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The Death Penalty in Washington: An Historical Perspective

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THE DEATH PENALTY IN WASHINGTON: AN HISTORICAL PERSPECTIVE

On May 14, 1981, Governor John D. Spellman approved new capital punishment legislation for the State of Washington. The new statute was enacted[1] in response to *State v. Frampton*,[2] in which the Washington Supreme Court invalidated the 1977 death penalty statute, RCW chapter 10.94.[3] The 1977 statute had been enacted as the result of an initiative approved by 67.8% of the state's voters in 1975.[4] The court based its decision in *Frampton* on its earlier ruling in *State v. Martin*.[5]

In *Martin*, the court held that a defendant charged with first degree murder has the right to plead guilty and that a defendant entering a guilty plea could not be sentenced to death under RCW chapter 10.94. As a result, a defendant electing to go to trial faced the possible imposition of the death penalty, while a defendant pleading guilty did not.

In *Frampton*, a divided court reaffirmed the *Martin* decision and held RCW chapter 10.94 unconstitutional. The state had conceded that the *Martin* construction invalidated the statute by placing an impermissible burden on a capital defendant's right to a trial by jury,[6] but urged the court to overrule *Martin*. In refusing to reconsider its earlier decision, the court struck down legislation overwhelmingly supported by the people of Washington.

This Comment follows the evolution of Washington's capital punishment law through the 1981 legislation and analyzes the two cases that invalidated the 1977 death penalty statute. The Comment favors the reasoning behind the dissenting opinions of *Martin* and *Frampton* as more consistent with established principles of statutory construction. The Comment concludes with a discussion of Washington's new capital punishment legislation enacted in response to the supreme court's decisions.

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1. Act of May 14, 1981, ch. 138, 1981 Wash. Laws 535 (codified at WASH. REV. CODE ch. 10.95 (1981)).

2. 95 Wn. 2d 469, 627 P.2d 922 (1981).

3. WASH. REV. CODE ANN. ch. 10.94 (repealed 1981).

4. In the November 4, 1975 state general election, Washington voters approved Initiative Measure No. 316, 1975–76 Wash. Laws 2d Ex. Sess. 17 (codified at WASH. REV. CODE ANN. §§ 9A.32.045–047 (1977) (repealed 1981), enacting a mandatory death penalty in all cases of aggravated first degree murder. The vote on the initiative was 662,535 for the mandatory death penalty to 296,257 against. 1977 Wash. Laws 1849. After the United States Supreme Court invalidated mandatory death penalty provisions in Woodson v. North Carolina, 428 U.S. 279 (1975), the Washington Legislature revised the sentencing scheme when it enacted RCW chapter 10.94. Act of June 10, 1977, ch. 206, 1977 Wash. Laws 1st Ex. Sess. 744, 776–78.

5. 94 Wn. 2d 1, 614 P.2d 164 (1980).

6. Consolidated Brief for Plaintiffs/Respondents at 2 n.1, State v. Frampton, 95 Wn. 2d 469, 627 P.2d 922 (1981).

I. BACKGROUND

A. *The Right to Plead Guilty*

Washington's territorial legislature enacted the first statute recognizing the criminal defendant's right to plead guilty to murder in 1854.[7] In 1881, the territorial legislature enacted another statute listing the permissible pleas, expressly including guilty pleas.[8] This latter provision remained the governing authority until superseded in 1973 by the supreme court's adoption of the Criminal Rules for Superior Court.[9] Under Criminal Rule 4.2(a) the only pleas acceptable at arraignment are not guilty, not guilty by reason of insanity, or guilty.[10] The supreme court's holding in *Martin* that the death penalty statute does not preclude a defendant from pleading guilty was, therefore, consistent with longstanding Washington law.

B. *Sentencing Schemes*

In contrast to the legislative development of the right to plead guilty, the development of sentencing procedures for defendants who plead guilty has been erratic. The original legislative scheme as enacted in 1854 provided for impaneling a sentencing jury whenever a defendant pleaded

7. Act of Apr. 28, 1854, § 87, 1854 Wash. Laws 100, 115. As later codified, this statute read:
Waiver of jury on plea of guilty—Exception. If on the arraignment of any person, he shall plead guilty, if the offense charged be not murder, the court shall, in their discretion, hear testimony, and determine the amount and kind of punishment to be inflicted; *but if the defendant plead guilty to a charge of murder, a jury shall be impaneled to hear testimony, and determine the degree of murder and punishment therefor.*
WASH. REV. CODE ANN. § 10.49.010 (1980) (repealed 1981) (emphasis added).

8. The original provision, relating to grand jury indictments, was amended in 1891 to include prosecutorial informations: "There are but three pleas to the indictment or information: A plea of — 1. Guilty; 2. Not guilty; 3. A former judgment of conviction or acquittal of the offense charged, which may be pleaded with or without the plea of not guilty." Act of Feb. 24, 1891, ch. 28, § 57, 1891 Wash. Laws 46, 57 (codified at WASH. REV. CODE § 10.40.150 (1981)) (superseded by WASH. SUPER. CT. CRIM. R. 4.2).

9. The Criminal Rules for Superior Court were adopted by order of the Washington Supreme Court on April 18, 1973. 82 Wn. 2d 1114 (1973). Rules promulgated by the supreme court supersede all prior inconsistent legislation. State v. Scott, 92 Wn. 2d 209, 212, 595 P.2d 549, 551 (1979); WASH. REV. CODE § 2.04.200 (1981). The result is less certain when a conflicting statute is enacted after a rule is adopted, although two Washington attorney general opinions have indicated that whichever is later in time should control. 1977 Op. Wash. Att'y Gen., No. 20 (Oct. 26, 1977); 1973 Op. Wash. Att'y Gen., No. 4 (Jan. 19, 1973).

10. Criminal Rule 4.2 supersedes the prior legislation concerning pleading, WASH. REV. CODE §§ 10.40.150, .160, .175 (1981). WASH. SUPER. CT. CRIM. R. 4.2 Comment.

guilty to determine both the degree of murder and the penalty to be imposed.[11] For first degree murder, the death penalty was automatic.[12]

A broader provision of the 1854 law required that the jury determine the punishment to be imposed whenever a criminal defendant was found guilty.[13] This provision was amended in 1869 to require that the court, rather than the jury, determine the penalty in these cases.[14] The amendment did not affect the requirement of the 1854 statute that a jury determine the degree of murder and the penalty to be imposed when a defendant pleaded guilty to murder. Nor did the amendment affect the mandatory death penalty for first degree murder.

The sentencing scheme for first degree murder was revised three times in the early part of this century. In 1909, the legislature made first degree murder punishable by life imprisonment or death, in the discretion of the court.[15] The legislature abolished the death penalty in 1913, making life imprisonment the sole penalty.[16] The legislature reinstated the death penalty in 1919 and granted the jury the power to determine whether the penalty for first degree murder would be life imprisonment or death.[17] The court assessed the penalty in all cases other than first degree murder. This scheme remained unchanged for the next fifty-six years.[18]

The death penalty was again abolished by the legislature in 1975.[19] Later that year Washington voters approved Initiative Measure No. 316,[20] imposing a mandatory death penalty for "Aggravated Murder in the First Degree," that is, first degree murder in the presence of statutorily defined aggravating circumstances.[21] A person found guilty of aggravated first

11. Act of Apr. 28, 1854, § 87, 1854 Wash. Laws 100, 115 (codified as amended at WASH. REV. CODE ANN. § 10.49.010 (1980)) (repealed 1981). *See generally* note 7 *supra* (text of WASH. REV. CODE ANN. § 10.49.010 (1980)).

12. Act of Apr. 28, 1854, § 12, 1854 Wash. Laws 75, 78 (repealed 1975).

13. Act of Apr. 28, 1854, § 128, 1854 Wash. Laws 100, 121.

14. Act of Dec. 2, 1869, § 258, 1869 Wash. Laws 198, 254.

15. Act of Mar. 22, 1909, ch. 249, §140, 1909 Wash. Laws 890, 930 (repealed 1975).

16. Act of Mar. 22, 1913, ch. 167, § 1, 1913 Wash. Laws 581, 581.

17. Act of Mar. 14, 1919, ch. 112, § 1, 1919 Wash. Laws 273, 274 (repealed 1975).

18. Before its repeal in 1975, the death penalty scheme enacted by the 1919 legislature had been codified at RCW § 9.48.030.

19. Washington Criminal Code Act of 1975, ch. 260, § 9A.92.010(125), 1975 Wash. Laws 1st Ex. Sess. 817, 862.

20. 1975–76 Wash. Laws 2d Ex. Sess. 17 (codified at WASH. REV. CODE ANN. §§ 9A.32.045–.047 (1977)) (repealed 1981).

21. The section on aggravating circumstances read, as amended, as follows:

(1) In a special sentencing proceeding under RCW 10.94.020, the following shall constitute aggravating circumstances:

(a) The victim was a law enforcement officer or fire fighter and was performing his or her official duties at the time of the killing and the victim was known or reasonably should have been known to be such at the time of the killing.

