

Amended by Order dated November 1, 2012; effective immediately.

RULES OF SUPREME COURT OF VIRGINIA
PART THREE A
CRIMINAL PRACTICE AND PROCEDURE

Rule 3A:17.1. Proceedings in Bifurcated Jury Trials of Non-Capital Felonies and Class 1 misdemeanors.

(a) *Application.* This Rule applies in cases of trial by jury upon a finding that the defendant is guilty of a non-capital felony or a Class 1 misdemeanor.

(b) *Bifurcated Proceedings.* In any jury trial in which the jury returns a verdict of guilty to one or more non-capital felony offenses, or Class 1 misdemeanor a separate proceeding limited to the ascertainment of punishment shall be held as soon as practicable before the same jury.

(c) *Instruction at Guilt Phase.* At the conclusion of all of the evidence in the guilt phase of the trial, the court shall instruct the jury as to punishment with respect to any Class 2, 3 or 4 misdemeanor being tried in the same proceeding or any lesser-included Class 2, 3 or 4 misdemeanor of any charged felony offense which may be properly considered by the jury. The jury shall not be instructed until the punishment phase with reference to the punishment for any charged or lesser-included felony offense or Class 1 misdemeanor.

(d) *Opening Statements at Penalty Phase.* Both the Commonwealth and the defense shall be entitled if they choose, to make an opening statement prior to the presentation of any evidence to the jury relevant to the penalty to be imposed. The Commonwealth shall give its statement first.

(e) *Presentation of Evidence at Penalty Phase.* If the jury convicts the defendant of one or more non-capital felony offenses, or a Class 1 misdemeanor the penalty phase shall proceed in the following order:

(1) The Commonwealth may present any victim impact testimony pursuant to § [19.2-295.3](#) and shall present the defendant's prior criminal history, including prior convictions and the punishments imposed, by certified, attested, or exemplified copies of the final order(s) as provided by law. As a prerequisite to the introduction of such evidence, the Commonwealth shall have advised the defense, in accord with the requirements of law, of its intention to introduce such evidence.

(2) The defense may introduce relevant admissible evidence related to punishment. The defense shall have the opportunity to present such evidence

irrespective of whether or not the Commonwealth presents evidence of previous criminal history.

(3) The Commonwealth may introduce relevant admissible evidence related to punishment in rebuttal.

(4) The defense may introduce relevant, admissible evidence related to punishment in rebuttal.

(f) *Closing Arguments at Penalty Phase.* Both the Commonwealth and defense shall be entitled to make a closing argument on the subject of punishment if they elect to do so. The Commonwealth shall be given the opportunity to argue first, followed by the defense. Rebuttal argument may be made by the Commonwealth.

(g) *Change of Plea.* The accused may enter a plea of guilty to the whole of the indictment at any time until the jury returns a verdict on the issue of the defendant's guilt or innocence.

(h) ~~*Mistrial Upon a Non-Unanimous Jury at the Penalty Phase.*~~ Should the jury fail to reach unanimous agreement as to punishment on any charge for which it returned a verdict of guilty, ~~a mistrial shall be declared as to that count and that charge shall be retried as to guilt or innocence as to the offense for which a verdict of guilty was returned. If the original jury returned a guilty verdict to a lesser included offense, but failed to be unanimous in determining punishment, retrial shall be upon the lesser included offense. If~~ the court shall impanel a different jury to ascertain punishment, unless the defendant, the attorney for the Commonwealth and the court agree, ~~rather than declare a mistrial, that~~ the court shall fix punishment in the manner provided in Section 19.2-257, for the offense upon which the jury unanimously returned a verdict of guilty.