are mentally impaired receive any protection from sexual abuse under the criminal law; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That a joint subcommittee be established to study the criminal law relative to the capacity of mentally impaired persons to consent to sexual activity. The joint subcommittee shall be comprised of 5 members to be appointed as follows: 3 members of the House of Delegates to be appointed by the Speaker of the House; and 2 members of the Senate to be appointed by the Senate Committee on Privileges and Elections.

The direct costs of this study shall not exceed $3,000.

The Division of Legislative Services shall provide staff support for the study. All agencies of the Commonwealth shall provide assistance to the joint subcommittee, upon request.

The joint subcommittee shall complete its work in time to submit its findings and recommendations to the Governor and the 1997 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents.

Implementation of this resolution is subject to subsequent approval and certification by the Joint Rules Committee. The Committee may withhold expenditures or delay the period for the conduct of the study.

457 S.E.2d 382, 20 Va. App. 332 ADKINS V. COMMONWEALTH (Ct. App. 1995)

ROBERT VINCENT ADKINS
vs.
COMMONWEALTH OF VIRGINIA

Record No. 1862-93-3
COURT OF APPEALS OF VIRGINIA
457 S.E.2d 382, 20 Va. App. 332
May 16, 1995, Decided

FROM THE CIRCUIT COURT OF THE CITY OF DANVILLE. James F. Ingram, Judge.

COUNSEL

Lawrence D. Gott (Office of the Public Defender, on brief), for appellant.
Leah A. Darron, Assistant Attorney General, (James S. Gilmore, III, Attorney General, on brief), for appellee.

JUDGES

Present: Judges Barrow,* Coleman and Senior Judge Hodges
AUTHOR: COLEMAN

OPINION

*{*336}* OPINION

Robert Adkins was convicted, in a bench trial, of rape for having had sexual intercourse with a person, not his spouse, through the use of her mental incapacity in violation of Code § 18.2-61(A)(ii). The trial judge sentenced Adkins to twenty years in the penitentiary.

*{*337}* On appeal, Adkins contends that the trial judge erred by admitting evidence of a doctor's "opinion" as to the victim's IQ. He argues that the doctor should not have been permitted to give an opinion because it was not based on IQ test results that had been admitted into evidence or upon tests administered by him. Adkins further contends that the evidence is insufficient to support a conviction for rape under Code § 18.2-61(A)(ii). We hold that the trial court did not err by permitting the doctor to testify concerning the complaining witness's IQ. However, because the Commonwealth's evidence failed to prove that the defendant had sexual intercourse with the victim "through the use of [her] mental incapacity," we reverse the conviction.

We will refer to the victim as Teresa. At the time of the charged offense, Teresa was sixteen years old and lived with her parents in Danville. She was in the eighth grade in the Danville public school system. Doctors at the Medical College of Virginia had diagnosed Teresa, at age three, as being mentally retarded. Over the ensuing years, her IQ test scores had ranged between fifty-eight and seventy.

Prior to the date of the charged offense, Teresa had met Adkins at a local mall. When they met, Teresa exchanged telephone numbers with him. She recorded his telephone number in an address book that she kept.

At the time of the charged offense, Adkins was twenty-seven years old and lived in an

apartment with his father. According to the testimony of Adkins' sister, she received his social security check because he is not capable of handling his own money.

One day before the charged offense, Teresa's mother heard Teresa talking with Adkins on the telephone. The mother took the telephone from Teresa and told Adkins, "Teresa is mentally retarded. Leave her alone."

On the day of the charged offense, Teresa's mother went shopping, leaving Teresa at home. Teresa knew that her mother did not want her to talk with or to see Adkins. Nevertheless, Teresa called Adkins and asked him to pick her *{*338}* up at a mini-market near her home. She left a note telling her mother that she had gone to the mini-market. Adkins met Teresa, and they went to the apartment where he and his father lived. At the apartment, they watched television, had sexual intercourse, ate dinner, had intercourse a second time, and then fell asleep.

When Teresa's mother returned and could not locate Teresa, she notified the Danville police. Based upon information from Teresa's parents, the Danville police found Teresa and Adkins late that evening, hiding in his apartment. Teresa said she was hiding because she did not want to go home. Later, Adkins signed a written statement admitting that he had had sexual intercourse with Teresa.

At trial, Teresa's mother testified that Teresa is mentally retarded, but that she knows how to take care of herself, how to call 911, and how to go shopping. The mother testified that she had explained to Teresa the consequences of having sexual intercourse and that Teresa at least partially understood these discussions.

Teresa testified that when she first met Adkins at the mall, she did so on her own initiative, at which time she gave him her telephone number. She testified that she knew her mother did not want her to see Adkins, but she did so anyway. She testified that on the day of the charged offense, she called Adkins with the idea of having sex with him, and she asked him to meet her.

Teresa testified that while at Adkins' apartment, she "made love" with him twice. She said it was "mostly" her idea to have sex, and she told Adkins that she was eighteen. When asked about the consequences of having sexual intercourse, she testified, "you could catch AIDS" and "you get pregnant."

James Pickens Culbert, PhD, a licensed clinical psychologist, was qualified as an expert witness. He testified that he had treated Teresa since she was seven years old, during which time he had tested her mental capacity and intellectual development. Based on IQ tests that had been administered to Teresa by Dr. Culbert's assistants, he testified that Teresa's *{*339}* IQ was fifty-nine, that her mental age was 10.4 years, and that her IQ range was determined to be between fifty-eight and seventy. Adkins objected to Dr. Culbert's testimony on the ground that he was giving an expert opinion that was not based on facts or test results admitted in evidence or that were personally known to Dr. Culbert. Adkins did not testify.

I. EXPERT OPINION EVIDENCE

For this opinion, we accept the parties' contention that Dr. Culbert's testimony as to Teresa's IQ is an expert's opinion. Because Dr. Culbert's opinion as to Teresa's IQ was based upon his personal knowledge of Teresa as her long-time treating psychologist and because his knowledge of the test results was based upon tests administered by persons directly under his supervision and control, we hold that Dr. Culbert's opinion as to Teresa's IQ was admissible.

The Commonwealth bore the burden of proving beyond a reasonable doubt that Adkins had sexual intercourse with Teresa "through the use of [her] mental incapacity." Code § 18.2-61(A)(ii). In an effort to prove that Teresa was mentally incapacitated, the Commonwealth introduced the testimony of Dr. Culbert, who had treated and tested Teresa since childhood concerning her mental and intellectual functioning.