(b) At the time of the act resulting in the death, the defendant was serving a term of imprison-

degree murder automatically received the death penalty.[22] In 1977, the legislature adopted RCW chapter 10.94,[23] which replaced the mandatory sentence and detailed the procedures by which the death penalty could be imposed.

Under RCW chapter 10.94, a defendant charged with first degree murder[24] faced the possible imposition of the death penalty whenever the prosecuting attorney filed a notice of intention to request that penalty.[25] Before filing the request, the prosecuting attorney had to have reason to believe the crime involved at least one aggravating circumstance.[26] If the defendant then was found guilty of first degree murder, the court con-

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ment in a state correctional institution or had escaped or was on authorized or unauthorized leave from a state correctional institution, or was in custody in a local jail and subject to commitment to a state correctional institution.

(c) The defendant committed the murder pursuant to an agreement that the defendant receive money or other thing of value for committing the murder.

(d) The defendant had solicited another to commit the murder and had paid or agreed to pay such person money or other thing of value for committing the murder.

(e) The murder was of a judge, juror, witness, prosecuting attorney, a deputy prosecuting attorney, or defense attorney because of the exercise of his or her official duty in relation to the defendant.

(f) There was more than one victim and the said murders were part of a common scheme or plan, or the result of a single act of the defendant.

(g) The defendant committed the murder in the course of, in furtherance of, or in immediate flight from the crimes of either (i) robbery in the first or second degree, (ii) rape in the first or second degree, (iii) burglary in the first degree, (iv) arson in the first degree, or (v) kidnaping in which the defendant intentionally abducted another person with intent to hold the person for ransom or reward, or as a shield or hostage, and the killing was committed with the reasonable expectation that the death of the deceased or another would result.

(h) The murder was committed to obstruct or hinder the investigative, research, or reporting activities of anyone regularly employed as a newsreporter, including anyone self-employed in such capacity.

Act of June 10, 1977, ch. 206, § 4, 1977 Wash. Laws 1st Ex. Sess. 774, 776 (amending WASH. REV. CODE ANN. § 9A.32.045 (1977)) (repealed 1981).

22. Initiative Measure No. 316, 1975–76 Wash. Laws 1st Ex. Sess. 17, 18 (codified at WASH. REV. CODE ANN. § 9A.32.046 (1977)) (repealed 1981).

23. Act of June 10, 1977, ch. 206, 1977 Wash. Laws 1st Ex. Sess. 774 (codified at WASH. REV. CODE ANN. ch. 10.94 (1980)) (repealed 1981). Presumably this action by the legislature was in response to the United States Supreme Court's invalidation of mandatory death penalty statutes in Woodson v. North Carolina, 428 U.S. 280 (1976) (invalidating a mandatory death penalty statute under the eighth amendment because it did not afford the jury the opportunity to consider an individual defendant's character and record and the circumstances of the particular offense in the penalty determination). *See* text accompanying notes 131–133 *infra*.

24. "A person is guilty of murder in the first degree when: (a) With a premeditated intent to cause the death of another person, he causes the death of such person or of a third person . . . ." WASH. REV. CODE § 9A.32.030(1) (1981).

25. WASH. REV. CODE ANN. § 10.94.010 (1980) (repealed 1981).

26. *Id. See generally* note 20 *supra* (partial text of Act of June 10, 1977, ch. 206, § 4, 1977 Wash. Laws 1st Ex. Sess. 774, 776 (amending WASH. REV. CODE ANN. § 9A.32.045 (1977)) (detailing the aggravating circumstances) (repealed 1981)).

ducted a special sentencing proceeding to determine whether to impose the death penalty.[27]

In the special proceeding, the sentencing jury determined whether aggravating circumstances were in fact present and whether there were sufficient mitigating circumstances[28] to merit leniency. If so, the death penalty was automatically imposed if, in addition, the jury unanimously agreed that: (1) the evidence at trial established guilt with clear certainty; and (2) there was no reasonable doubt the defendant would commit additional acts of violence constituting a continuing threat to society.[29] If the jury found that aggravating circumstances were present, but any one of the other remaining requisites for imposing the death penalty was not met, the defendant was sentenced to life imprisonment without the possibility of release or parole.[30] In all first degree murder convictions in

27. WASH. REV. CODE ANN. § 10.94.020 (1980) (repealed 1981). This statute provided, in part:

(1) If notice of intention to request the death penalty has been served and filed by the prosecution in accordance with RCW 10.94.010, then a special sentencing proceeding shall be held in the event the defendant is found guilty of murder in the first degree under RCW 9A.32.030(1)(a).

(2) If the prosecution has filed a request for the death penalty in accordance with RCW 10.94.010, and the trial jury returns a verdict of murder in the first degree under RCW 9A.32.030(1)(a), then, at such time as the verdict is returned, the trial judge shall reconvene the same trial jury to determine in a separate special sentencing proceeding whether there are one or more aggravating circumstances and whether there are mitigating circumstances sufficient to merit leniency, as provided in RCW 9A.32.045 as now or hereafter amended, and to answer special questions pursuant to subsection (10) of this section. The special sentencing proceeding shall be held as soon as possible following the return of the jury verdict.

28. The statutory provision on mitigating circumstances was as follows:

(2) In deciding whether there are mitigating circumstances sufficient to merit leniency, the jury may consider any relevant factors, including, but not limited to, the following:

(a) The defendant has no significant history of prior criminal activity;

(b) The murder was committed while the defendant was under the influence of extreme mental disturbance;

(c) The victim consented to the homicidal act;

(d) The defendant was an accomplice in a murder committed by another person and the defendant's participation in the homicidal act was relatively minor;

(e) The defendant acted under duress or under the domination of another person;

(f) At the time of the murder, the capacity of the defendant to appreciate the criminality (wrongfulness) of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired as a result of mental disease or defect;

(g) The age of the defendant at the time of the crime calls for leniency.

Act of June 10, 1977, ch. 206, § 4, 1977 Wash. Laws 1st Ex. Sess. 774, 777 (repealed 1981).

29. WASH. REV. CODE ANN. § 10.94.020(10) (1980) (repealed 1981); *see also* Act of June 10, 1977, ch. 206, § 5, 1977 Wash. Laws 1st Ex. Sess. 774, 777 (amending WASH. REV. CODE ANN. § 9A.32.046 (1977)) (stating conditions under which the death penalty was automatic) (repealed 1981).

30. Act of June 10, 1977, ch. 206, § 3(2), 1977 Wash. Laws 1st Ex. Sess. 774, 776 (codified as amended at WASH. REV. CODE § 9A.32.040(2) (1981)). In addition, in the event of a commuted sentence of death, or a finding that the death penalty was unconstitutional, the sentence was life without the possibility of release or parole. *Id.* § 6, 1977 Wash. Laws 1st Ex. Sess. at 778 (codified as amended at WASH. REV. CODE § 9A.32.047 (1981)) (repealed 1981).

which the prosecuting attorney did not request the special death penalty proceeding or if the special sentencing jury found no aggravating circumstances, the penalty was limited to life with the possibility of parole.[31] These procedures were the subject of controversy in *Martin* and *Frampton*.

II. THE INVALIDATION OF THE 1977 DEATH PENALTY STATUTE

A. State v. Martin

Donald Martin was arraigned on July 3, 1979, on charges arising out of a series of brutal crimes committed in the early spring of 1979.[32] He was prepared to plead guilty to first degree murder if the judge confirmed that the maximum sentence upon such a plea was life with the possibility of parole.[33] Martin argued that life with the possibility of parole was the maximum permissible sentence because the death penalty statute that the state sought to impose against him[34] did not provide explicitly for imposing the death penalty after a guilty plea. Therefore, he argued, the penalty should be the same as that for any non-aggravated first degree murder conviction.

The state asserted a right either to preclude Martin from pleading guilty or to seek the death penalty regardless of the plea.[35] The trial judge refused to accept Martin's plea on the ground that the state's right to request the death penalty under RCW chapter 10.94 prevented his guilty plea.[36]

The supreme court reversed and remanded,[37] holding: (1) a defendant is entitled to plead guilty to first degree murder; (2) the special sentencing procedures of RCW chapter 10.94 do not apply if a defendant pleads guilty; and (3) the maximum sentence upon a guilty plea is life with the possibility of parole.

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31. Act of June 10, 1977, ch. 206, § 3(3), 1977 Wash. Laws 1st Ex. Sess. 774, 776 (codified as amended at WASH. REV. CODE § 9A.32.040(3) (1981)).

