

While it would, of course, have been preferable to amend §412 to its pre-1975 form, eliminating the reference to §616(a) and the limiting phrase "not punishable by death," we do not believe that the failure to do so either renders §412 meaningless or establishes such a fundamental inconsistency between §412 and the death penalty provisions of Senate Bill 106 as to create significant legal or constitutional problems with respect to murder prosecutions. Both the phrase "pursuant to §616(a)" and the limitation of the applicability of §412 to persons indicted for murder not punishable by death came into being as a consequence of the passage of Chapter 252 of the Laws of 1975, Maryland's present death penalty statute. The enactment of Chapter 252 also marked the first occasion on which §616 was broken down into two distinct subsections, one of which (§616(b)) provided a form of indictment for murder in which the State seeks the imposition of the death penalty and the other of which (§616(a)) provided a form of indictment for all other murder or manslaughter. With the return to the single form of statutory indictment for murder embodied in §616 as contained in Senate Bill 106, and the abandonment of the short-lived distinction as to the form of indictment based upon whether the State seeks the imposition of the death penalty, the raison d'être for limiting the application of §412 to statutory indictments for murder not punishable by death disappears altogether. Accordingly, we believe that the courts would ascribe no substantive significance to the now anachronistic references to §616(a) and murder "not punishable by death" and that §412 would be held to apply to all indictments for murder. As so construed, we perceive no substantial inconsistency between §412 and the death penalty provisions of Senate Bill 106.

Generally speaking, §412 deals only with the establishment of degree and does not speak in any specific terms to the particular sentence to be imposed or the manner in which the sentence should be determined. One exception to this general observation is the provision in §412 that if a defendant is convicted by confession, the court shall determine the degree of the crime and "give sentence accordingly." If, as we have suggested, §412 is construed as being applicable to all murder indictments, there is an inconsistency between its requirement that in a conviction by confession, the court, as distinct from a jury, should impose sentence and the provisions of new §413(b) that if the defendant has pleaded guilty to first degree murder, the sentencing proceeding should be conducted before a jury empaneled for that purpose unless waived by the defendant. With respect to that one inconsistency, we believe that the later enacted provisions of §413(b) would control.

Alternatively, should §412 be construed as applying