Code § 8.01-401.1 provides:

> In any civil action any expert witness may give testimony and render an opinion or draw inferences from facts, circumstances or data made known to or perceived by such witness at or before the hearing or trial during which he is called upon to testify. The facts, circumstances or data relied upon by such witness in forming an opinion or drawing inferences, if of a type normally relied upon by others in the particular field of expertise in forming opinions and drawing inferences, need not be admissible in evidence.

Cf. Fed. R. Evid. 703 and 705. In criminal cases, however, the Supreme Court has expressly refused to adopt such a broad rule of admissibility for expert testimony. **See Simpson v.** *{*340}* **Commonwealth**, 227 Va. 557, 566, 318 S.E.2d 386, 391-92 (1984).

The Court said in **Simpson** :

> The General Assembly, in 1982, enacted Code § 8.01-401.1 which essentially adopts the foregoing provisions [Rules 703 and 705] of the Federal Rules of Evidence. That statute's application is expressly limited to "any civil action." We regard this limitation as a clear expression of legislative intent to retain the historic restrictions upon expert testimony in criminal cases in Virginia.

Simpson, 227 Va. at 566, 318 S.E.2d at 391 (citation omitted). The traditional rule for admissibility of opinion evidence, which continues to apply in criminal cases, is that "an expert may give an opinion based upon his own knowledge of facts disclosed in his testimony or he may give an opinion based upon facts in evidence assumed in a hypothetical question." **Walrod v. Matthews**, 210 Va. 382, 388, 171 S.E.2d 180, 185 (1969).

Adkins contends that, by applying the foregoing standard to Dr. Culbert's opinion as to Teresa's IQ, the opinion was inadmissible. Adkins posits that the underlying tests administered to Teresa which provided Dr. Culbert with the results to formulate his opinion were not personally administered by the doctor and, therefore, were not "based upon his own knowledge of facts," and the test results had not been admitted into evidence. We disagree with the defendant's contentions as to what is required in order for facts to be within the personal knowledge of an expert witness.

Dr. Culbert testified that Teresa had been his patient since she was seven years old. He had examined her on five occasions--at ages seven, ten, eleven, thirteen, and fifteen. The purpose of the examinations was to determine Teresa's intellectual functioning. Dr. Culbert testified that on those occasions, his assistants administered intellectual functioning tests to Teresa, and they provided him with the results and test scores. He then conducted an independent examination of Teresa, including a personal interview with her and her *{*341}* parents. Thereafter, Dr. Culbert applied to the test results and the facts personally known to him about Teresa accepted and

established procedures and standards in the field for determining Teresa's intellectual functioning. Based upon those standards, Dr. Culbert gave his opinion as to Teresa's IQ and relative mental age. His opinion was based upon his personal knowledge of the test results and upon facts that he knew personally about Teresa.

Unlike the situations in **Toro v. City of Norfolk** , 14 Va. App. 244, 416 S.E.2d 29 (1992), and **Meade v. Belcher**, 212 Va. 796, 188 S.E.2d 211 (1972), relied upon by Adkins, where test results and procedures were neither in evidence nor personally known to the witness, the tests administered to Teresa were under Dr. Culbert's direct supervision and control. He had personal knowledge of or access to the specific testing procedures that had been used, and he knew how the results were determined and how he had used them to formulate his opinion. From this knowledge, Adkins could have effectively cross-examined Dr. Culbert and could have required him to explain how he formed an opinion as to Teresa's IQ and mental age.

The admissibility of expert witness evidence is within the sound discretion of the trial court, and the decision will not be disturbed on appeal unless the trial court has clearly abused its discretion. **Thorpe v. Commonwealth**, 223 Va. 609, 614, 292 S.E.2d 323, 326 (1982). The trial judge did not abuse his discretion by admitting Dr. Culbert's opinion as to Teresa's IQ and mental age; therefore, we affirm the trial court's ruling.

II. SUFFICIENCY OF EVIDENCE

When the sufficiency of the evidence is challenged on appeal, "it is our duty to consider [the evidence] in the light most favorable to the Commonwealth and give it all reasonable inferences fairly deducible therefrom." **Higginbotham v. Commonwealth**, 216 Va. 349, 352, 218 S.E.2d 534, 537 (1975). The trial court's judgment will not be reversed unless it is *{*342}* plainly wrong or without evidence to support it. Code § 8.01-680; **Feigley v. Commonwealth**, 16 Va. App. 717, 722, 432 S.E.2d 520, 524 (1993).

Code § 18.2-61(A) provides that "if any person has sexual intercourse with a complaining witness who is not his or her spouse . . . and **such act is accomplished**. . . (ii) **through the use of the complaining witness's mental incapacity**. . . he or she shall be guilty of rape." (emphasis added). "Mental incapacity" is defined as "that condition of the complaining witness existing at the time of an offense under this article which prevents the complaining witness from **understanding the nature or consequences** of the sexual act involved in such offense and about which the accused knew or should have known." Code § 18.2-67.10 (emphasis added).

The elements necessary to constitute a crime are generally to be gathered from the definition of the crime. **Commonwealth v. Callaghan**, 4 Va. (2 Va. Cas.) 460, 462 (1825). The Commonwealth has the burden of proving beyond a reasonable doubt each and every element of the charged crime. **Powers v. Commonwealth**, 211 Va. 386, 388, 177 S.E.2d 628, 629 (1970).

Adkins concedes that the evidence proved beyond a reasonable doubt that he had sexual intercourse with Teresa, who was not his spouse. However, the critical question is whether the evidence proved that he "accomplished" the act of sexual intercourse with her "through the use of" her "mental incapacity." His argument is twofold: first, he contends that "mental incapacity," for purposes of Code § 18.2-61(A)(ii), has a more particularized meaning than diminished mental capacity in general, requiring the Commonwealth to prove specifically that the victim did not understand the nature and consequences of sexual intercourse; second, he contends that the Commonwealth must prove that **he** in some way used or took advantage of Teresa's mental incapacity in order to "accomplish" the act of sexual intercourse with her.