32. Donald Martin was suspected of terrorizing residents of Seattle's Capitol Hill for 44 hours in the early spring of 1979. He was accused of perpetrating crimes against twelve victims, two of whom were brutally murdered and two severely maimed, between 1:30 a.m. on Saturday, March 31, 1979, and 9:00 p.m. on Sunday, April 1, 1979. Lewis, *A Weekend of Terror*, Seattle Times, Mar. 15, 1981, at 8 (Pacific Magazine). The prosecution presented 22 charges against Martin, including two homicides, two rapes, two attempted murders, kidnaping, assault, and armed robbery. *Id.*

33. 94 Wn. 2d at 3, 614 P.2d at 165.

34. WASH. REV. CODE § 9A.32.040 (1981) (amended 1981).

35. 94 Wn. 2d at 2–3, 614 P.2d at 165.

36. *Id.* at 3, 614 P.2d at 165; *see generally* WASH. REV. CODE ANN. § 10.94.010 (1980) (allowing prosecuting attorney 30 days from arraignment to request the death penalty) (repealed 1981).

37. 94 Wn. 2d at 9, 614 P.2d at 176.

1. The Right to Plead Guilty

The supreme court held that all criminal defendants have the right to plead guilty and that the state's death penalty statute did not abrogate that right.[38] Nevertheless, the court recognized that the right is neither constitutional nor absolute. The United States Supreme Court has stated that a criminal defendant has no constitutional right to have a guilty plea accepted, but that a state could grant the right by statute or other means.[39] Under this authority, the court in *Martin,* Justice Stafford writing, held that the state had granted the right to have a guilty plea accepted by virtue of Criminal Rule 4.2(a).[40]

Justice Horowitz, joined by Chief Justice Utter, concurred. He rejected the state's argument that RCW chapter 10.94 impliedly repealed Rule 4.2(a), since he found no inconsistency between the two.[41] He noted that implied repeals are disfavored under Washington law.[42]

In dissent, Justice Rosellini, joined by Justice Hicks, argued that Rule 4.2(a) did not confer the right to plead guilty to first degree murder. He reasoned that Rule 4.2(a) merely lists permissible pleas and does not specify circumstances under which such pleas would be accepted.[43] He found guilty pleas prohibited in capital cases by reading RCW chapter 10.94 in conjunction with RCW § 10.01.060.[44] He stated that even if

38. *Id.* at 3, 614 P.2d at 165.

39. North Carolina v. Alford, 400 U.S. 25, 38 n.11 (1970); *see also* Lynch v. Overholser, 369 U.S. 705, 719 (1962) (same).

40. 94 Wn. 2d at 4, 614 P.2d at 165.

41. *Id.* at 13, 614 P.2d at 170.

42. *Id.* at 13–14, 614 P.2d at 170. Justice Horowitz also rejected the state's argument that RCW § 10.01.060 prevents capital defendants from pleading guilty. This statute provides:

> No person informed against or indicted for a crime shall be convicted thereof, unless by admitting the truth of the charge in his plea, by confession in open court, or by the verdict of a jury, accepted and recorded by the court: *Provided however,* That except in capital cases, where the person informed against or indicted for a crime is represented by counsel, such person may, with the assent of the court, waive trial by jury and submit to trial by the court.

WASH. REV. CODE § 10.01.060 (1981).

In Justice Horowitz's view, RCW § 10.01.060 consisted of two parts: the first clause listing the methods of determining guilt, the second allowing trial by the court except in capital cases. This second provision merely limits trial options without affecting the other methods of determining guilt. 94 Wn. 2d at 14, 614 P.2d at 170. He asserted that § 10.01.060 had never been used to deny the right to plead guilty when charged with a capital offense. Justice Horowitz said that such an interpretation "would have the effect of enacting a new statute that is inconsistent with decades of practice in this state." *Id.* at 15, 614 P.2d at 171. He cited RCW § 10.49.010, in effect in 1951 when RCW § 10.01.060 was enacted, as "implicitly anticipat[ing] the guilty pleas of murder defendants" by providing for impaneling a sentencing jury for defendants pleading guilty to murder charges. *Id.* at 14–15, 614 P.2d at 170; *see generally* note 7 *supra* (partial text of WASH. REV. CODE ANN. § 10.49.010 (1980) (repealed 1981)).

43. 94 Wn. 2d at 28, 614 P.2d at 177.

44. *Id. See generally* note 42 *supra* (text of WASH. REV. CODE § 10.01.060 (1981)).

Rule 4.2(a) addressed the issue of when guilty pleas may be entered, RCW chapter 10.94, as a special and later law, superseded the general and earlier procedural principles of Rule 4.2(a) in capital cases.[45]

2. *Special Sentencing Under RCW Chapter 10.94*

After upholding the defendant's right to plead guilty, the court held that Washington's death penalty statute did not apply if the defendant pleads guilty.[46] The court rejected the state's contention that it could imply a special sentencing procedure from the provision in RCW chapter 10.94[47] that requires the jury that returned the verdict of first degree murder also to determine the sentence.[48] Instead, the court found that that provision did not provide for impaneling a sentencing jury in the event of a guilty plea. A special sentencing jury impaneled after a guilty plea would be neither the "trial jury" that had returned a first degree murder verdict nor the "same trial jury" reconvened.[49] The court decided that the legislature had failed to anticipate that a capital defendant might plead guilty; and, in the absence of express language, it refused to read into the statute the omitted sentencing provision. Although the court recognized the attractiveness of the state's proposal to imply a special sentencing procedure, it reasoned that such action would constitute "clear judicial usurpation of legislative power."[50]

Justice Rosellini rejected the theory of legislative oversight. He said that the legislature, striving to draft a law that would meet constitutional standards, is presumed to be aware of United States and Washington Supreme Court decisions.[51] In light of that presumption, the legislature must have known that it constitutionally could not permit a capital defendant to

45. *Id.*; *see also* Pannell v. Thompson, 91 Wn. 2d 591, 597, 589 P.2d 1235, 1239 (1979) (supporting the general rule that later, special legislation supersedes earlier, general legislation); Hama Hama Co. v. Shorelines Hearings Bd., 85 Wn. 2d 441, 447, 536 P.2d 157, 161 (1975) (same); Knowles v. Holly, 82 Wn. 2d 694, 702, 513 P.2d 18, 23 (1973) (same).

46. 94 Wn. 2d at 3, 8, 9, 614 P.2d at 167–68.

47. WASH. REV. CODE ANN. § 10.94.020(2) (1980) (repealed 1981); *see* note 25 *supra* (text of statute).

48. 94 Wn. 2d at 7–8, 614 P.2d at 167.

49. *Id.* at 8, 614 P.2d at 167. This reasoning also led the court to find inapposite the cases cited by the state in support of its argument. Those cases were decided under a provision of RCW chapter 10.49 requiring defendants on murder charges who plead guilty to submit to a jury determination of the degree of murder and the penalty to be imposed. WASH. REV. CODE ANN. § 10.49.010 (1980) (repealed 1981); *see* note 7 *supra* (text of statute).

50. 94 Wn. 2d at 8, 614 P.2d at 168.

51. *Id.* at 26, 614 P.2d at 176 (dissenting opinion); *see also In re* Marriage of Little, 96 Wn. 2d 183, 189–90, 634 P.2d 498, 502 (1981) (legislature is presumed to be familiar with its own prior enactments and with judicial decisions on the subject); Woodson v. State, 95 Wn. 2d 257, 262, 623 P.2d 683, 685 (1980) (same); State v. Fenner, 89 Wn. 2d 56, 62, 569 P.2d 67, 70 (1977) (same).

escape the possible imposition of the death penalty by pleading guilty.[52] Nothing in RCW chapter 10.94 restricted the prosecuting attorney's right to request the death penalty to cases in which a defendant pleads not guilty. Justice Rosellini therefore concluded that the legislature intended RCW chapter 10.94 to allow the prosecuting attorney to seek the death penalty in *all* cases of aggravated first degree murder.[53] Despite the legislature's failure explicitly to require a special sentencing procedure in all capital cases, Justice Rosellini stated that the conclusion that the death penalty applies if a defendant pleads guilty is "inescapable if the language is given its fair import."[54] Further, he reminded the court of its duty to construe ambiguous statutes to favor a construction preserving the constitutionality of the statute over one rendering it invalid.[55]

B. State v. Frampton

The majority's interpretation of RCW chapter 10.94 in *Martin* resulted in an inequitable sentencing scheme. A defendant pleading guilty to first degree murder faced a maximum penalty of life with the possibility of parole, while a defendant choosing to go to trial faced the possibility of death. Eight defendants challenged the constitutionality of this sentencing scheme in *State v. Frampton*.[56] Five of the defendants had been convicted and sentenced to death under RCW chapter 10.94.[57] A divided court[58] reaffirmed *Martin* and invalidated the death penalty statute. As a result, none of the defendants received a sentence more severe than life with the possibility of release or parole.[59]

52. The Washington Legislature did, in fact, recognize that *Martin* left chapter 10.94 constitutionally infirm. *See* note 160 and accompanying text *infra*.

53. 94 Wn. 2d at 27, 614 P.2d at 177 (dissenting opinion).

