Chapter III

Punishment and Sentencing

Chapter Overview:

Chapter three of the text concerns criminal sentencing and punishment for crimes. There are a variety of purposes for punishing the violation of criminal laws. These include retribution, deterrence, rehabilitation, incapacitation, and restoration. Retribution is based on the idea that an offender deserves punishment for bad behavior and so the punishment is proportional to the severity of the crime. Deterrence can mean either special deterrence, by which the punishment is intended to discourage the individual from recidivism, or general deterrence, by which the punishment is intended to discourage the general population from committing the same crime. The question of whether or not punishment successfully deters is a controversial subject.

The other three purposes of punishment each serve the interests of a specific person or group. The idea behind rehabilitation is that the punishment imposed could help the perpetrator of the crime turn their life around and change their criminal behavior. Incapacitation, on the other hand, serves the purposes of the community at large, to remove criminals from society and protect others from victimization. Restoration is intended to serve the interests of the victims themselves, requiring that criminals make some degree of monetary contribution to the victim or community harmed in the crime.

There are numerous types of punishment available for judges to impose in a criminal sentence. These are imprisonment, fines, probation, intermediate sanctions, and death. Assets forfeiture is also allowed when the prosecutors of the case show by a preponderance of the evidence that certain assets are linked to specific illegal activities. In determining whether a sentence is fair, there are several different concepts that can be examined. Proportionality, for example, suggests that a sentence should fit the crime. Along the same lines, disparity is the idea that similar crimes should be punished with similar sentences.

Governments typically approach sentencing in one of four ways. The first is determinate sentencing, which is a system by which the legislature sets strict guidelines for how different crimes are to be sentenced, giving judges little discretion and requiring them to justify any decisions to increase or decrease the recommended sentence. Giving judges a little more discretion, mandatory minimum sentences require that criminals serve no less than a specified sentence dependent upon their crime, but judges have authority to determine how much more than the minimum an offender must serve based upon the unique elements of the case. Judges also maintain discretion in indeterminate sentencing, by which the judge defines a minimum and maximum sentence. A little closer to determinate sentences, presumptive sentencing guidelines are determined by a legislative commission and take several factors into consideration but requiring judges to justify their decisions to depart from the presumptive sentence, which will also allow the guilty party the right to an appeal.

The concept of cruel and unusual punishment is also discussed in this chapter, with looks at capital punishment, the juvenile death penalty, and status offenses, which punish people for their

status, as opposed to any action. An example of this would be to punish someone for his or her status as a homeless person or drug addict. Finally, this chapter looks at the concept of equal protection as an important element of fairness in sentencing. In this chapter of the supplement you will learn about the specifics of Virginia's sentencing guidelines and read some cases to show you how the courts apply those statutes.

I. Purpose of Punishment:

Section Introduction: Punishment for a crime is intended to serve one or more of the purposes listed in the section above. The following case asks the question of what level of action against a defendant furthers such goals enough to be deemed punishment.

Auer v. Commonwealth, 46 Va.App. 637, 621 S.E.2d 140 (2005)

Procedural History: Bryan David Auer was convicted by a jury of aggravated involuntary manslaughter, in violation of Code § 18.2-36.1, and driving under the influence of alcohol (DUI), in violation of Code § 18.2-266.

Issue(s): Did the trial court err during the punishment phase of the defendant's trial by admitting into evidence his prior misdemeanor conviction under a city ordinance for DUI?

Facts: On August 4, 2003, Auer was indicted by a grand jury for aggravated involuntary manslaughter and DUI, second offense. On the Commonwealth's motion, the latter indictment was amended prior to trial to DUI, first offense. After hearing the evidence presented at trial on those charges, a jury convicted Auer of DUI, first offense, under Code §§ 18.2-266 and 18.2-270, and aggravated involuntary manslaughter, under Code § 18.2-36.1.

During the punishment phase of the trial, the Commonwealth sought to introduce into evidence a certified copy of a general district court order reciting Auer's prior criminal conviction for misdemeanor DUI, in violation of Virginia Beach City Code § 21-336. Rejecting Auer's argument that evidence of a prior conviction based on a city ordinance was inadmissible under Code § 19.2-295.1, the trial court admitted the order into evidence.

At the conclusion of the punishment phase of the trial, the jury fixed Auer's punishment at nine years and six months of incarceration on the manslaughter charge and twelve months *643 of incarceration on the DUI charge. The trial court subsequently sentenced Auer pursuant to the jury's verdict.

Holding: *Affirmed.*

Opinion: CLEMENTS, Judge.

Auer contends, on appeal, that Code § 19.2-295.1 prohibits the Commonwealth from presenting evidence at the punishment phase of a bifurcated jury trial of a defendant's prior convictions under local laws. Thus, he concludes, the trial court erred in admitting into evidence his prior

conviction for misdemeanor DUI, which was based on Virginia Beach City Code § 21-336, and the case must be remanded for resentencing. We disagree.

" '[T]he admissibility of evidence is within the broad discretion of the trial court, and [its ruling thereon] will not be disturbed on appeal in the absence of an abuse of discretion.' " Jones v. Commonwealth, 38 Va.App. 231, 236, 563 S.E.2d 364, 366 (2002) (quoting Blain v. Commonwealth, 7 Va.App. 10, 16, 371 S.E.2d 838, 842 (1988)). However, "a trial court 'by definition abuses its discretion when it makes an error of law.' " Shooltz v. Shooltz, 27 Va.App. 264, 271, 498 S.E.2d 437, 441 (1998) (quoting Koon v. United States, 518 U.S. 81, 100, 116 S.Ct. 2035, 2047, 135 L.Ed.2d 392 (1996)). "In determining whether the trial court made an error of law, 'we review the trial court's statutory interpretations and legal conclusions de novo.' " Rollins v. Commonwealth, 37 Va.App. 73, 79, 554 S.E.2d 99, 102 (2001) (quoting Timbers v. Commonwealth, 28 Va.App. 187, 193, 503 S.E.2d 233, 236 (1998)).