The legislative purpose of Code § 18.2-61(A)(ii) is to protect persons who are mentally impaired or retarded from *{*343}* being sexually exploited due to their mental incapacity. **See State v. Ortega-Martinez**, 124 Wash. 2d 702, 881 P.2d 231, 236 (Wash. 1994) (explaining the legislative purpose of a similar statute). However, such statutes must not be interpreted and applied in a manner that creates an unintended rule that would prohibit all mentally impaired or retarded persons from engaging in consensual sexual intercourse without having their partners commit a felony.[1] **See State v. Olivio**, 123 N.J. 550, 589 A.2d 597, 604 (N.J. 1991) (expressing concern about "unenlightened attitudes toward mental impairment and about the importance of according the mentally handicapped their fundamental rights"). By specifically defining mental incapacity, the legislature has chosen to protect those mentally deficient persons whose mental condition prevents them from "understanding the nature and consequences of the sexual act involved." Code § 18.2-67.10(3).

Thus, in order to convict a person of violating Code § 18.2-61(A)(ii), the Commonwealth must prove that the victim was "mentally incapacitated" as defined in Code § 18.2-67.10(3), which means that the person does not understand "the nature and consequences of the sexual act involved."

Some jurisdictions have interpreted and applied similar statutory requirements narrowly by requiring the state to prove that the victim was incapable of comprehending the "distinctively sexual nature of the conduct." **See Olivio**, 589 A.2d at 599. **See also** K.H. Carson, **Rape or Similar Offense Based on Intercourse With Woman Who Is Allegedly Mentally Deficient**, 31 A.L.R. 3d 1227 (1970) (discussing the treatment of mental incapacity in similar rape statutes). Other jurisdictions have interpreted similar statutes more broadly, requiring the state to prove only that the victim did not understand the physiological, social, and moral ramifications of his or her actions. **See People v. Easley**, 42 N.Y.2d 50, 396 N.Y.S.2d 635, 638, *{*344}* 364 N.E.2d 1328, 1332 (N.Y. 1977) (stating that being able to "appraise" the nature of conduct means an "appreciation of how it will be regarded in the framework of the societal environment and taboos to which a person will be exposed"). **See also People v. McMullen**, 91 Ill. App. 3d 184, 414 N.E.2d 214, 217, 46 Ill. Dec. 492 (Ill. App. Ct. 4th 1980) (stating that the victim was unable to understand how "illicit sexual activity is regarded by other people").

While the interpretations that other jurisdictions have given similar statutes are instructive, they are not controlling. Code § 18.2-61(A)(ii) does not leave solely to judicial interpretation the defined class of persons protected by the statute. To the extent that we must interpret the meaning of the statutory language--"understanding the nature and consequences of the sexual act"--we construe it strictly against the Commonwealth, because the statute is penal in nature, and limit its application to cases falling clearly within its ambit. **Turner v. Commonwealth**, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983).

A person suffers from a "mental incapacity" within the meaning of the statute if he or she has a mental "condition" that "prevents" the person from being able to "understand" **either** the "nature" **or** "consequences" of engaging in sexual intercourse. To "understand" is "to grasp the meaning of[; to] comprehend," **Webster's Third New International Dictionary** 2490 (1986) or "to know; to apprehend the meaning; to appreciate." **Black's Law Dictionary** 1526 (6th ed. 1990). **See State v. Johnson**, 155 Ariz. 23, 745 P.2d 81 (Ariz. 1987) (en banc) (discussing the meaning of "to understand"). "Nature" is defined as the "normal and characteristic quality . . . of something," "the distinguishing qualities or properties of something." **Webster's Third New International Dictionary** 1507 (1986). "Consequence" is defined as "something that is produced by a cause or follows from a form of necessary connection or from a set of conditions: a natural

or necessary result." **Id.** at 482.

To "know, apprehend, or appreciate" the "nature and consequences" of sexual intercourse can range from a simple *{*345}* understanding of how the act of coitus is physically accomplished together with an understanding that a sensation of pleasure may accompany the act, to a thorough and comprehensive understanding of the complex psychological and physiological "nature" of "the sexual act involved" and that, aside from immediate gratification, the act may have dire familial, social, medical, physical, economic, or spiritual consequences.

Manifestly, the legislature did not intend to include as part of the protected class of people under Code § 18.2-61(A)(ii) those whose mental impairment or handicap may prevent them from comprehending the more complex aspects of the nature or consequences of sexual intercourse, but who, nevertheless, have the mental capacity to have a basic understanding of the elementary and rudimentary nature and consequences of sexual intercourse. Not all persons who are mentally retarded or handicapped need the special protection of Code § 18.2-61(A)(ii). The range of intellectual functioning among the mentally impaired and mentally retarded varies widely. The statute was not designed to unfairly punish the sexual partners of those mentally impaired or mentally retarded persons who have a basic understanding of the act and consequences of sexual intercourse and are capable of making a volitional choice to engage or not engage in such conduct.

The commentary of the Supreme Court of New Jersey interpreting a similar statute is noteworthy:

> The statutory concept of ["mental incapacity"] implicates both the intellectual or cognitive capacity and the volitional or consensual capacity of the individual with respect to personal sexual activity. The consensual capacity involves knowing that one's body is private and is not subject to the physical invasions of another, and that one has the right and ability to refuse to engage in sexual activity. The cognitive capacity, which is also implicit in the notion of consensual capacity, involves the knowledge that the conduct is distinctively sexual.

Olivio, 589 A.2d at 604-05.

When a mentally impaired or mentally retarded person has sufficient cognitive and intellectual capacity to *{*346}* comprehend or appreciate that he or she is engaging in intimate or personal sexual behavior which later may have some effect or residual impact upon the person, upon the person's partner, or upon others, then the person does not have a "mental incapacity" within the meaning of the statute. If a person is mentally incapacitated but, nevertheless, has the capacity to understand the nature and consequences of the sexual act, which understanding includes the capacity to make a volitional choice to engage or not engage in such act, then that person's sexual partner has not violated the rape statute merely because a mentally impaired person has made an unwise decision or has chosen to be sexually active.

The fact finder cannot infer from proof of general mental incapacity or retardation or an IQ range or mental age that a victim is prevented or unable to understand the nature and consequences of a sexual act, unless the evidence proves that the victim lacks the ability to comprehend or appreciate either the distinguishing characteristics or physical qualities of the sexual act or the future natural behavioral or societal results or effects which may flow from the sexual act. The Commonwealth has the burden to prove every element of the offense in order to

prove guilt beyond a reasonable doubt.

In this case, the Commonwealth presented testimony of Dr. Culbert, an expert witness; the victim's mother; and the victim. Dr. Culbert testified that the victim had an IQ of fifty-nine and a mental age of 10.4 years. He did not relate her IQ or her mental age to her capacity to understand the nature or consequences of sexual intercourse, particularly her capacity to make a volitional choice. On cross-examination, Dr. Culbert stated that although he measured her IQ and general intellectual capacity, he did not know whether Teresa understood or could use words like "penis" and "vagina," because he does not test such knowledge. Teresa's mother testified that Teresa is "severely mentally retarded."