54. *Id.*

55. *Id.*; *see* Woodson v. State, 95 Wn. 2d 257, 261, 623 P.2d 683, 685 (1980); Anderson v. Morris, 87 Wn. 2d 706, 716, 558 P.2d 155, 161 (1976); *see also* Hart v. Peoples Nat'l Bank, 91 Wn.2d 197, 203, 588 P.2d 204, 208 (1978) (stating that a statute susceptible of two interpretations should be construed in the manner which best advances the overall legislative purpose).

56. 95 Wn. 2d 469, 627 P.2d 922 (1981). Although a number of other issues pertaining to capital punishment were before the court, this Comment discusses only the constitutionality of the statute.

57. *Id.* at 472, 627 P.2d at 923. A sixth defendant had been sentenced to life without the possibility of release or parole because his sentencing jury was not convinced beyond a reasonable doubt that there were not sufficient mitigating circumstances to merit leniency as required under RCW chapter 10.94. WASH. REV. CODE ANN. § 10.94.020(8) (1980) (repealed 1981); *see* note 28 *supra* (text of statute). Two additional defendants were before the court on interlocutory appeals because of confused trial court rulings that had followed *Martin* regarding the status of RCW chapter 10.94.

58. Justices Rosellini, Dore, Dimmick, and Hicks were in favor of overruling the court's earlier decision in *Martin*. 95 Wn. 2d at 503, 528, 627 P.2d at 939, 952.

59. *Id.* at 484, 627 P.2d at 929.

1. Sentencing Under Chapter 10.94

In *Frampton* the court reaffirmed its holding in *Martin* that, under the sentencing procedures of RCW chapter 10.94, a defendant who pleads guilty to first degree murder avoids the possible imposition of the death penalty, unlike a defendant who is convicted in a jury trial. Writing for the plurality, Justice Dolliver concluded that this sentencing scheme was unconstitutional.[60] Under *United States v. Jackson*,[61] this scheme places an impermissible burden on a capital defendant's right to a jury trial.[62]

Justice Dolliver, in reaffirming *Martin*, rejected the state's contention that RCW § 10.49.010,[63] which provided for impaneling a sentencing jury after a guilty plea, should be construed in pari materia[64] with RCW § 10.94.020,[65] which provided for impaneling a sentencing jury after a jury verdict. He concluded that RCW § 10.49.010 was relevant only to the first degree murder sentencing scheme in existence before the legislative enactments of 1975 and 1977 that resulted in RCW chapter 10.94.[66] He rejected the contention that the legislature intended the provisions to be read together without expressly stating so.[67] He concluded that the connection between RCW § 10.49.010 and RCW § 10.94.020 was too tenuous in light of the judiciary's traditional adherence to all safeguards when a defendant's life is at stake.[68]

The plurality adopted the analysis in Justice Horowitz's special concurrence in *Martin*, which had concluded from the legislative history of the 1977 death penalty bill that the legislature had overlooked the pleading problem.[69] Justice Horowitz had reached this conclusion because the

60. *Id.* at 483, 627 P.2d at 929.

61. 390 U.S. 570 (1968).

62. At issue in *Jackson* was the constitutionality of the Federal Kidnaping Act, 18 U.S.C. § 1201(a) (1966). Like RCW chapter 10.94, that Act provided no explicit procedure for imposing the death penalty upon a defendant pleading guilty to the crime but did provide the death penalty for a defendant adjudged guilty by a jury verdict. Because of the impermissible burden placed on a defendant's right to a trial by jury, the Court invalidated the sentencing provision of the Act. 390 U.S. at 572.

63. WASH. REV. CODE ANN. § 10.49.010 (1980) (repealed 1981); *see* note 7 *supra* (text of statute).

64. *See generally* notes 112–13 and accompanying text *infra* (discussing the in pari materia rule of construction).

65. WASH. REV. CODE ANN. § 10.94.020 (1980) (repealed 1981); *see* note 26 *supra* (text of statute).

66. 95 Wn. 2d at 475, 627 P.2d at 925. According to Justice Dolliver, the sentencing scheme prior to the enactment of RCW chapter 10.94 provided for jury determination of the degree of murder and the punishment to be imposed, regardless of whether a defendant pleaded guilty or not guilty. *Id.*

67. *Id.*

68. *Id.* at 478, 627 P.2d at 926. Justice Horowitz had made this same argument in *Martin*, 94 Wn. 2d at 21, 614 P.2d at 174 (concurring opinion).

69. *Frampton*, 95 Wn. 2d at 476–78, 627 P.2d at 925–26. The validity of this conclusion is undermined by the number of drafts of death penalty legislation presented to the Washington Legisla-

original bill had included a provision for impaneling a jury in the event of a guilty plea that was excluded in the final version.[70] Justice Dolliver rejected the possibility that the legislature was aware of RCW § 10.49.010 and thus purposely deleted the provision in RCW chapter 10.94. Justice Dolliver also rejected the state's argument that RCW chapter 10.94 required a jury trial in every capital case. He left this policy choice to the legislature.[71] In doing so, he followed *Jackson,* in which the United States Supreme Court had expressed its disapproval of mandatory jury trials on the issue of guilt. Under the Court's construction of the Federal Kidnaping Act in *Jackson,* only those defendants electing to go to trial faced the possibility of the death penalty.[72] The government had urged the Court to instruct federal judges not to allow defendants in kidnaping cases to waive jury trials or plead guilty so that all defendants would face the possibility of death. The Court rejected this request for mandatory jury trials although criminal defendants have no absolute right to have their guilty pleas accepted. The Court found that requiring a defendant to submit to a "full-dress jury trial as a matter of course"[73] would have a cruel effect upon defendants preferring not to contest their guilt and would rob the criminal process of much of its flexibility.[74]

In his *Frampton* dissent, Justice Rosellini asserted that the *Martin* court's misconstruction of the aggravated murder statute thwarted the legislature's intention to require a jury trial in every capital case.[75] He noted that this construction opposed the will of the people and of the legislature and ignored fundamental principles of statutory construction.[76] He asserted that Criminal Rule 4.2(a), listing permissible pleas, which the *Martin* court had construed to require the court to accept a murder defendant's guilty plea,[77] should be read as a unified whole with statutory provisions governing criminal procedure, that is, in pari materia.[78] So con-

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ture during the 1977 session, a large number of which included provisions addressing the pleading situation. *See, e.g.,* H.B. No. 184, 45th Leg., Reg. Sess. (1977); S.B. No. 2001, 45th Leg., Reg. Sess. (1977); H.B. No. 1160, 45th Leg., Reg. Sess. (1977); and H.B. No. 1358, 45th Leg., Reg. Sess. (1977).

70. *Martin,* 94 Wn. 2d at 19, 614 P.2d at 173.

71. 95 Wn. 2d at 479, 627 P.2d at 927.

72. *See* note 62 *supra.*

73. United States v. Jackson, 390 U.S. 570, 584 (1968).

74. *Id.*

75. 95 Wn. 2d at 500, 627 P.2d at 938.

76. *Id.* at 502, 627 P.2d at 939.

77. *See* text accompanying notes 38–40 *supra.*

78. 95 Wn. 2d at 504–05, 627 P.2d at 939; *cf.* City of Seattle v. State, 54 Wn. 2d 139, 146, 338 P.2d 126, 130 (1959) (stating that "statutes in *pari materia* should be construed together and effect given to both"); State v. Houck, 32 Wn. 2d 681, 684, 203 P.2d 693, 695 (1949) (same). *See generally* text accompanying notes 121–122 *infra* (discussing the in pari materia rule of construction).

strued, he found a legislative intent to require jury trials in all capital cases.[79]

Justice Rosellini found no inconsistency between Rule 4.2 and the statutory requirement for a jury trial in every capital case. He reasoned that Rule 4.2 merely delineates permissible pleas rather than limiting the legislature's power to require a jury trial for particular crimes.[80]

In a separate dissent, Justice Dore challenged the plurality's reliance upon the legislative history of House Bill No. 615, the predecessor bill of RCW chapter 10.94.[81] The plurality concluded from the legislative history that the legislature did not intend the special sentencing provisions of RCW chapter 10.94 to apply when defendants pleaded guilty to first degree murder because earlier drafts of the bill included a provision for imposing the death penalty upon such defendants which was omitted from the final version.[82] Justice Dore had two objections to this conclusion. First he objected to the plurality's reliance on the printed versions of the progressive drafts of the bill.[83] He did not believe that these materials

79. 95 Wn. 2d at 509, 627 P.2d at 942–43. Justice Rosellini noted that the court had never suggested that Rule 4.2(a) superseded the other statutes in effect on its adoption. *Id.* Implied repeals are disfavored in Washington law. Jenkins v. State, 85 Wn. 2d 883, 886, 540 P.2d 1363, 1365 (1975).