Code § 19.2-295.1 provides in pertinent part that, at the punishment phase of a bifurcated jury trial,

> the Commonwealth shall present the defendant's prior criminal convictions by certified, attested or exemplified copies of the record of conviction, including adult convictions and juvenile convictions and adjudications of delinquency. Prior convictions shall include convictions and adjudications of delinquency under the laws of any state, the District of Columbia, the United States or its territories.

As framed by Auer, the sole issue in this appeal is whether the trial court violated the terms of Code § 19.2-295.1 when, during the punishment phase of trial, it allowed the Commonwealth to present evidence to the jury of Auer's DUI conviction for violating Virginia Beach City Code § 21-336. Auer contends Code § 19.2-295.1 prohibits the admission into evidence of convictions based on local laws; the Commonwealth insists the statute contains no such prohibition.

At the center of this dispute is the question whether Auer's DUI conviction for violating Virginia Beach City Code § 21-336 is a "prior conviction," as that term is used in Code § 19.2-295.1. Auer argues that, because penal statutes are to be construed strictly against the Commonwealth, Code § 19.2-295.1's provision that "[p]rior convictions shall include convictions and adjudications of delinquency under the laws of any state, the District of Columbia, the United States or its territories" should be read as providing an exhaustive list of the convictions that may be presented to the jury at sentencing. Thus, Auer's argument continues, the omission of convictions under local laws from that list reflects the legislature's intent that such convictions not be considered by the jury in fixing a convicted defendant's punishment. To hold otherwise, Auer maintains, would be to add terms to the statute and to conclude that the legislature did not mean what it actually expressed.

The Commonwealth claims that Auer's reading of Code § 19.2-295.1 is too restrictive. Nothing in the language of the statute itself, the Commonwealth argues, indicates that the legislature intended to prohibit the presentation at sentencing of prior convictions under local laws. Moreover, the Commonwealth adds, reading such a prohibition into Code § 19.2-295.1 would defeat the statute's purpose.

In seeking to resolve the ambiguity in the statutory language and discern the legislature's intent, we apply established principles of statutory interpretation. See Va. Dep't of Labor & Industry v. Westmoreland Coal Co., 233 Va. 97, 101-02, 353 S.E.2d 758, 762 (1987). Consistent with such principles, we interpret the statute so as "to promote the end for which it was enacted, if such an interpretation can reasonably be made from the language used." Mayhew v. Commonwealth, 20 Va.App. 484, 489, 458 S.E.2d 305, 307 (1995). Thus, the "statute must be construed with reference to its subject matter, the object sought to be attained, and the legislative purpose in enacting it; the provisions should receive a construction that will render it harmonious with that purpose rather than one which will defeat it." Esteban v. Commonwealth, 266 Va. 605, 609, 587 S.E.2d 523, 526 (2003). Furthermore, although "[i]t is a cardinal principle of law that penal statutes are to be construed strictly against the [Commonwealth]" and "cannot be extended by implication, or be made to include cases which are not within the letter and spirit of the statute," Wade v. Commonwealth, 202 Va. 117, 122, 116 S.E.2d 99, 103 (1960), "we will not apply 'an unreasonably restrictive interpretation of the statute' that would subvert the legislative intent expressed therein," Armstrong v. Commonwealth, 263 Va. 573, 581, 562 S.E.2d 139, 144 (2002) (quoting Ansell v. Commonwealth, 219 Va. 759, 761, 250 S.E.2d 760, 761 (1979)).

Applying these principles to the provision of Code § 19.2-295.1 at issue here, we conclude that the statutory interpretation urged by Auer is contrary to the manifest purpose of Code § 19.2-295.1. Plainly, the legislative intent underlying Code § 19.2-295.1 is to assure that sufficient information regarding the convicted defendant's criminal record is provided during the punishment proceeding to enable the jury " 'to impose the sentence as seemed to them to be just.' " Hartigan v. Commonwealth, 31 Va.App. 243, 254, 522 S.E.2d 406, 411 (1999) (quoting Coward v. Commonwealth, 164 Va. 639, 646, 178 S.E. 797, 800 (1935)), aff'd en banc, 32 Va.App. 873, 531 S.E.2d 63 (2000). " 'The sentencing decision ... is a quest for a sentence that best effectuates the criminal justice system's goals of deterrence (general and specific), incapacitation, retribution and rehabilitation.' " Gilliam, 21 Va.App. at 524, 465 S.E.2d at 594 (quoting United States v. Morris, 837 F.Supp. 726, 729 (E.D.Va.1993)). "Manifestly, the prior criminal convictions of a felon ... " 'bear upon a tendency to commit offenses, the probabilities of rehabilitation, and similar factors' " indispensable to the determination of an appropriate sentence." Id. at 524, 465 S.E.2d 592, 465 S.E.2d at 595 (quoting Thomas v. Commonwealth, 18 Va.App. 656, 659, 446 S.E.2d 469, 472 (1994) (internal quotation marks omitted)).

As we explained in Hartigan, "[i]n contrast to the unitary system [in effect prior to Code § 19.2-295.1's enactment], in which juries [in non-capital cases] determined guilt and sentencing based only on the facts germane to the offense and the range of punishment available, the jury now is given a much broader range of information under the bifurcated procedure." Id. at 255, 522 S.E.2d at 411. "Such information ensures an individualized assessment of a defendant's previous criminal conduct in the context of the subject offense, thereby promoting a more informed determination of sentence." Gilliam, 21 Va.App. at 523, 465 S.E.2d at 594. To that end, "Code § 19.2-295.1 creates a category of evidentiary admissibility. It is not a rule of evidentiary exclusion." Gilley v. Commonwealth, 21 Va.App. 740, 744, 467 S.E.2d 312, 313 (1996).