When Teresa testified, she stated, on cross-examination, that she "made love" to the appellant, that she knew that she could get pregnant from "making love" and could catch AIDS, *{*347}* that she had had sex education classes in school, and she used the words "penis" and "vagina" when describing the act of sexual intercourse. The Commonwealth did not explore the extent to which she knew or understood the significance of these words or engaging in sexual intercourse. No attempt was made to prove that Teresa may have been superficially mouthing these words to describe what had happened to her or to explain that she did not understood the nature and consequences of her actions. In fact, her testimony shows that she was the person who conceived the notion of having sexual intercourse with Adkins and initiated the sexual liaison between them.

We recognize that a person may passively or suggestively take advantage of a mentally retarded or incapacitated individual; however, the fact that a victim may have diminished mental capacity does not relieve the Commonwealth of its burden of proving that the "mental incapacity" is that defined by Code § 18.2-67.10(3). We, therefore, find that the Commonwealth failed to meet its burden.

Adkins also contends that the evidence failed to prove an additional element of the offense--that he "accomplished" having sexual intercourse with Teresa "through the use of" her mental incapacity. He argues that the evidence failed to show that he knowingly used or took advantage of her incapacity in order to accomplish the act of sexual intercourse. His argument would have us address whether he could have "accomplished" the result by knowingly taking advantage of a condition through passive conduct. However, because we find the evidence insufficient to prove that Teresa had a mental incapacity as defined in the statute, we do not address this contention. For the foregoing reasons, we reverse the conviction and dismiss the indictment.

Reversed and dismissed.

DISPOSITION

Reversed and dismissed.

JUDGES FOOTNOTES

* Judge Bernard G. Barrow participated in the hearing and decision of this case and joined in the opinion prior to his death.

§ 18.2-61. Rape.

A. If any person has sexual intercourse with a complaining witness who is not his or her spouse or causes a complaining witness, whether or not his or her spouse, to engage in sexual intercourse with any other person and such act is accomplished (i) against the complaining witness's will, by force, threat or intimidation of or against the complaining witness or another person, or (ii) through the use of the complaining witness's mental incapacity or physical helplessness, or (iii) with a child under age thirteen as the victim, he or she shall be guilty of rape.

B. If any person has sexual intercourse with his or her spouse and such act is accomplished against the spouse's will by force, threat or intimidation of or against the spouse or another, he or she shall be guilty of rape.

However, no person shall be found guilty under this subsection unless, at the time of the alleged offense, (i) the spouses were living separate and apart, or (ii) the defendant caused serious physical injury to the spouse by the use of force or violence.

C. A violation of this section shall be punishable, in the discretion of the court or jury, by confinement in a state correctional facility for life or for any term not less than five years. There shall be a rebuttable presumption that a juvenile over the age of 10 but less than 14, does not possess the physical capacity to commit a violation of this section. In any case deemed appropriate by the court, all or part of any sentence imposed for a violation of subsection B may be suspended upon the defendant's completion of counseling or therapy, if not already provided, in the manner prescribed under § 19.2-218.1 if, after consideration of the views of the complaining witness and such other evidence as may be relevant, the court finds such action will promote maintenance of the family unit and will be in the best interest of the complaining witness.

D. Upon a finding of guilt under subsection B in any case tried by the court without a jury, the court, without entering a judgment of guilt, upon motion of the defendant and with the consent of the complaining witness and the attorney for the Commonwealth, may defer further proceedings and place the defendant on probation pending completion of counseling or therapy, if not already provided, in the manner prescribed under § 19.2-218.1. If the defendant fails to so complete such counseling or therapy, the court may make final disposition of the case and proceed as otherwise provided. If such counseling is completed as prescribed under § 19.2-218.1, the court may discharge the defendant and dismiss the proceedings against him if, after consideration of the views of the complaining witness and such other evidence as may be relevant, the court finds such action will promote maintenance of the family unit and be in the best interest of the complaining witness.

§ 18.2-67.10. General definitions.

As used in this article:

1. *"Complaining witness"* means the person alleged to have been subjected to rape, forcible sodomy, inanimate or animate object sexual penetration, marital sexual assault, aggravated sexual battery, or sexual battery.

2. *"Intimate parts"* means the genitalia, anus, groin, breast, or buttocks of any person.

3. *"Mental incapacity"* means that condition of the complaining witness existing at the time of an offense under this article which prevents the complaining witness from understanding the nature or consequences of the sexual act involved in such offense and about which the accused knew or should have known.

4. *"Physical helplessness"* means unconsciousness or any other condition existing at the time of an offense under this article which otherwise rendered the complaining witness physically unable to communicate an unwillingness to act and about which the accused knew or should have known.

5. The complaining witness's *"prior sexual conduct"* means any sexual conduct on the part of the complaining witness which took place before the conclusion of the trial, excluding the conduct involved in the offense alleged under this article.

6. *"Sexual abuse"* means an act committed with the intent to sexually molest, arouse, or gratify any person, where:

a. The accused intentionally touches the complaining witness's intimate parts or material directly covering such intimate parts;

b. The accused forces the complaining witness to touch the accused's, the witness's own, or another person's intimate parts or material directly covering such intimate parts; or

c. The accused forces another person to touch the complaining witness's intimate parts or material directly covering such intimate parts.

RUTH LUCKASSON, JD
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MEMORANDUM

To: Members of the Commonwealth of Virginia Joint Subcommittee Studying the Criminal Law Relative to the Capacity of Mentally Impaired Persons to Consent to Sexual Activity

From: Ruth Luckasson, JD, Professor of Special Education
University of New Mexico

Date: November 8, 1996

Subject: Addressing Justice for Victims of Crime who have Mental Retardation

Thank you for the opportunity to address the Subcommittee at your meeting October First. I was asked additionally to recommend several possible next steps, and I offer the following four suggestions. In the second part of the memo I address the subcommittee's questions about possible "bright line" legislation.

SUGGESTIONS FOR THE SUBCOMMITTEE

1. Create a special short term Task Force to investigate and report back to the subcommittee with recommendations for improved justice for victims of crime who have mental retardation

Although there has been at least one reported incident of alleged injustice in the criminal justice system toward a Virginian with mental retardation who was the victim of crime (the case of Betsy Richardson), further investigation about the situation in Virginia should be done. Some of the remedies necessary to improve justice for victims of crime who have mental retardation may be legislative, but in my opinion, genuinely improving the situation will require systems change built upon the input and knowledge of all the important players.