Justice Utter, concurring in part and dissenting in part, argued that article 2, § 37 of the Washington constitution prevents an in pari materia reading of RCW chapter 10.94 and RCW § 10.49.010. 95 Wn. 2d at 519, 627 P.2d at 947. This constitutional provision requires any act revising or amending another act to include at full length the revised or amended provision. By this provision, any new legislative enactment must be complete in itself or it must indicate how it is related to the provision it alters. Justice Utter determined that the dissent's argument for a reading in pari materia is a concession that the two statutes were interdependent, and as such, RCW chapter 10.94 amended RCW § 10.49.010. *Id.* Because the text of the death penalty statute nowhere sets forth the text of RCW § 10.49.010, the later provision was an invalid attempt under the constitution to amend the earlier statute.

This argument can be refuted on a number of grounds. First, the death penalty is complete in itself and reference to any other statute is not required in order to determine the special sentencing procedures. Second, RCW chapter 10.94 does not alter the scope or effect of RCW § 10.49.010. Third, adoption of Justice Utter's analysis would obliterate the in pari materia rule of construction in Washington. Article 2, § 37 of the Washington constitution had never been read to effect such an abrogation. *See* Weyerhaeuser v. King County, 91 Wn. 2d 721, 731, 592 P.2d 1108, 1114 (1979) (stating the test as whether an act changes a prior act in scope and effect).

80. 95 Wn. 2d at 510, 627 P.2d at 943.

81. *Id.* at 521, 627 P.2d at 948–50 (opinion concurring in part, dissenting in part).

82. *See* text accompanying notes 69–70 *supra*.

83. 95 Wn. 2d at 523, 627 P.2d at 949–50. Justice Horowitz had reached the conclusion in *Martin* that this omission indicated the legislature's intention that the special sentencing procedures would not apply to a defendant pleading guilty to first degree murder. 94 Wn. 2d 1, 19, 614 P.2d at 173 (concurring opinion). He noted an original version of the bill, subsequently eliminated, which contained a specific provision relating to guilty pleas: "If the trial jury has been waived, or if the defendant pleaded guilty to murder in the first degree, the death penalty proceeding shall be conducted before a jury impaneled for that purpose and such jury cannot be waived." *Id.* (quoting Wash. H.R. 615, 45th Leg., Reg. Sess. (1977)). The majority adopted this analysis in *Frampton*. 95 Wn. 2d at 476–78, 627 P.2d at 925–26.

constituted conclusive evidence of legislative intent,[84] especially when an omission in a later draft of a bill was involved.[85] Even if reliance on the successive drafts was proper, Justice Dore objected to the conclusion reached by the plurality. He observed that several inferences could be drawn from the exclusion of the sentencing provision: the omission may have been inadvertent; the provision may have seemed superfluous in light of RCW § 10.49.010; or the legislature may have meant to radically change existing law to allow all defendants pleading guilty to avoid the death penalty.[86] Justice Dore asserted that in light of these equally tenable alternative explanations, the challengers of the statute failed to prove "beyond a reasonable doubt"[87] that the omission was the consequence of the third alternative. In other words, he argued that the omission was not a purposeful act by the legislature to allow defendants pleading guilty to escape the death penalty.[88]

III. ANALYSIS

A. The Right to Plead Guilty

In *Martin,* the Washington Supreme Court held that Criminal Rule 4.2(a) conferred the right to plead guilty upon defendants charged with first degree murder.[89] Whether this conclusion was correct depends upon whether Rule 4.2(a) is characterized as procedural or substantive.[90]

84. 95 Wn. 2d at 523, 627 P.2d at 950 (citing Hama Hama Co. v. Shorelines Hearings Bd., 85 Wn. 2d 441, 536 P.2d 157 (1975)).

85. *Id.*

86. *Id.* at 523–24.

87. *Id.* at 524, 627 P.2d at 950. The Washington courts have indicated that the burden to prove a statute unconstitutional is on the challenger, and that the burden is a heavy one. Justice Dore's standard was derived from Sator v. Department of Revenue, 89 Wn. 2d 338, 572 P.2d 1094 (1977), in which the court held that the party challenging a statute bears the burden of proving the statute unconstitutional beyond a reasonable doubt. *Id.* at 346, 572 P.2d at 1098; *see also* Aetna Life Ins. Co. v. Washington Life & Disability Ins. Guaranty Ass'n, 83 Wn. 2d 523, 528, 520 P.2d 162, 166 (1974); Hoppe v. State, 78 Wn. 2d 164, 169, 469 P.2d 909, 913 (1970); State v. Primeau, 70 Wn. 2d 109, 111, 422 P.2d 302, 304 (1966). *But see* Louthan v. King County, 94 Wn. 2d 422, 428, 617 P.2d 977, 981 (1980) (burden of showing ordinance unconstitutional rests "heavily" on the challenger). Apparently, the favored definition of the standard is the "beyond a reasonable doubt" description used by Justice Dore. *See In re* Marriage of Johnson, 96 Wn. 2d 255, 258, 634 P.2d 877, 879 (1981) (the court's most recent statement on the burden).

88. Justices Dimmick and Hicks concurred in the dissents of Justices Rosellini and Dore, favoring the overruling of *State v. Martin* and the preservation of RCW chapter 10.94. 95 Wn. 2d at 528–30, 627 P.2d at 952–53.

89. *See* notes 38–40 and accompanying text *supra.*

90. There is also an issue whether Rule 4.2(a) was impliedly overruled by RCW chapter 10.94. Implied repeals are disfavored in Washington. Jenkins v. State, 85 Wn. 2d 883, 886, 540 P.2d 1363, 1365 (1975). Implied repeals may be effected, however, if a later enactment cannot be reconciled with an earlier one. State v. Ensminger, 77 Wn. 2d 535, 540, 463 P.2d 612, 616 (1970); State v.

The supreme court is authorized to promulgate rules of pleading, practice, and procedure.[91] Procedural rules pertain to essentially mechanical operations of the courts.[92] When such rules are adopted by the supreme court they have the effect of law[93] and they invalidate prior inconsistent legislation.[94] The court cannot, however, promulgate substantive rules,[95] that is, rules that create, define, or regulate primary rights.[96]

The power to prescribe the form, kind, and character of court pleadings does not, of itself, include the power to prescribe the situations in which particular pleas are appropriate.[97] This substantive decision is beyond the power granted to the court. Despite this limitation, the court found that Rule 4.2(a) established a substantive right for criminal defendants: the right to plead guilty to first degree murder. If Rule 4.2(a) established a right to plead guilty, the court improperly engaged in substantive lawmaking when it adopted the rule.

Justice Rosellini in his *Martin* dissent interpreted Rule 4.2(a) as a list of the pleas generally available at arraignment, rather than as a legal mandate of the circumstances in which a defendant can plead guilty.[98] This construction would have preserved the validity of Rule 4.2(a) as a procedural rule in noncapital cases, while allowing the provisions of RCW chapter 10.94 and RCW § 10.49.010 to govern pleading in capital cases.

Under this interpretation, two possible procedures for a capital defendant pleading guilty could have been derived from RCW chapter 10.94

Cross, 22 Wn. 2d 402, 156 P.2d 416 (1945). Rule 4.2(a) and RCW chapter 10.94 are not clearly irreconcilable. It is thus more persuasive to argue that Rule 4.2(a) is limited by reading it in pari materia with other laws than to argue that RCW chapter 10.94 impliedly repealed the rule. *See generally* text accompanying notes 121–22 *infra* (discussing the in pari materia rule of construction).

91. WASH. REV. CODE § 2.04.190 (1981). In addition to this statutory power, the court has inherent rulemaking power under article 4, § 1 of the Washington Constitution. State v. Fields, 85 Wn. 2d 126, 129, 530 P.2d 284, 286 (1975); *see also* State v. Smith, 84 Wn. 2d 498, 501, 502, 527 P.2d 674, 676–77 (1974) (stating that rulemaking is an inherent attribute of the court and an integral part of the judicial process); Emwright v. King County, 96 Wn. 2d 538, 543, 637 P.2d 656, 659 (1981) (same).

92. State v. Smith, 84 Wn. 2d 498, 501–02, 527 P.2d 674, 676–77 (1974) (setting forth guidelines for distinguishing procedural and substantive areas).

93. WASH. REV. CODE § 2.04.190 (1981).

94. *See* note 9 *supra*.

95. State v. Fields, 85 Wn. 2d 126, 530 P.2d 284 (1975). Whether proceeding under statutory or inherent rulemaking authority, the court must still determine whether the subject matter involved is procedural or substantive. "If it is substantive law, it is beyond our authority." *Id.* at 129, 530 P.2d at 286; *see also* Emwright v. King County, 96 Wn. 2d 538, 543, 637 P.2d 656, 659 (1981) (same).

96. State v. Smith, 84 Wn. 2d 498, 501, 527 P.2d 674, 676–77 (1974).

97. Justice Rosellini raised this point in his *Martin* dissent, arguing that Rule 4.2(a) merely lists the kinds of pleas appropriate at arraignment. 94 Wn. 2d at 28, 614 P.2d at 177.