It follows, therefore, that, as we stated in consideration of a related issue in Bunn v. Commonwealth, 21 Va.App. 593, 598, 466 S.E.2d 744, 746 (1996) (emphasis added),

> [t]he obvious purpose of Code § 19.2-295.1 is to allow the jury, which will be recommending sentence, to consider the defendant's ... current record of criminal convictions. Nothing in the language or logic of the statute suggests that the legislature intended to limit the jury's consideration to anything other than the defendant's complete criminal record.

* * * * * *

It is beyond dispute that, were we to read Code § 19.2-295.1 as prohibiting the presentation at sentencing of convictions under local laws, as Auer urges, the jury, in cases such as this, would not have the convicted defendant's complete criminal record before them in determining the appropriate punishment to recommend. Such a reading of the statute would clearly undermine the legislative intent expressed therein of allowing the jury to consider the defendant's complete criminal record at sentencing. We conclude, therefore, that, consistent with the manifest purpose of the statute, Code § 19.2-295.1 does not provide an exclusive definition of the term "prior convictions" and, thus, does not prohibit the presentation at sentencing of convictions under local laws. Rather, the statute's provision that "[p]rior convictions shall include convictions ... under the laws of any state, the District of Columbia, the United States or its territories" indicates that the prior convictions the Commonwealth may present at sentencing are not limited to convictions under the statutes contained in the Code of Virginia. Accordingly, we hold that the trial court did not err in allowing the Commonwealth to present evidence of Auer's misdemeanor DUI conviction for violating Virginia Beach City Code § 21-336.

This resolution of the issue is buttressed by the fact that Auer's reading of Code § 19.2-295.1 would yield the inconsistent result of permitting the Commonwealth to present evidence at sentencing of a prior conviction under Code § 18.2-266 but not under Virginia Beach City Code § 21-336, even though both statutes refer to the same driving under the influence offense. See Cook v. Commonwealth, 268 Va. 111, 116, 597 S.E.2d 84, 87 (2004) (noting that "our case law uses the phrase 'absurd result' to describe situations in which the law would be internally inconsistent"). "[A] statute should never be construed so that it leads to absurd results." Branch v. Commonwealth, 14 Va.App. 836, 839, 419 S.E.2d 422, 424 (1992). Consequently, "[w]here a particular construction of a statute will result in an absurdity, some other reasonable construction which will not produce the absurdity will be found." Miller v. Commonwealth, 180 Va. 36, 41, 21 S.E.2d 721, 723 (1942).

For these reasons, we affirm the trial court's judgment.

Critical Thinking Question(s): What is the reason that prior convictions, generally, with exceptions, are not admitted at trial? Following your logic, is it reasonable to present evidence of prior convictions at sentencing when they are not permissible in the defendant's trial? Why or why not? How is the sentencing phase for a certain crime different than the trial phase?

II. Sentencing:

Section Introduction: There are many different types of penalties that can be imposed on a guilty defendant during the sentencing phase of a trial. The state statutes listed below describe the punishments available to judges in Virginia.

Virginia Code § 18.2-10. Punishment for conviction of felony; penalty.
The authorized punishments for conviction of a felony are:

(a) For Class 1 felonies, death, if the person so convicted was 18 years of age or older at the time of the offense and is not determined to be mentally retarded pursuant to § 19.2-264.3:1.1, or imprisonment for life and, subject to subdivision (g), a fine of not more than $100,000. If the person was under 18 years of age at the time of the offense or is determined to be mentally retarded pursuant to § 19.2-264.3:1.1, the punishment shall be imprisonment for life and, subject to subdivision (g), a fine of not more than $100,000.

(b) For Class 2 felonies, imprisonment for life or for any term not less than 20 years and, subject to subdivision (g), a fine of not more than $100,000.

(c) For Class 3 felonies, a term of imprisonment of not less than five years nor more than 20 years and, subject to subdivision (g), a fine of not more than $100,000.

(d) For Class 4 felonies, a term of imprisonment of not less than two years nor more than 10 years and, subject to subdivision (g), a fine of not more than $100,000.

(e) For Class 5 felonies, a term of imprisonment of not less than one year nor more than 10 years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months and a fine of not more than $2,500, either or both.

(f) For Class 6 felonies, a term of imprisonment of not less than one year nor more than five years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months and a fine of not more than $2,500, either or both.

(g) Except as specifically authorized in subdivision (e) or (f), or in Class 1 felonies for which a sentence of death is imposed, the court shall impose either a sentence of imprisonment together with a fine, or imprisonment only. However, if the defendant is not a natural person, the court shall impose only a fine.

For any felony offense committed (i) on or after January 1, 1995, the court may, and (ii) on or after July 1, 2000, shall, except in cases in which the court orders a suspended term of confinement of at least six months, impose an additional term of not less than six months nor more than three years, which shall be suspended conditioned upon successful completion of a period of post-release supervision pursuant to § 19.2-295.2 and compliance with such other terms as the sentencing court may require. However, such additional term may only be imposed when the sentence includes an active term of incarceration in a correctional facility.

For a felony offense prohibiting proximity to children as described in subsection A of § 18.2-370.2, the sentencing court is authorized to impose the punishment set forth in subsection B of that section in addition to any other penalty provided by law.