Members of the special Task Force would include representatives from: commonwealth attorneys, the judiciary, attorneys with successful experience prosecuting child abuse cases, mental retardation professionals, advocates such as the Virginia Protection and Advocacy, Department of Mental Retardation, Department of Corrections, law enforcement, public defenders, and families and people with mental retardation.

The appointed task force could be given three charges: (1) collect data on the intake and disposition of cases where the victim has mental retardation; (2) analyze the responses of courts, prosecutors, police officers, advocates, and others in the system; and (3) recommend coordinated remedies for the Virginia system.

The task force might be directed to consider the following agenda: (a.) Improve intake and record keeping protocols to be used when an alleged victim has mental retardation. (b.) Develop a centralized system of data collection for crimes in which the victim has mental retardation. (c.) Consider mandatory reporting of suspected crimes, along the lines of

mandatory child abuse reporting, when sexual victimization of individuals with mental retardation is suspected. (d.) Consider mandatory arrests when the victim has mental retardation, along the lines of other state laws in the domestic violence area. (e.) Clarify the law on competence to be a witness, in order to address the needs of people with mental retardation and assure that assistance, aids, experts, and necessary accommodations for witnesses (including victim-witnesses) with mental retardation are considered. (f.) Consider creation of new crimes and/or enhanced sentencing when the victim was selected because he or she has mental retardation. (g.) Include individuals with mental retardation in a Victim's Bill of Rights.

2. Mandate continuing education or training on mental retardation for courts, prosecutors, law enforcement personnel, and others in the system such as consumer fraud units and victims assistance units.

Many problems encountered by victims with mental retardation in the criminal justice system could be alleviated if personnel in the system had the necessary information on disability and could participate in a coordinated systemic effort.

3. Mandate criminal background checks for all direct service mental retardation workers.

The research suggests that much of the victimization against individuals with mental retardation is committed by people known to the victim, often a worker with a history of victimizing. It is important that agencies avoid hiring such personnel.

4. Permit experts with specific mental retardation expertise (who may not necessarily be psychologists or psychiatrists) to assist and testify in cases

Successful prosecution of these cases requires that prosecutors have available to them the appropriate experts. If Virginia law does not allow use of experts in mental retardation, it should be changed.

UNSUITABILITY OF BRIGHT LINE LEGISLATION

Bright Line IQ: One question that arose is whether it would be possible to legislate a "bright line", that is, to subdivide individuals with mental retardation into 2 groups: one group that can consent to sex, and a different group (with lower IQ scores) that cannot consent to sex.

In my opinion, no useful bright line IQ limitation, below which an individual with mental retardation can always be said to have been raped if intercourse has occurred, may usefully be established.

First, IQ alone does not establish degree of disability in mental retardation. This is borne out by the recognition that diagnosis of mental retardation requires three elements: significantly impaired intellectual ability (usually expressed by an IQ score), related impairments in adaptive skill areas, and manifestation of the disability before age 18. It is also borne out by the field's abandonment of the old "levels" of mental retardation (mild, moderate, severe, and profound) and modern use of individualized determinations of "intensities of supports" needed by the person. IQ score does not necessarily coincide with level of disability or ability to consent.

Second, as Dr. Harold Carmel stated at the Oct. first meeting, bright lines do not usually fit the heterogeneity of people within the mental retardation category, or the individuality of people with mental retardation, especially in their right to consensual chosen sexual relations.

Third, even if an IQ bright line could be established, it would be so low as to be practically useless for prosecutions. The number of people with such low IQs, however, is extremely small. Most people with mental retardation have higher IQs. Approximately 89% of all people with mental retardation have IQs between 50-55 to 70-75, and the vast majority of all people with mental retardation have IQs from 40 to 70-75. This higher IQ group is the group of people who are of concern in the sexual consent area because they comprise the largest group, the group most likely to engage in consensual sex, the group where the highest numbers will be abused or exploited, and the group in which consent is most likely to be questioned. A bright line subdivision cannot be made within this group.

A bright line IQ does not at all address the Betsy Richardson case. She argues that although she has mental retardation and she is capable of consenting to sex, she did not consent in this case. The prosecution would not have been aided by a bright line designation about her IQ score.

A rebuttable presumption bright line would have all of the above problems plus several additional problems: such a presumption would carry a stigma of total incompetence directly contrary to modern views of mental retardation in other legal areas such as guardianship, and it would create an overwhelming burden for the defense to prove a negative.

Other Bright Lines: Although a bright line IQ designation is not useful in the sexual consent area, other bright lines may be helpful. For example, the legislature could designate certain relationships between staff and individuals with mental retardation, such as therapist/client, doctor/patient, nurse/patient, attendant/patient, social worker/client, and the like, as always violating the law.

CONCLUSION

I hope the above considerations will contribute to your continuing efforts to assure fair disposition of cases in which the victim has mental retardation. As the subcommittee knows, I am on a sabbatical in England until Dec. 15. After that date, when I return to my office and research, I would be happy to assist the subcommittee further.

COMMONWEALTH of VIRGINIA

DEPARTMENT OF

Mental Health, Mental Retardation and Substance Abuse Services

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November 18, 1996

D. Robie Ingram
Attorney
Division of Legislative Services
910 Capitol Street, 2nd floor
Richmond, Virginia 23219

Dear Mr. Ingram,

I appreciated the opportunity to testify on October 1 before the HJR 80 Subcommittee ("Criminal Law Relative to the Capacity of Mentally Impaired Persons to Consent to Sexual Activity") and for the opportunity to consult with experts in mental retardation whether a "bright line" (such as IQ score) can be found to demarcate those persons with mental retardation capable of consenting to sexual activity from those who cannot.

The consensus of experts I consulted (including physicians at DMHMRSAS training centers, staff of the DMHMRSAS Office of Mental Retardation Services, and faculty at the University of Virginia Institute on Law, Psychiatry and Public Policy) is that no such "bright line" really exists. In addition, it appears that current law is appropriate on its face to protect persons with mental retardation from sexual exploitation.

The experts I consulted agreed with the Subcommittee's apparent appreciation of the complexities of the issue and the need to protect persons needing protection while not unnecessarily criminalizing consensual behavior.