98. 94 Wn. 2d at 28, 614 P.2d at 177. Justice Rosellini added: "In passing I should say that I find it bizarre that a court rule should be utilized to aid a statutory construction which renders an act unconstitutional." *Id.*

and RCW § 10.49.010. Either alternative would have preserved the constitutionality of RCW chapter 10.94. First, the provisions of RCW chapter 10.94 read alone would have required a jury trial in all capital cases, altogether precluding the defendant from pleading guilty.[99] This alternative is supported by *Corbitt v. New Jersey*,[100] in which the United States Supreme Court held that the federal government and the states are free to abolish guilty pleas and plea bargaining. This alternative would conflict with the Washington court's disapproval of mandatory jury trials,[101] however, and would mark a radical change in Washington practice.[102]

The second alternative would have been to allow a capital defendant to plead guilty and then impose a mandatory sentencing trial under RCW § 10.49.010. Every capital defendant pleading guilty would face a jury trial determining the degree of murder and the penalty to be imposed. The procedure of the sentencing trial would be governed by RCW chapter 10.94.

Requiring all capital defendants to submit to a sentencing trial would also conflict with the Washington court's policy against mandatory jury trials.[103] Nevertheless, this result cannot be avoided if the death penalty is to be imposed. The United States Supreme Court has determined that the eighth amendment to the United States Constitution[104] requires that a jury consider the circumstances surrounding the case, as well as the individual characteristics of the defendant, before the jury can impose the death penalty.[105] The hardship caused by a jury trial is minimized by allowing a capital defendant to plead guilty, which eliminates a trial on the issue of guilt.

B. The Sentencing Scheme

Construing Rule 4.2(a) in conjunction with RCW chapter 10.94, RCW § 10.49.010, and other statutory provisions governing criminal procedure[106] would have resulted in a comprehensive sentencing scheme for aggravated first degree murder. The scheme would have required impaneling a jury following a guilty plea (pursuant to RCW § 10.49.010) for a

99. *See* text accompanying notes 51–55 *supra*.

100. 439 U.S. 212 (1978).

101. *See* text accompanying notes 72–74 *supra*.

102. State v. Martin, 94 Wn. 2d at 15, 614 P.2d at 171 (Horowitz, J., specially concurring).

103. *See* text accompanying notes 64–66 *supra*.

104. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

105. Woodson v. North Carolina, 428 U.S. 280 (1976).

106. *E.g.*, WASH. REV. CODE ch. 9A.32 (1981) (Homicide); WASH. REV. CODE § 10.01.060 (1981); *see* note 42 *supra* (text of statute).

special sentencing proceeding (under RCW §§ 10.94.020(1) and (2)). That special sentencing jury would deliberate (under RCW §§ 10.94.020(3) through (10)), answer the special questions of RCW § 10.94.020(10) regarding aggravating and mitigating circumstances, and determine whether to impose the death penalty. This scheme would have encompassed those situations in which a defendant elects to go to trial as well as those in which a defendant chooses to plead guilty. The maximum possible penalty is identical in each case. In addition, this conclusion is consistent with the state's historical treatment of defendants who plead guilty to charges of first degree murder.[107]

1. The Significance of RCW § 10.49.010

The *Martin* court determined that no procedure existed for imposing the death penalty on a capital defendant who pleaded guilty.[108] This holding was reaffirmed in *Frampton*.[109] Both decisions failed to acknowledge the validity of RCW § 10.49.010,[110] which provides for impaneling a special sentencing jury if a defendant pleads guilty to murder.

RCW § 10.49.010 had remained in effect since its enactment in 1854.[111] In *In re Brandon v. Webb*,[112] the supreme court recognized the applicability of this statute to cases in which the jury was given a choice of sentences. When *Brandon* was decided, a jury in a first degree murder case was required to determine whether the penalty would be life imprisonment or death.[113] Because sentencing for all other crimes was performed by the court, the supreme court in *Brandon* concluded that RCW § 10.49.010 applied only to first degree murder.[114]

The statute never was altered after *Brandon* and was not expressly repealed when the legislature adopted chapter 10.94 in 1977. The legislature, however, did expressly repeal RCW § 10.49.010 in April, 1981.[115] Before 1977, neither the court nor the legislature had indicated that the statute was any less effective than it had been when it was adopted. Had

107. *See* text accompanying notes 7–10 *supra*. Further, the 1981 death penalty legislation requiring a sentencing trial if a capital defendant pleads guilty demonstrates the continuing state policy that the death penalty apply to all defendants charged with aggravated first degree murder regardless of their pleas. WASH. REV. CODE § 10.95.050(4).

108. 94 Wn. 2d at 8–9, 614 P.2d at 167–68.

109. 95 Wn. 2d 469, 627 P.2d 922 (1981).

110. WASH. REV. CODE ANN. § 10.49.010 (1980) (repealed 1981); *see* note 7 *supra* (text of statute).

111. Act of Apr. 28, 1854, § 87, 1854 Wash. Laws 100, 115.

112. 23 Wn. 2d 155, 160 P.2d 529 (1945).

113. *See* notes 17–18 and accompanying text *supra*.

114. 23 Wn. 2d at 166–67, 160 P.2d at 534–35.

115. Act of May 14, 1981, ch. 138, § 24(4), 1981 Wash. Laws 535, 546.

the legislature intended to repeal this statute at an earlier date or to make it inapplicable to RCW chapter 10.94, the legislature would have made that intention clear, as it did in April, 1981. The legislature may be presumed to intend that enactments not repealed be given full effect.[116]

The existence of RCW § 10.49.010 explains why the legislature adopted the 1977 death penalty statute without providing a specific procedure to be followed when a capital defendant pleads guilty.[117] Because the legislature is presumed to be aware of the state of the law,[118] it may have eliminated an extraneous provision in RCW chapter 10.94 because RCW § 10.49.010 already provided the procedure.

Reading RCW § 10.49.010 in conjunction with RCW chapter 10.94 would have provided a complete procedure for sentencing defendants convicted of aggravated first degree murder. RCW chapter 10.94 applied in all cases in which the prosecuting attorney had filed notice of intent to seek the death penalty: directly, in the case of a jury verdict; and indirectly through RCW § 10.49.010, in the event of a guilty plea. Had the court recognized the validity of RCW § 10.49.010, it would not have found it necessary to invalidate the 1977 death penalty statute.

2. *Principles of Statutory Construction*

In ascertaining the meaning of a statute, a court should be guided by several rules of statutory construction. The rules apply only if the statute is ambiguous. The paramount objective of all rules of construction is to ascertain the legislature's intent and, where possible, to effectuate that intent.[119] Four such rules of construction are relevant to the present discussion.

First, whenever a statute may be interpreted in more than one way, the court should favor the construction that preserves its constitutionality over one that renders it invalid.[120]

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116. Olympia State Bank & Trust Co. v. Craft, 56 Wn. 2d 546, 548–49, 354 P.2d 386, 387 (1960); 73 AM. JUR. 2d *Statutes* § 253, at 424–25 (1974).

117. In *Martin*, Justice Horowitz contended that the omission of a provision for impaneling a jury in the event of a guilty plea meant that the legislature did not intend to allow a special sentencing trial when defendants pleaded guilty to first degree murder. An equally tenable explanation for the omission is that the legislature purposefully omitted the provision because of the existence of RCW § 10.49.010.

118. *See* note 51 *supra*.

119. "In interpreting a statute, it is the duty of the court to ascertain and give effect to the intent and purpose of the legislature, as expressed in the act." Burlington Northern, Inc. v. Johnson, 89 Wn. 2d 321, 326, 572 P.2d 1085, 1088 (1977); *see also* State v. Rinkes, 49 Wn. 2d 664, 667, 306 P.2d 205, 207 (1957); State v. Cain, 28 Wash. App. 462, 464, 624 P.2d 732, 733 (1981).

120. *See* note 55 and accompanying text *supra*.

Second, statutes relating to the same subject matter should be read in conjunction—that is, in pari materia—and effect given to each of them.[121] Statutes relating to the same person, thing, class of persons or things, or to the same subject, are in pari materia. The in pari materia rule of construction requires that all such statutes be construed together, the object of the rule being to ascertain the legislative intent underlying the *entire* statutory scheme by reading the provisions as a unified, harmonious whole.[122]

Third, penal statutes should be construed against the state to give the benefit of any doubt to the defendant.[123]

Fourth, underlying the construction of any statute is a strong presumption that the legislation is constitutional,[124] and a heavy burden rests on the party asserting its invalidity. In Washington, this burden has been described as proof beyond a reasonable doubt.[125]

These rules of construction dictate that RCW chapter 10.94, RCW § 10.94.010, and Rule 4.2(a) be read in pari materia to require that a court impanel a special sentencing jury after a capital defendant has entered a guilty plea. This construction would have preserved the constitutionality of the death penalty statute while effectuating the intent of the legislature.