Virginia Code § 18.2-11. Punishment for conviction of misdemeanor.
The authorized punishments for conviction of a misdemeanor are:

(a) For Class 1 misdemeanors, confinement in jail for not more than twelve months and a fine of not more than $2,500, either or both.

(b) For Class 2 misdemeanors, confinement in jail for not more than six months and a fine of not more than $1,000, either or both.

(c) For Class 3 misdemeanors, a fine of not more than $500.

(d) For Class 4 misdemeanors, a fine of not more than $250.

For a misdemeanor offense prohibiting proximity to children as described in subsection A of § 18.2-370.2, the sentencing court is authorized to impose the punishment set forth in subsection B of that section in addition to any other penalty provided by law.

Virginia Code § 19.2-298.01. Use of discretionary sentencing guidelines.
A. In all felony cases, other than Class 1 felonies, the court shall (i) have presented to it the appropriate discretionary sentencing guidelines worksheets and (ii) review and consider the suitability of the applicable discretionary sentencing guidelines established pursuant to Chapter 8 (§ 17.1-800 et seq.) of Title 17.1. Before imposing sentence, the court shall state for the record that such review and consideration have been accomplished and shall make the completed worksheets a part of the record of the case and open for inspection. In cases tried by a jury, the jury shall not be presented any information regarding sentencing guidelines.

B. In any felony case, other than Class 1 felonies, in which the court imposes a sentence which is either greater or less than that indicated by the discretionary sentencing guidelines, the court shall file with the record of the case a written explanation of such departure.

C. In felony cases, other than Class 1 felonies, tried by a jury and in felony cases tried by the court without a jury upon a plea of not guilty, the court shall direct a probation officer of such court to prepare the discretionary sentencing guidelines worksheets. In felony cases tried upon a plea of guilty, including cases which are the subject of a plea agreement, the court shall direct a probation officer of such court to prepare the discretionary sentencing guidelines worksheets, or, with the concurrence of the accused, the court and the attorney for the Commonwealth, the worksheets shall be prepared by the attorney for the Commonwealth.

D. Except as provided in subsection E, discretionary sentencing guidelines worksheets prepared pursuant to this section shall be subject to the same distribution as presentence investigation reports prepared pursuant to subsection A of § 19.2-299.

E. Following the entry of a final order of conviction and sentence in a felony case, the clerk of the circuit court in which the case was tried shall cause a copy of such order or orders, the original of the discretionary sentencing guidelines worksheets prepared in the case, and a copy of any departure explanation prepared pursuant to subsection B to be forwarded to the Virginia Criminal Sentencing Commission within five days. Similarly, the statement required by §§ 19.2-295 and 19.2-303 and regarding departure from or modification of a sentence fixed by a jury shall be forwarded to the Virginia Criminal Sentencing Commission.

F. The failure to follow any or all of the provisions of this section or the failure to follow any or all of the provisions of this section in the prescribed manner shall not be reviewable on appeal or the basis of any other post-conviction relief.

G. The provisions of this section shall apply only to felony cases in which the offense is committed on or after January 1, 1995, and for which there are discretionary sentencing guidelines. For purposes of the discretionary sentencing guidelines only, a person sentenced to a boot camp incarceration program pursuant to § 19.2-316.1, a detention center incarceration program pursuant to § 19.2-316.2 or a diversion center incarceration program pursuant to § 19.2-316.3 shall be deemed to be sentenced to a term of incarceration.

III. Approaches to Sentencing:

Section Introduction: In addition to standard sentencing guidelines, Governors and President may grant clemency to an offender to reduce his or her sentence. Under Article V, Section 12 of the Constitution of Virginia, the Governor of Virginia may grant clemency. The following is the full text of that section.

Section 12. Executive clemency.
The Governor shall have power to remit fines and penalties under such rules and regulations as may be prescribed by law; to grant reprieves and pardons after conviction except when the prosecution has been carried on by the House of Delegates; to remove political disabilities consequent upon conviction for offenses committed prior or subsequent to the adoption of this Constitution; and to commute capital punishment. He shall communicate to the General Assembly, at each regular session, particulars of every case of fine or penalty remitted, of reprieve or pardon granted, and of punishment commuted, with his reasons for remitting, granting, or commuting the same.

IV. Victims' Rights:

Section Introduction: In certain cases sentencing may take into account certain aspects of a victim's experience of a crime. The involvement of victims in criminal proceedings necessitates the clarification of a victim's rights with regard to such proceedings. These Virginia statutes involve the rights of victims and the case that follows looks at some possible effects of a victim's involvement in a trial.

Virginia Code § 19.2-11.01. Crime victim and witness rights.

A. In recognition of the Commonwealth's concern for the victims and witnesses of crime, it is the purpose of this chapter to ensure that the full impact of crime is brought to the attention of the courts of the Commonwealth; that crime victims and witnesses are treated with dignity, respect and sensitivity; and that their privacy is protected to the extent permissible under law. It is the further purpose of this chapter to ensure that victims and witnesses are informed of the rights provided to them under the laws of the Commonwealth; that they receive authorized services as appropriate; and that they have the opportunity to be heard by law-enforcement agencies, attorneys for the Commonwealth, corrections agencies and the judiciary at all critical stages of the criminal justice process to the extent permissible under law. Unless otherwise stated and subject to the provisions of § 19.2-11.1, it shall be the responsibility of a locality's crime victim and witness assistance program to provide the information and assistance required by this chapter, including verification that the standardized form listing the specific rights afforded to crime victims has been received by the victim.

As soon as practicable after identifying a victim of a crime, the investigating law-enforcement agency shall provide the victim with a standardized form listing the specific rights afforded to crime victims. The form shall include a telephone number by which the victim can receive further information and assistance in securing the rights afforded crime victims, the name, address and telephone number of the office of the attorney for the Commonwealth, the name, address and telephone number of the investigating law-enforcement agency, and a summary of the victim's rights under § 40.1-28.7:2.