Gary L. Hawk, Ph.D. (804 924 5436), of the University of Virginia Institute on Law, Psychiatry and Public Policy, suggested that prosecutors be encouraged to assess such situations on a case-by-case basis, seeking the consultation of professionals experienced in issues of mental retardation and competencies to consent.

I have come across references to the following articles which might have relevance to the Subcommittee's deliberations:

> David Carson, Legality of Responding to the Sexuality of a Client with Profound Learning Disability, 20 Mental Handicap 85 , 87 (1992) (on the question of consent to sexual activity in institutions for the mentally disabled); and
>
> Hilary Brown & Vicky Turk, Defining Sexual Abuse as it Affects Adults with

Learning Disabilities, 20 Mental Handicap 44 (1992) (discussing when sexual activity between a person with mental disabilities and a person without mental disabilities can, is, or should be defined as sexual abuse).

In addition, I have come across references to the following cases:

Hall v. State, 504 N.E.2d 298, 300 (Ind. Ct. App. 1987) (finding that the trier of fact could reasonably conclude that a complainant with moderate mental disabilities was incapable of consenting to sexual intercourse); and

New Jersey in re B.G., C.A. and P.A., 589 A.2d 637 (N.J. Super. Ct App. Div. 1991) (notorious case in which four men were convicted of sexually assaulting a young woman with mental disabilities with a broom handle, baseball bat, and a stick; despite the barbarity of the assault itself, much attention was focused on the woman's past sexual experience and the extent of her ability to understand or exercise her right to refuse to engage in sexual acts.)

I appreciate the opportunity to be of service. Please let me know how I can help further.

Best wishes,

Sincerely,

Harold Carmel, M.D.
Director, Medical Affairs

cc: DMHMRSAS Management Team
DMHMRSAS Training Center Facility Directors and Medical Directors
Martha Mead, DMHMRSAS Legislative Liaison
Daniel P. Richardson
Janet Hill, DMHMRSAS Office of Mental Retardation Services
Cynthia Smith, DMHMRSAS Office of Mental Retardation Services
Gary L. Hawk, Ph.D., University of Virginia Institute on Law, Psychiatry and Public Policy

Good Morning

I appreciate the opportunity to appear today to comment on my impression of the status of the law surrounding 18.2-61 A (ii) and the evidentiary problems inherent in trying cases under this section. I hope to present a level picture as I have spoken with the Assistant Commonwealth Attorney who tried the case, as well as the directors of the Danville Association of Retarded Citizens Employment Center and the Danville Community Services Board Mental Retardation Services Department. If you are being inundated with material or calls about the resolution, I must take the blame for stirring the pot by asking questions. You see, I did not try this case; I was appointed to do the appeal. It is apparent, however that the trial attorney focussed on the language of the statute and the definition of incapacity found in 18.2-67.10, subdivision 3, as he prepared and tried the case. So too, did the Court of Appeals in its opinion.

The Court's expressed concern that statutes such as this cannot be construed or applied in such a way as to prohibit consensual sex has, I

think, been met by the statutory definition of mental incapacity. The mentally retarded person must not understand the nature or consequence of the sex act. And, as an element of the offense, the Commonwealth must prove that incapacity as defined since the term must be strictly construed against the state.

By construing the statute as it has, the Court has properly created a case by case determination rather than a strict test or bright line blanket rule. The mentally retarded population covers a wide spectrum. A 1987 American Psychiatric Association study published in 1987 indicated approximately 2 million people in this country carry a mentally retarded diagnosis. Of those, about 85% are considered mildly retarded (IQ 55-70), about 10% moderately retarded (IQ 40-66), around 4% are considered severely retarded while the remainder are termed profoundly retarded. (Tharinger, et als, 14 Child Abuse & Neglect, p.302 (1990)). What is significant about these numbers is that in around 95% of the mentally retarded population (the mild and moderate) sexual development and interest happens at about the same ages as in the normal population

(Id. and studies cited therein). The hormonal changes may be present, but the level of interpersonal sophistication and the degree of insight associated with normal children is much slower to develop. Thus, there exists a vulnerability to sexual exploitation. The mentally retarded, as a class, should be both protected from exploitation and allowed to engage in adult sexual relationships - much the same as the public is allowed to invest at their own risk, but are protected from the unscrupulous broker/con-artist by making that type of activity illegal. And it is the individual facts that determine if an individual's conduct is illegal with regard to fraud, just as it should be in determining whether consensual sex occurred.

We must never lose sight of the fact that the class of people known as mentally retarded are indeed still people with the same basic emotional and physiological needs as the rest of us. Mentally retarded individuals should have the right to make bad choices within their ability and should be held accountable for those choices.

The standard for accountability as far as the capacity to consent to

sex is fairly loose as the Adkins opinion points out. So if the issue is approached on a case by case basis, the matter revolves around proving the inability to understand the nature or consequences or proving the ability to understand. Proving the existence of retardation may not be a problem, but the problem is what to do with that proof. In Adkins the Commonwealth focussed on the estimated mental age of the young girl which was just over 10, although chronologically she was 17. The Assistant who tried the case remembered in speaking to her pre-trial, he had difficulty detecting evidence of the retardation. She might have known the biological terms and could say one could get AIDS or pregnant from sex; however, she lacked any real understanding for the true effect of these consequences. In his estimation, she was merely using the terms. His concern is the need to protect this type of individual from the sexual predators.

When faced with such a client, victim, or witness, the evidentiary problems are really the same for both sides. You have to know how to talk to the retarded - you have to know how they communicate and what

they tend to do when around "smart people" and why. Start with local ARC or CSB and learn how a mentally retarded witness or defendant will tend to respond to questioning and suggestiveness. Learn how to simplify the legal concepts you are trying to prove or disprove. By focussing on questions designed to let the person demonstrate their understanding (or lack of) the present standard is both fundamentally fair and neutral in its application, certainly as far as the mildly to moderately retarded are concerned. Obviously, the severely or profoundly retarded that are likely to be institutionalized are less likely to meet the test. One way to limit the scope of statute while protecting the truly needy is to restrict it to caretakers. Most sexual abuse is rarely done by a stranger. That would make the Commonwealth's burden easier and arguably get at the greater number of abuse cases (See Sexual Abuse of Adults with Mental Retardation, 32 Mental Retardation, No. 3, 175-180 (1994)).