A further rule aiding this construction is that the legislature is presumed to be aware of the state of the law.[126] Under this presumption, the legislature must be credited with the knowledge that allowing a defendant to avoid the death penalty by pleading guilty would violate the constitutional principles enunciated by the United States Supreme Court in *Jackson*.

Language in the *Jackson* decision supports the use of RCW § 10.49.010 to validate the death penalty statute. In construing a sentencing scheme closely similar to RCW chapter 10.94,[127] the Supreme Court noted that, had the power to impanel a special sentencing jury been recognized elsewhere in the federal system at the time the Act was adopted, it may have considered the omission of a similar provision in the Act itself to be a tacit incorporation of the existing sentencing procedure.[128] In Washington, a separate sentencing statute providing for impaneling a spe-

121. *See* note 78 and accompanying text *supra*.

122. State v. Williams, 94 Wn. 2d 531, 617 P.2d 1012 (1981).

123. State v. Thompson, 38 Wn. 2d 774, 232 P.2d 87 (1951); State v. Cain, 28 Wash. App. 462, 624 P.2d 732 (1981).

124. Louthan v. King County, 94 Wn. 2d 422, 617 P.2d 977 (1980); Sator v. Dept. of Revenue, 89 Wn. 2d 338, 572 P.2d 1094 (1977).

125. *See* note 79 *supra*.

126. State v. Houck, 32 Wn. 2d 681, 684, 203 P.2d 693, 695 (1949); *In re* Sage, 21 Wash. App. 803, 808, 586 P.2d 1201 (1978).

127. This scheme was enacted by Congress as part of the Federal Kidnaping Act. *See generally* note 62 *supra* (discussing *Jackson*).

128. 390 U.S. at 578.

cial sentencing jury did exist. Consistent with the *Jackson* dictum, therefore, the Washington court could have assumed that RCW § 10.49.010 had been tacitly incorporated into the death penalty statute.

In both *Martin* and *Frampton* the Washington court asserted that the uniqueness of the death penalty operated to displace application of the usual rules of statutory construction.[129] The court cited no authority for this proposition. In *Frampton*, Justice Utter, concurring, [130] attempted to support this proposition reasoning by analogy to the United States Supreme Court's decisions in *Woodson v. North Carolina*[131] and *Lockett v. Ohio*.[132] This analogy is not convincing.

Neither *Woodson* nor *Lockett* involved statutory construction. Both cases dealt with the constitutionality of death penalty legislation that did not allow a sentencing jury to consider the character and record of the defendant or the circumstances of the offense. Because the death penalty is qualitatively different from imprisonment, the Court held that the jury must consider these individualized factors before imposing the death penalty.[133] These cases, although standing for the proposition that the death penalty is qualitatively unique, do not stand for the proposition that general principles of statutory construction should be ignored when a court construes a death penalty statute.

In concluding that RCW chapter 10.94 was inapplicable to defendants pleading guilty to first degree murder, the *Martin* majority relied on the language of RCW § 10.94.020(2), which provided for reconvening the "same trial jury" to determine the penalty issue if the jury had returned a guilty verdict.[134] As noted by Justice Rosellini in his dissenting opinion,[135] RCW § 10.94.010 does not restrict the death penalty to those cases in which the defendant has pleaded not guilty. The dissent's interpretation focused on the *entire act*, applied the in pari materia rule, and harmonized all of the relevant statutes.[136] This interpretation diminishes any controlling impact that the "same trial jury" language might have because RCW § 10.94.020(1) provides for the special sentencing proceeding whenever a defendant is "found" guilty of murder in the first degree. Washington's supreme court has long recognized that a guilty plea is the functional equivalent of a guilty verdict.[137]

129. *Martin*, 94 Wn. 2d at 21, 614 P.2d at 174; *Frampton*, 95 Wn. 2d at 518, 627 P.2d at 947.
130. 95 Wn. 2d at 518, 627 P.2d at 947.
131. 428 U.S. 280 (1976).
132. 438 U.S. 586 (1978).
133. *Woodson*, 428 U.S. at 305.
134. WASH. REV. CODE ANN. § 10.94.020(2) (1980) (repealed 1981).
135. 94 Wn. 2d at 30, 614 P.2d at 178–79.
136. *Id.*
137. *See, e.g., In re* Brandon v. Webb, 23 Wn. 2d 155, 159, 160 P.2d 529, 531 (1945).

Although penal statutes must be strictly construed, the court should still apply all other applicable rules of statutory construction. The controlling factor in the interpretation of all statutes, including penal statutes, is legislative intent.[138] Strict constructions should not be allowed to defeat the policy and purposes of valid legislation.[139]

3. *Legislative History*

In *Frampton,* the plurality adopted Justice Horowitz's analysis in *Martin,* which relied on sequential drafts of the original 1977 death penalty bill to conclude that the legislature intended to omit a capital sentencing procedure for defendants pleading guilty.[140] The court's reliance on the successive drafts was misplaced.[141]

In *Hama Hama Co. v. Shorelines Hearings Board,*[142] the Washington Supreme Court questioned the use of successive legislative drafts in construing the meaning of a statute. The court concluded that the assumption that each subsequent draft of a bill takes into consideration the language of each preceding draft ignores the reality and imprecision of the legislative process.[143] Courts and legal scholars discourage over-reliance on successive drafts as an absolute tool of construction.[144] In *Hama Hama,* the court found that the process may be useful in "appropriate circumstances,"[145] but should not be considered conclusive.

In *Martin,* Justice Horowitz cited *Hama Hama* for the proposition that the procedure was valid, asserting that the *Martin* case was an "appropriate circumstance."[146] The court in *Hama Hama,* however, had concluded that, unless legislative history explains the changes, "it is not a proper judicial function for the court to speculate and attribute controlling meaning to an unexplained change that is just as likely to have occurred

138. *See, e.g.,*3 J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 59.06 (C. Sands 4th ed. 1974); 73 AM. JUR. 2d *Statutes* § 300, at 456 (1974).

139. *See, e.g.,* 3 J. SUTHERLAND, *supra* note 138, at § 59.06.

140. *See* notes 69–72 and accompanying text *supra.*

141. The court recently interpreted an omission in a subsequent draft of a bill as an intentional act in *State v. Cleppe,* 96 Wn. 2d 373, 635 P.2d 435 (1981). At issue was the meaning of the legislature's omission of "knowingly" and "intentionally" as elements in the felony of simple possession of a controlled substance. The court concluded that the legislature would have included the words as elements had it intended them to constitute a part of the crime. *Id.* at 379. This is distinguishable from the present case in that the legislature there adopted the new Uniform Controlled Substances Act. The legislature in defining the crime of simple possession was not working with an existing statute such as RCW § 10.49.010, which provided supplementary information on the law involved.

142. 85 Wn. 2d 441, 536 P.2d 157 (1975).

143. *Id.* at 449–50, 536 P.2d at 162.

144. *See, e.g.,* 2A SUTHERLAND, *supra* note 138, at § 48.18.

145. 85 Wn. 2d at 450.

146. 94 Wn. 2d at 19, 614 P.2d at 173 (Horowitz, J., concurring).

through happenstance."[147] As noted by Justice Dore in his *Frampton* dissent, there is no explanatory legislative history in this case and there are a number of equally plausible explanations for the legislature's omission in RCW chapter 10.94 of an explicit provision for imposing the death penalty on capital defendants who plead guilty.[148]

In the presence of alternative explanations for the omission, the established rules of construction obligated the court to adopt that explanation which would have preserved the constitutionality of the statute. Because of these plausible alternative explanations, the defendants challenging the validity of the statute did not prove the unconstitutionality of the statute beyond a reasonable doubt.[149]

4. A Procedure Consistent with Washington History

Had the *Martin* majority used RCW § 10.49.010 to fill the alleged gap in the death penalty sentencing procedures, it would not have been the court's first acknowledgment of separate sentencing trials. Since 1854, Washington juries have been deciding the penalty to be imposed for murder independently of determining the guilt of the defendant.[150] Before 1975, only a jury could impose the death penalty by returning a special verdict at trial or by a special sentencing trial in the event of a guilty plea.[151]

Further, despite the absence of an explicit statutory provision, the court has recognized the need for a jury trial on the issue of punishment alone. In *State v. Todd,*[152] the court interpreted RCW § 10.49.010 to allow, by implication, a separate trial on the question whether to impose the death penalty. The court in *Todd* was considering a conviction for first degree murder. The only error the court found related to the sentence imposed. The court ordered a new trial solely on the issue of punishment. The court acknowledged that no statute authorized a bifurcated penalty trial after a jury conviction. Nevertheless, the court concluded that the legislature had sanctioned such a sentencing trial in the event of a guilty plea under RCW § 10.49.010. The court thus implicitly recognized that it could order a jury trial to impose the death penalty.[153]

147. 85 Wn. 2d at 451, 536 P.2d at 163.