1. Victim and witness protection and law-enforcement contacts.

    a. In order that victims and witnesses receive protection from harm and threats of harm arising out of their cooperation with law-enforcement, or prosecution efforts, they shall be provided with information as to the level of protection which may be available pursuant to § 52-35 or to any other federal, state or local program providing protection, and shall be assisted in obtaining this protection from the appropriate authorities.

    b. Victims and witnesses shall be provided, where available, a separate waiting area during court proceedings that affords them privacy and protection from intimidation, and that does not place the victim in close proximity to the defendant or the defendant's family.

2. Financial assistance.

    a. Victims shall be informed of financial assistance and social services available to them as victims of a crime, including information on their possible right to file a claim for compensation from the Crime Victims' Compensation Fund pursuant to Chapter 21.1 (§ 19.2-368.1 et seq.) of this title and on other available assistance and services.

    b. Victims shall be assisted in having any property held by law-enforcement agencies for evidentiary purposes returned promptly in accordance with §§ 19.2-270.1 and 19.2-270.2.

    c. Victims shall be advised that restitution is available for damages or loss resulting from an offense and shall be assisted in seeking restitution in accordance with §§ 19.2-305, 19.2-

305.1, Chapter 21.1 (§ 19.2-368.1 et seq.) of this title, Article 21 (§ 58.1-520 et seq.) of Chapter 3 of Title 58.1, and other applicable laws of the Commonwealth.

3. Notices.

a. Victims and witnesses shall be (i) provided with appropriate employer intercession services to ensure that employers of victims and witnesses will cooperate with the criminal justice process in order to minimize an employee's loss of pay and other benefits resulting from court appearances and (ii) advised that pursuant to § 18.2-465.1 it is unlawful for an employer to penalize an employee for appearing in court pursuant to a summons or subpoena.

b. Victims shall receive advance notification when practicable from the attorney for the Commonwealth of judicial proceedings relating to their case and shall be notified when practicable of any change in court dates in accordance with § 19.2-265.01 if they have provided their names, current addresses and telephone numbers.

c. Victims shall receive notification, if requested, subject to such reasonable procedures as the Attorney General may require pursuant to § 2.2-511, from the Attorney General of the filing and disposition of any appeal or habeas corpus proceeding involving their case.

d. Victims shall be notified by the Department of Corrections or a sheriff or jail superintendent (i) in whose custody an escape, change of name, transfer, release or discharge of a prisoner occurs pursuant to the provisions of §§ 53.1-133.02 and 53.1-160 or (ii) when an accused is released on bail, if they have provided their names, current addresses and telephone numbers in writing. Such notification may be provided through the Virginia Statewide VINE (Victim Information and Notification Everyday) System or other similar electronic or automated system.

e. Victims shall be advised that, in order to protect their right to receive notices and offer input, all agencies and persons having such duties must have current victim addresses and telephone numbers given by the victims. Victims shall also be advised that any such information given shall be confidential as provided by § 19.2-11.2.

4. Victim input.

a. Victims shall be given the opportunity, pursuant to § 19.2-299.1, to prepare a written victim impact statement prior to sentencing of a defendant and may provide information to any individual or agency charged with investigating the social history of a person or preparing a victim impact statement under the provisions of §§ 16.1-273 and 53.1-155 or any other applicable law.

b. Victims shall have the right to remain in the courtroom during a criminal trial or proceeding pursuant to the provisions of § 19.2-265.01.

c. On motion of the attorney for the Commonwealth, victims shall be given the opportunity, pursuant to §§ 19.2-264.4 and 19.2-295.3, to testify prior to sentencing of a defendant regarding the impact of the offense.

d. In a felony case, the attorney for the Commonwealth, upon the victim's written request, shall consult with the victim either verbally or in writing (i) to inform the victim of the contents of a proposed plea agreement and (ii) to obtain the victim's views about the disposition of the case, including the victim's views concerning dismissal, pleas, plea negotiations and sentencing. However, nothing in this section shall limit the ability of the attorney for the Commonwealth to exercise his discretion on behalf of the citizens of the Commonwealth in the disposition of any criminal case. The court shall not accept the plea agreement unless it finds that, except for good cause shown, the Commonwealth has complied with clauses (i) and (ii). Good cause shown shall include, but not be limited to, the unavailability of the victim due to incarceration, hospitalization, failure to appear at trial when subpoenaed, or change of address without notice.

Upon the victim's written request, the victim shall be notified in accordance with subdivision A 3 b of any proceeding in which the plea agreement will be tendered to the court.
The responsibility to consult with the victim under this subdivision shall not confer upon the defendant any substantive or procedural rights and shall not affect the validity of any plea entered by the defendant.

5. Courtroom assistance.

a. Victims and witnesses shall be informed that their addresses and telephone numbers may not be disclosed, pursuant to the provisions of §§ 19.2-11.2 and 19.2-269.2, except when necessary for the conduct of the criminal proceeding.

b. Victims and witnesses shall be advised that they have the right to the services of an interpreter in accordance with §§ 19.2-164 and 19.2-164.1.

c. Victims and witnesses of certain sexual offenses shall be advised that there may be a closed preliminary hearing in accordance with § 18.2-67.8 and, if a victim was 14 years of age or younger on the date of the offense and is 16 or under at the time of the trial, or a witness to the offense is 14 years of age or younger at the time of the trial, that two-way closed-circuit television may be used in the taking of testimony in accordance with § 18.2-67.9.