Clearly, the mentally retarded can be victims of sexual exploitation. But like most general statements such a simplification includes many, yet describes few. By requiring the Commonwealth prove the incapacity

rather than a reliance on the mental age of the victim. The Court of Appeals has set a workable standard that protects those that need protecting without overly restricting the basic rights of the more highly functioning mentally retarded. It recognizes the burden must be on the Commonwealth to prove the crime but allows them to do so by proper questioning of the victim of the alleged sexual abuse.

CHAPTER 687

An Act to amend and reenact § 63.1-55.3 of the Code of Virginia, relating to protection of aged or incapacitated adults and reports of abuse, etc.; penalty.

[H 2779]

Approved March 21, 1997

Be it enacted by the General Assembly of Virginia:

1. That §63.1-55.3 of the Code of Virginia is amended and reenacted as follows:

§63.1-55.3. Protection of aged or incapacitated adults; physicians, nurses, etc., to report abuse, neglect or exploitation of adults; complaint by others; penalty for failure to report.

A. Any person licensed to practice medicine or any of the healing arts, any hospital resident or intern, any person employed in the nursing profession, any person employed by a public or private agency or facility and working with adults, any person providing full-time or part-time care to adults for pay on a regularly scheduled basis, any person employed as a social worker, any mental health professional and any law-enforcement officer, in his professional or official capacity, who has reason to suspect that an adult is an abused, neglected or exploited adult, shall report the matter immediately to the local department of the county or city wherein the adult resides or wherein the abuse, neglect or exploitation is believed to have occurred. If neither locality is known, then the report shall be made to the local department of the county or city where the abuse, neglect, or exploitation was discovered. If the information is received by a staff member, resident, intern or nurse in the course of professional services in a hospital or similar institution, such person may, in place of the report, immediately notify the person in charge of the institution or department, or his designee, who shall make such report forthwith. Any person required to make the report *or notification required by this subsection shall do so either orally or in writing and* shall disclose all information which is the basis for the suspicion of abuse, neglect or exploitation of the adult and, upon request, shall make available to the adult protective services worker and the local department investigating the reported case of abuse, neglect or exploitation any records or reports which document the basis for the report.

B. The ~~initial report may be an oral report but the~~ report *required by subsection A* shall be reduced to writing within seventy-two hours by the director of the local department on a form prescribed by the State Board of Social Services.

~~B.~~ *C.* Any person required to make a report pursuant to subsection A who has reason to suspect that an adult has been sexually abused as that term is defined in §18.2-67.10, and any person in charge of a hospital or similar institution, or a department thereof, who receives such information from a staff member, resident, intern or nurse, also shall immediately report the matter, *either orally or in writing,* to the local law-enforcement agency where the adult resides or the sexual abuse is believed to have occurred, or if neither locality is known, then where the abuse was discovered. The person making the report shall disclose and, upon request, make available to the law-enforcement agency all information forming the basis of the report.

~~C.~~ *D.* Any person other than those specified in subsection A who suspects that an adult is an abused, neglected or exploited adult may report the matter to the local department of the county or city wherein the adult resides or wherein the abuse, neglect or exploitation is believed to have occurred. Such a complaint may be oral or in writing.

~~D.~~ *E.* Any person who makes a report or provides records or information pursuant to subsection A or ~~C~~ *D* of this section or who testifies in any judicial proceeding arising from such report, records or information shall be immune from any civil or criminal liability on account of such report, records, information or testimony, unless such person acted in bad faith or with a malicious purpose.

~~E.~~ *F.* All law-enforcement departments and other state and local departments, agencies, authorities and institutions shall cooperate with each adult protective services worker of a local department in the

detection and prevention of abuse, neglect or exploitation of adults.

~~F.~~ *G.* Any person ~~required to file a report pursuant to subsection A of this section~~ who is found guilty of ~~failure to do so~~ *failing to make a required report or notification pursuant to subsection A or C of this section, within 24 hours of having the reason to suspect abuse* shall be fined not more than $500 for the first failure and not less than $100 nor more than $1,000 for any subsequent failures.

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HOUSE BILL NO. 2780

Offered January 20, 1997

A BILL to amend and reenact §§ 18.2-61, 18.2-67.1, 18.2-67.2, 18.2-67.3 and 18.2-67.4 of the Code of Virginia, relating to rape and sexual battery.

Patrons-- McDonnell; Senator: Edwards

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§18.2-61, 18.2-67.1, 18.2-67.2, 18.2-67.3 and 18.2-67.4 of the Code of Virginia are amended and reenacted as follows:

§18.2-61. Rape.

A. If any person has sexual intercourse with a complaining witness who is not his or her spouse or causes a complaining witness, whether or not his or her spouse, to engage in sexual intercourse with any other person and such act is accomplished (i) against the complaining witness's will, by force, threat or intimidation of or against the complaining witness or another person, or (ii) through the use of the complaining witness's mental incapacity or physical helplessness, or (iii) with a child under age thirteen as the victim, he or she shall be guilty of rape.

B. If any person has sexual intercourse with his or her spouse and such act is accomplished against the spouse's will by force, threat or intimidation of or against the spouse or another, he or she shall be guilty of rape.

However, no person shall be found guilty under this subsection unless, at the time of the alleged offense, (i) the spouses were living separate and apart, or (ii) the defendant caused serious physical injury to the spouse by the use of force or violence.

C. A violation of this section shall be punishable, in the discretion of the court or jury, by confinement in a state correctional facility for life or for any term not less than five years. There shall be a rebuttable presumption that a juvenile over the age of 10 but less than 14, does not possess the physical capacity to commit a violation of this section. In any case deemed appropriate by the court, all or part of any sentence imposed for a violation of subsection B may be suspended upon the defendant's completion of counseling or therapy, if not already provided, in the manner prescribed under §19.2-218.1 if, after consideration of the views of the complaining witness and such other evidence as may be relevant, the court finds such action will promote maintenance of the family unit and will be in the best interest of the complaining witness.

D. Upon a finding of guilt under subsection B in any case tried by the court without a jury, the court, without entering a judgment of guilt, upon motion of the defendant and with the consent of the complaining witness and the attorney for the Commonwealth, may defer further proceedings and place the defendant on probation pending completion of counseling or therapy, if not already provided, in the manner prescribed under §19.2-218.1. If the defendant fails to so complete such counseling or therapy, the court may make final disposition of the case and proceed as otherwise provided. If such counseling is completed as prescribed under §19.2-218.1, the court may discharge the defendant and dismiss the proceedings against him if, after consideration of the views of the complaining witness and such other evidence as may be relevant, the court finds such action will promote maintenance of the family unit and be in the best interest of the complaining witness.