148. *See* note 86 and accompanying text *supra.*

149. *See* note 87 and accompanying text *supra* (discussion of burden on defendant challenging constitutionality of statute).

150. *See* notes 13–23 and accompanying text *supra.*

151. *See id.*

152. 78 Wn. 2d 362, 474 P.2d 542 (1970).

153. *Id.* at 377, 474 P.2d at 551.

In *In re Hawkins v. Rhay*,[154] the court again ordered a trial solely on the issue of punishment. In *Hawkins*, the defendant was convicted of first degree murder and was sentenced to death. The defendant appealed only the imposition of the death penalty. Citing *Todd*, the court ordered a new penalty trial[155] notwithstanding the absence of a statute authorizing this procedure.

Although these cases pre-date the 1977 death penalty statute, they indicate the court's willingness to recognize the appropriateness of separate sentencing trials as implicitly authorized by RCW § 10.49.010. Because the court could imply from RCW § 10.49.010 that a separate sentencing trial is proper when a defendant convicted by a jury challenges a sentence, it could certainly have found that a separate sentencing trial was appropriate in *Martin*, a case clearly falling within the scope of the statute.

Separate sentencing trials are consistent with the state's historical treatment of the jury and of capital punishment. Since 1919, the death penalty has been imposed in Washington only by a jury, regardless of the plea entered by the defendant.[156] To construe RCW § 10.49.010 and RCW chapter 10.94 together would be wholly consistent with prior Washington practice. The provisions of RCW chapter 10.94 merely expand and delineate the procedures under which the RCW § 10.49.010 sentencing jury would operate.

5. *Policy Considerations*

The Washington Supreme Court's decisions in *Martin* and *Frampton* are inconsistent with the express wishes of the people of Washington. Washington voters overwhelmingly approved capital punishment in a 1975 initiative.[157] The initiative created the classification of aggravated murder in the first degree, punishable by a mandatory death sentence.[158] When the United States Supreme Court invalidated mandatory death penalty provisions in 1976,[159] the legislature developed and adopted the detailed sentencing procedures of RCW chapter 10.94 in 1977.

154. 78 Wn. 2d 389, 474 P.2d 557 (1970).

155. The defendant had challenged only the selection of his jury under Witherspoon v. Illinois, 391 U.S. 510 (1968). The Washington Supreme Court agreed that *Witherspoon* compelled vacation of the death sentence, concluding that eight jurors were improperly excused for cause to the detriment of the defendant's constitutional rights. The jurors were disqualified without a dialogue establishing that each juror's opposition to the death penalty would preclude that juror from making an impartial determination upon the issue of guilt. 78 Wn. 2d at 397, 474 P.2d at 563.

156. *See* notes 13–23 and accompanying text *supra*.

157. *See* note 4 *supra*.

158. *See id.*

159. Woodson v. North Carolina, 428 U.S. 280 (1976); *see* text accompanying note 133 *supra*.

The legislature recognized the constitutional infirmity of RCW chapter 10.94 that resulted from the *Martin* interpretation and introduced replacement legislation in both houses several months before *Frampton* was decided.[160] By refusing to overrule *Martin,* the court thus thwarted the wishes of the voting public and caused an unnecessary expenditure of legislative time and energy in drafting replacement legislation.

Perhaps the single most significant consequence of *Frampton* in the mind of the public was the reduced sentences given to the nine defendants charged with aggravated first degree murder under the invalid statute. Defendant Martin, originally charged with two homicides, two attempted homicides, and eighteen other felonies, escaped the penalties of RCW chapter 10.94 and received three consecutive life sentences, all with the possibility of parole.[161] Under RCW chapter 10.94, four defendants in *Frampton* had been sentenced to death and one to life without the possibility of release or parole.[162] The court's decisions reduced the maximum sentence of each defendant to life with the possibility of release or parole.[163]

IV. WASHINGTON'S NEW CAPITAL PUNISHMENT LAW

Washington's new capital punishment law, enacted May 14, 1981,[164] provides a comprehensive scheme of criminal procedure for the disposition of the crime of aggravated first degree murder. The statute repealed the 1977 provisions defining the crime and punishment for aggravated murder in the first degree.[165] The new law is a complete and integrated statutory procedure regulating the imposition of the death penalty.

The new law is responsive in three ways to the sentencing inequity resulting from the *Martin* decision. First, the statute is replete with spe-

160. Bills introduced to the house and senate before the supreme court decided *Frampton* include: S.B. No. 3096, 47th Leg., Reg. Sess. (1981); H.B. No. 76, 47th Leg., Reg. Sess. (1981); and S.B. No. 3203, 47th Leg., Reg. Sess. (1981).

161. King County Superior Court Judge Norman Quinn sentenced Martin to three consecutive life terms on Sept. 26, 1980. Judge Quinn stated that Martin was a "lucky man," and that Martin's case, if any, warranted the death penalty, and recommended that the Board of Prison Terms and Paroles never let him go free. Lewis, note 32 *supra* at 23.

162. *See* note 57 *supra* (discussion of disposition of other *Frampton* defendants).

163. *Frampton,* 95 Wn. 2d at 484, 627 P.2d at 929. The public's outrage at the court's decision in *Martin* is indicated by the fact that Chief Justice Utter was challenged in his first contested election bid in the fall of 1980 by Kitsap County Prosecuting Attorney Dan Clem. Clem claimed that the challenge was at the request of his community, which was upset at the court's handling of the *Martin* case. The Seattle Post-Intelligencer, Aug. 31, 1980, at A–16, col. 1.

164. Act of May 14, 1981, ch. 138, 1981 Wash. Laws 535 (1981) (codified at WASH. REV. CODE ch. 10.95 (1981)).

165. *Id.* § 24, 1981 Wash. Laws at 546. *See generally* notes 23–31 and accompanying text *supra* (describing the provisions of the 1977 death penalty statute).

cial provisions that apply to the defendant who pleads guilty. Up to thirty days after arraignment, the prosecuting attorney may file a written notice requesting a special sentencing proceeding to consider the death penalty.[166] During this period a defendant may plead guilty only with the consent of the prosecuting attorney.[167] If the prosecuting attorney correctly files notice, the sentencing proceeding will be held whenever a defendant is adjudged guilty of aggravated first degree murder by plea, jury verdict, or decision of the court.[168] The defendant cannot avoid the proceeding by any plea, admission, or agreement.[169]

Second, two separate provisions govern the impaneling of the special sentencing jury following a guilty plea or a jury verdict. If a jury has returned a guilty verdict, the trial court reconvenes the same jury for the special sentencing proceeding.[170] If a defendant pleads guilty, the trial court impanels a twelve-person special sentencing jury to decide the penalty question.[171] The procedures of the special sentencing proceeding are identical whether the defendant is found guilty by jury verdict, court decision, or guilty plea.

Third, the statute provides that no supreme court rule can be construed to supersede or alter any provision of the chapter.[172] This section bars the supreme court from using any court rule to frustrate the operation of the statute and the intention of the legislature. These three provisions demonstate the legislature's determination to preclude defendants charged with aggravated first degree murder from escaping the possible imposition of the death penalty by pleading guilty.

V. CONCLUSION

The Washington death penalty statute, as interpreted by the Washington Supreme Court in *State v. Martin,* placed an impermissible burden on a capital defendant's right to a trial by jury. In reaching the conclusion that RCW chapter 10.94 did not apply to capital defendants pleading guilty, the court rejected the possible constructions of the law that would have preserved the constitutionality of legislation overwhelmingly supported by Washington voters. The court refused to read as a unified whole

166. WASH. REV. CODE § 10.95.040 (1981).
167. *Id.* § 10.95.040(2).
168. *Id.* § 10.95.050(1).
169. *Id.*
170. *Id.* § 10.95.050(3).
171. *Id.* § 10.95.050(4). This same procedure is followed when there is a decision of the trial court sitting without a jury, in the event of a retrial of the sentencing, or when an appellate court has remanded the case for retrial. *Id.*
172. *Id.* § 10.95.010.

all provisions relevant to the prosecution of those accused of aggravated first degree murder. Such a reading would have preserved the right of capital defendants to plead guilty and would have validated an equitable capital sentencing procedure.

The Washington Supreme Court's refusal in *State v. Frampton* to reconsider its decision in *Martin* necessitated both the invalidation of the 1977 death penalty statute and the enactment of replacement legislation. These decisions at least resulted in a new capital punishment law that effectuates the will of the people to impose the death penalty in appropriate cases.[173]

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173. RCW chapter 10.95 is significant not only because of the provisions plugging the *Martin* loophole, but also because it allows a convicted defendant to elect against death by hanging. RCW section 10.95.180(1) allows a defendant the alternative of a "continuous, intravenous administration of a lethal dose of sodium thiopental," a procedure believed by many to be more humane than death by hanging. *See* S.B. No. 3203, 47th Leg., Reg. Sess. (1981) (provided for death by lethal injection as the primary method of execution). Relatively few states have adopted this procedure and the constitutionality of the process is yet to be established.