6. Post trial assistance.

a. Within 30 days of receipt of a victim's written request after the final trial court proceeding in the case, the attorney for the Commonwealth shall notify the victim in writing, of (i) the disposition of the case, (ii) the crimes of which the defendant was convicted, (iii) the defendant's right to appeal, if known, and (iv) the telephone number of offices to contact in the event of nonpayment of restitution by the defendant.

b. If the defendant has been released on bail pending the outcome of an appeal, the agency that had custody of the defendant immediately prior to his release shall notify the victim as soon as practicable that the defendant has been released.

c. If the defendant's conviction is overturned, and the attorney for the Commonwealth decides to retry the case or the case is remanded for a new trial, the victim shall be entitled to the same rights as if the first trial did not take place.

B. For purposes of this chapter, "victim" means (i) a person who has suffered physical, psychological or economic harm as a direct result of the commission of a felony or of assault and battery in violation of § 18.2-57 or § 18.2-57.2, stalking in violation of § 18.2-60.3, sexual battery in violation of § 18.2-67.4, attempted sexual battery in violation of § 18.2-67.5, maiming or driving while intoxicated in violation of § 18.2-51.4 or § 18.2-266, (ii) a spouse or child of such a person, (iii) a parent or legal guardian of such a person who is a minor, (iv) for the purposes of subdivision A 4 of this section only, a current or former foster parent or other person who has or has had physical custody of such a person who is a minor, for six months or more or for the majority of the minor's life, or (v) a spouse, parent, sibling or legal guardian of such a person who is physically or mentally incapacitated or was the victim of a homicide; however, "victim" does not mean a parent, child, spouse, sibling or legal guardian who commits a felony or other enumerated criminal offense against a victim as defined in clause (i).

C. Officials and employees of the judiciary, including court services units, law-enforcement agencies, the Department of Corrections, attorneys for the Commonwealth and public defenders, shall be provided with copies of this chapter by the Department of Criminal Justice Services or a crime victim and witness assistance program. Each agency, officer or employee who has a responsibility or responsibilities to victims under this chapter or other applicable law shall make reasonable efforts to become informed about these responsibilities and to ensure that victims and witnesses receive such information and services to which they may be entitled under applicable law, provided that no liability or cause of action shall arise from the failure to make such efforts or from the failure of such victims or witnesses to receive any such information or services.

Virginia Code § 19.2-11.2. Crime victim's right to nondisclosure of certain information; exceptions; testimonial privilege.

Upon request of any witness in a criminal prosecution under § 18.2-46.2 or 18.2-46.3, or any crime victim, neither a law-enforcement agency, the attorney for the Commonwealth, the counsel for a defendant, a court nor the Department of Corrections, nor any employee of any of them, may disclose, except among themselves, the residential address, telephone number, or place of employment of the witness or victim or a member of the witness' or victim's family, except to the extent that disclosure is (i) of the site of the crime, (ii) required by law or Rules of the Supreme Court, (iii) necessary for law-enforcement purposes or preparation for court proceedings, or (iv) permitted by the court for good cause.

Except with the written consent of the victim, a law-enforcement agency may not disclose to the public information which directly or indirectly identifies the victim of a crime involving any sexual assault, sexual abuse or family abuse, except to the extent that disclosure is (i) of the site of the crime, (ii) required by law, (iii) necessary for law-enforcement purposes, or (iv) permitted by the court for good cause. In addition, at the request of the victim to the Court of Appeals of Virginia or the Supreme Court of Virginia hearing, on or after July 1, 2007, the case of a crime involving any sexual assault or sexual abuse, no appellate decision shall contain the first or last name of the victim.

Nothing herein shall limit the right to examine witnesses in a court of law or otherwise affect the conduct of any criminal proceeding.

Rock v. _Commonwealth,_ 45 Va.App. 254, 610 S.E.2d 314 (2005)

Procedural History: At Rock's trial, both White and Hunt testified that Rock gave them directions to Gravely's home and participated in the planning of the robbery. Gravely testified that Rock visited her home in Essex County several times in the past. The jury convicted Rock of conspiracy to commit robbery, but acquitted him of eight other felony counts relating to the attempted robbery and murder at Gravely's home. At the sentencing hearing, over Rock's objection, the court permitted the Commonwealth to present victim impact testimony of the murder victim's brother, Eugene Cook, and the mother of the murder victim's children, Sarah Seely. Following the jury's recommendation, the trial court sentenced Rock to six years in the state penitentiary.

Issue(s): May a brother and mother give victim-impact testimony at sentencing even if they were not "victims" within meaning of statute?

Facts: Four masked intruders, two of whom were carrying assault rifles and one of whom was carrying a handgun, broke into Pamela Gravely's home in Essex County, Virginia. Gravely, Michael Cook, Jill Cossica and Scott Cox were present in the living area of the home, and Gravely's two daughters were in a bedroom. Gravely removed a mask from one of the intruders while the intruder was present in her home. One of the intruders demanded that Gravely, Cook, Cossica and Cox get down on the floor. Another intruder demanded that Gravely's daughters go into the living area with the others. Cook approached one of the intruders who had a gun. The intruder shot Cook, killing him. All four intruders fled. DNA from the mask Gravely removed from one of the intruders matched that of Andre White. Subsequently, White, Jason Hunt, Michael Williams and Rock were arrested for crimes related to the intrusion into Gravely's home, including attempted robbery, statutory burglary, abduction, and murder. White and Hunt pled guilty to crimes related to the break-in and homicide.

Holding: *Affirmed.*

Opinion: McCLANAHAN, Judge.

John Davis Rock, III appeals his sentencing upon conviction of conspiracy to commit robbery. Rock contends that the trial court erred in allowing the Commonwealth to present to the jury victim impact testimony by the family of Michael Cook, who was murdered during the conspired robbery. For the reasons that follow, we affirm.