E. For the purposes of this section, intimidation shall be presumed to exist, subject to rebuttal, when sexual intercourse is accomplished through the use of a person's position of trust as custodian or care provider of the complaining witness.

§18.2-67.1. Forcible sodomy.

A. An accused shall be guilty of forcible sodomy if he or she engages in cunnilingus, fellatio, anallingus, or anal intercourse with a complaining witness who is not his or her spouse, or causes a complaining witness, whether or not his or her spouse, to engage in such acts with any other person, and

1. The complaining witness is less than thirteen years of age, or

2. The act is accomplished against the will of the complaining witness, by force, threat or intimidation of or against the complaining witness or another person, or through the use of the complaining witness's mental incapacity or physical helplessness.

B. An accused shall be guilty of forcible sodomy if (i) he or she engages in cunnilingus, fellatio, anallingus, or anal intercourse with his or her spouse, and (ii) such act is accomplished against the will of the spouse, by force, threat or intimidation of or against the spouse or another person.

However, no person shall be found guilty under this subsection unless, at the time of the alleged offense, (i) the spouses were living separate and apart, or (ii) the defendant caused serious physical injury to the spouse by the use of force or violence.

C. Forcible sodomy is a felony punishable by confinement in a state correctional facility for life or for any term not less than five years. In any case deemed appropriate by the court, all or part of any sentence imposed for a violation of subsection B may be suspended upon the defendant's completion of counseling or therapy, if not already provided, in the manner prescribed under §19.2-218.1 if, after consideration of the views of the complaining witness and such other evidence as may be relevant, the court finds such action will promote maintenance of the family unit and will be in the best interest of the complaining witness.

D. Upon a finding of guilt under subsection B in any case tried by the court without a jury, the court, without entering a judgment of guilt, upon motion of the defendant and with the consent of the complaining witness and the attorney for the Commonwealth, may defer further proceedings and place the defendant on probation pending completion of counseling or therapy, if not already provided, in the manner prescribed under §19.2-218.1. If the defendant fails to so complete such counseling or therapy, the court may make final disposition of the case and proceed as otherwise provided. If such counseling is completed as prescribed under §19.2-218.1, the court may discharge the defendant and dismiss the proceedings against him if, after consideration of the views of the complaining witness and such other evidence as may be relevant, the court finds such action will promote maintenance of the family unit and be in the best interest of the complaining witness.

E. For the purposes of this section, intimidation shall be presumed to exist, subject to rebuttal, when sexual abuse is accomplished through the use of a person's position of trust as custodian or care provider of the complaining witness.

§18.2-67.2. Object sexual penetration; penalty.

A. An accused shall be guilty of inanimate or animate object sexual penetration if he or she penetrates the labia majora or anus of a complaining witness who is not his or her spouse with any object, other than for a bona fide medical purpose, or causes such complaining witness to so penetrate his or her own body with an object or causes a complaining witness, whether or not his or her spouse, to engage in such acts with any other person or to penetrate, or to be penetrated by, an animal, and

1. The complaining witness is less than thirteen years of age, or

2. The act is accomplished against the will of the complaining witness, by force, threat or intimidation of or against the complaining witness or another person, or through the use of the complaining witness's mental incapacity or physical helplessness.

B. An accused shall be guilty of inanimate or animate object sexual penetration if (i) he or she penetrate the labia majora or anus of his or her spouse with any object other than for a bona fide medical purpose, or causes such spouse to so penetrate his or her own body with an object and (ii) such act is accomplished against the spouse's will by force, threat or intimidation of or against the spouse or anothe person.

However, no person shall be found guilty under this subsection unless, at the time of the alleged offense (i) the spouses were living separate and apart or (ii) the defendant caused serious physical injury to the spouse by the use of force or violence.

C. Inanimate or animate object sexual penetration is a felony punishable by confinement in the state correctional facility for life or for any term not less than five years. In any case deemed appropriate by the court, all or part of any sentence imposed for a violation of subsection B may be suspended upon the defendant's completion of counseling or therapy, if not already provided, in the manner prescribed under §19.2-218.1 if, after consideration of the views of the complaining witness and such other evidence as may be relevant, the court finds such action will promote maintenance of the family unit and will be in the best interest of the complaining witness.

D. Upon a finding of guilt under subsection B in any case tried by the court without a jury, the court, without entering a judgment of guilt, upon motion of the defendant and with the consent of the complaining witness and the attorney for the Commonwealth, may defer further proceedings and place the defendant on probation pending completion of counseling or therapy, if not already provided, in the manner prescribed under §19.2-218.1. If the defendant fails to so complete such counseling or therapy, the court may make final disposition of the case and proceed as otherwise provided. If such counseling i completed as prescribed under §19.2-218.1, the court may discharge the defendant and dismiss the proceedings against him if, after consideration of the views of the complaining witness and such other evidence as may be relevant, the court finds such action will promote maintenance of the family unit anc be in the best interest of the complaining witness.

E. For the purposes of this section, intimidation shall be presumed to exist, subject to rebuttal, when sexual abuse is accomplished through the use of a person's position of trust as custodian or care provider of the complaining witness.

§18.2-67.3. Aggravated sexual battery.

A. An accused shall be guilty of aggravated sexual battery if he or she sexually abuses the complaining witness, and

1. The complaining witness is less than thirteen years of age, or

2. The act is accomplished against the will of the complaining witness, by force, threat or intimidation, or through the use of the complaining witness's mental incapacity or physical helplessness, and

a. The complaining witness is at least thirteen but less than fifteen years of age, or

b. The accused causes serious bodily or mental injury to the complaining witness, or

c. The accused uses or threatens to use a dangerous weapon.

B. *For the purposes of this section, intimidation shall be presumed to exist, subject to rebuttal, when sexual abuse is accomplished through the use of a person's position of trust as custodian or care provider of the complaining witness.*

C. Aggravated sexual battery is a felony punishable by confinement in a state correctional facility for a term of not less than one nor more than twenty years and by a fine of not more than $100,000.

§18.2-67.4. Sexual battery.

A. An accused shall be guilty of sexual battery if he or she sexually abuses the complaining witness against the will of the complaining witness, by force, threat or intimidation, or through the use of the complaining witness's mental incapacity or physical helplessness.

B. *For the purposes of this section, intimidation shall be presumed to exist, subject to rebuttal, when sexual abuse is accomplished through the use of a person's position of trust as custodian or care provider of the complaining witness.*

C. Sexual battery is a Class 1 misdemeanor.