Rock asserts on appeal that the trial court abused its discretion in allowing victim impact testimony by Cook's family during the sentencing phase of his trial because Rock was convicted of conspiracy to commit robbery, but was acquitted of Cook's murder. More specifically, Rock argues that the victims who provided impact testimony at the sentencing phase were not victims within the meaning of Code § 19.2-11.01(B) because they did not suffer as a "direct result" of

Rock's conspiracy to commit robbery. Rock argues that any connection between the conspiracy to commit robbery conviction and the murder is "purely speculative." We disagree.

In 1995, in recognition of the concern for the victims and witnesses of crime, the General Assembly enacted the Crime Victim and Witness Rights Act, Code §§ 19.2-11.01-11.4. The purpose of the statute is "to ensure that the full impact of crime is brought to the attention of the courts of the Commonwealth; that crime victims and witnesses are treated with dignity, respect and sensitivity; and that their privacy is protected to the extent permissible under law." Code § 19.2-11.01(A).

Prior to 1998, the statutes addressed victims' rights in the sentencing process only through the use of a pre-sentence or written report containing victim impact statements. *See* Code § 19.2-11.01(A)(4)(a) ("Victims shall be given the opportunity ... to prepare a written victim impact statement prior to sentencing of a defendant...."); Code § 19.2-264.5; Code § 19.2-299.1 ("[The] presentence report ... shall, with the consent of the victim ... include a Victim Impact Statement."). Such statements generally were available only to the judge. *Thomas v. Commonwealth*, 263 Va. 216, 235, 559 S.E.2d 652, 663 (2002). The pre-1998 statutes did not provide for oral testimony by the victim during the sentencing proceeding.

In 1998, the General Assembly expanded the permissible scope of the Act by establishing the victim's right to present victim impact *oral testimony* during the sentencing proceeding. Code §§ 19.2-11.01(A)(4)(c) and 19.2-295.3; *see also Thomas,* 263 Va. at 235, 559 S.E.2d at 662-63. Code § 19.2-11.01(A)(4)(c) provides that "[o]n motion of the attorney for the Commonwealth, victims *shall* be given the opportunity, pursuant to §§ 19.2-264.4 and 19.2-295.3, to testify prior to sentencing of a defendant regarding the impact of the offense." (Emphasis added). Code § 19.2-295.3 states:

In cases of trial by jury or by the court, upon a finding that the defendant is guilty of a felony, the court *shall* permit the victim, as defined in § 19.2-11.01, upon motion of the attorney for the Commonwealth, to testify in the presence of the accused regarding the impact of the offense upon the victim. (Emphasis added). Whereas "[t]he written statements were generally available only to the judge in the sentencing process, these amendments allowed the victim testimony to be presented to and considered by the jury in its sentencing deliberations." *Thomas,* 263 Va. at 235, 559 S.E.2d at 663.

Under these amendments, victims who wish to offer impact testimony at the sentencing hearing of a defendant found guilty of a felony have a statutorily protected right to testify in the presence of the jury.

The pertinent language of Code §§ 19.2-11.01(A)(4)(c) and 19.2-295.3 is mandatory. By explicitly providing that victims *shall* be allowed to testify regarding the impact of the offense on them when the defendant is found guilty of a felony, Code § 19.2-295.3 establishes the victim's right to testify without interference. However, those persons given this right must meet the definition of "victim" as defined in Code § 19.2-11.01(B). *Thomas,* 263 Va. at 235, 559 S.E.2d at 663. Code § 19.2-11.01(B) defines a "victim" as: (i) a person who suffered physical, psychological or economic harm as a *direct result* of the commission of a felony, ... (ii) a spouse

or child of such a person, ... or (v) a spouse, parent, sibling or legal guardian of such a person who is physically or mentally incapacitated or was the victim of a homicide.... (Emphasis added). Once it is determined that the persons who offer their impact testimony are "victims" within the meaning of the statute, the court *shall* permit the victims to testify regarding the *impact* of the offense. *See* Code § 19.2-295.3.

At Rock's trial on all nine charges, he was acquitted of the murder charge, but was convicted of the conspiracy to commit robbery charge. The trial court recognized that the jury heard the evidence on all nine charges, and the court made the factual finding that the evidence showed that the murder occurred as a direct consequence of the conspiracy to commit robbery when it made its evidentiary ruling:

Certainly the jury has every detail about what happened. They heard it for three days, exactly what happened in the robbery of this trailer. There is hardly a detail left that they have not heard. They considered that in coming to their verdict in this case. *And I know of no practical way at this point to put limitation on what is a direct consequence of that conspiracy, which is that a man died as a result of it.* (Emphasis added).

This factual finding was a prerequisite to the court's determination that Eugene Cook and Sarah Seely satisfied the legal definition of victim under Code § 19.2-11.01(B) and that, therefore, their victim impact testimony was admissible. *See Claytor v. Anthony,* 27 Va. (6 Rand.) 285, 299-300 (1828) (inquiry involved a preliminary determination of fact by the judge in order that he or she may determine whether the evidence is admissible); *see also Rabeiro v. Commonwealth,* 10 Va.App. 61, 64, 389 S.E.2d 731, 732 (1990) ("Factual determinations which are necessary predicates to rulings on the admissibility of evidence and the purposes for which it is admitted are for the trial judge [to decide].").

Determination of the admissibility of evidence lies within the broad discretion of the trial court. *See Blain v. Commonwealth,* 7 Va.App. 10, 16, 371 S.E.2d 838, 842 (1988). The trial court's ruling regarding the admissibility of evidence will not be disturbed on appeal absent a clear abuse of discretion. *See Commonwealth v. Shifflett,* 257 Va. 34, 44, 510 S.E.2d 232, 236-37 (1999). "Given the 'broad discretion' of a trial judge over evidentiary matters, we apply a deferential abuse-of-discretion standard of appellate review." *Seaton v. Commonwealth,* 42 Va.App. 739, 752, 595 S.E.2d 9, 15 (2004) (citations omitted); *see Valentine v. Commonwealth,* 28 Va.App. 239, 244, 503 S.E.2d 798, 800 (1998); *Herbin v. Commonwealth,* 28 Va.App. 173, 185, 503 S.E.2d 226, 232 (1998). "We review the trial court's factual findings only to determine if they are plainly wrong or devoid of supporting evidence." *Campbell v. Commonwealth,* 39 Va.App. 180, 186, 571 S.E.2d 906, 909 (2002).

We cannot say that the trial court was plainly wrong or that its factual findings were without supporting evidence when it made the factual determination that the murder was a direct consequence of the conspiracy. Rock assembled the men, planned the robbery that involved the use of guns, and directed the men to Gravely's home. The robbery occurred contemporaneously with Cook's murder, for which the other defendants pled guilty. Rock was the only defendant who knew Gravely, had been in her home in the past, and knew where her home was located. White, Hunt and Williams did not know Gravely, did not know where Gravely lived, and had

never been in her home, where Cook was murdered. These facts and circumstances provide a rational basis for concluding that the murder in Gravely's home during the robbery was a direct consequence of the conspiracy to rob her home. Applying the statutes to this case, and in light of the General Assembly's purpose in enacting the Crime Victim and Witness Rights Act, we hold that the trial court did not abuse its discretion by admitting the victim impact testimony during the sentencing proceeding.

Furthermore, we hold that the admissibility of the victim impact testimony was relevant and within the sound discretion of the trial court even if persons who are not deemed "victims" under the statute offered the testimony. *See Beck v. Commonwealth,* 253 Va. 373, 385, 484 S.E.2d 898, 905 (1997). In *Thomas,* the Supreme Court held the trial court erred by failing to apply the proper test to the defendant's motion to change venue. Although not dispositive of the case, the court addressed the admissibility of victim impact testimony and whether persons who do not meet the definition of victim under the statute have a right to testify. In *Thomas,* a cousin of the murder victim and the victim's fiancé were allowed to testify in the penalty phase of the trial where the potential punishment was death. 263 Va. at 233, 559 S.E.2d at 662. The Court deemed admissible relevant victim impact testimony by persons who did not meet the statutory definition of "victim." *Id.* at 235, 559 S.E.2d at 663. The Court held that " [w]hile such persons do not have a statutorily protected right to testify, their testimony is not automatically barred by Code § 19.2-264.4(A1)." *Id.* The *Thomas* Court relied on *Beck,* stating *Beck's* determination that:

> [T]he statutes do not limit evidence of victim impact to that received from the victim's family members. Rather, the circumstances of the individual case will dictate what evidence will be necessary and relevant, and from what sources it may be drawn. In a capital murder trial, as in any other criminal proceeding, the determination of the admissibility of relevant evidence is within the sound discretion of the trial court subject to the test of abuse of that discretion. 253 Va. at 384-85, 484 S.E.2d at 905.

"Evidence which tends to prove a material fact is relevant and admissible, unless excluded by a specific rule or policy consideration." *Pughsley v. Commonwealth,* 33 Va.App. 640, 645, 536 S.E.2d 447, 449 (2000) (internal quotation marks and citations omitted). The *Beck* Court reasoned that "[i]n a capital murder trial, as in any other criminal proceeding, the determination of the admissibility of relevant evidence is within the sound discretion of the trial court subject to the test of abuse of that discretion." *Beck,* 253 Va. at 384-85, 484 S.E.2d at 905. Although the specific statute at issue in *Thomas* is not at issue in this case, we find that the rationale of the case is applicable. *Congdon v. Congdon,* 40 Va.App. 255, 265, 578 S.E.2d 833, 838 (2003) (noting that the principle that courts are bound by the doctrine of *stare decisis* "applies not merely to the literal holding of the case, but also to its *ratio decidendi*-the essential rationale in the case that determines the judgment"). Guided by these principles, we perceive no sound reason why relevant victim impact testimony that may be considered by a jury in a capital case should not likewise be considered in a non-capital case. Accordingly, we hold that Code §§ 19.2-295.3 and 19.2-11.01(B) do not limit the admission of relevant evidence. Because the trial court, acting within its sound discretion, determined that Eugene Cook and Sarah Seely's testimony was relevant to Rock's sentencing for conspiracy to commit robbery, we cannot say the trial court abused its discretion in admitting this evidence.

Finally, Rock's argument that the prejudicial effect of the testimony outweighed its probative value ignores the statutory *mandate* of Code §§ 19.2-295.3 and 19.2-11.01(A)(4)(c). Those sections provide a statutorily protected right for victims to testify at the sentencing hearing regarding the impact of the offense upon them. Both statutes *mandate* that a victim be given the opportunity to testify.

We hold the trial court did not abuse its discretion in permitting the murder victim's brother and mother of his children to testify in the sentencing proceeding about the impact of the offense upon them and upon the victim's children. We affirm the judgment of the trial court.

Critical Thinking Question(s): What is the reason behind allowing victims/witnesses to submit an impact statement to the court in the first place? Is it proper to have victim/witness impact testimony during the sentencing phase? Would it be proper to have such testimony during the trial stage? Why or why not? Does such testimony cause a particular defendant to be sentenced differently, perhaps more harshly, for the same act when victim/witness testimony is not offered to the jury?