CONSTITUTIONAL LAW—STANDING—NEXT FRIEND STANDING DENIED TO PRISONER WHO ASSERTED CLAIM ON BEHALF OF A FELLOW DEATH ROW INMATE WHO WAIVED HIS RIGHT TO APPEAL—*Whitmore v. Arkansas*, 110 S. Ct. 1717 (1990).

> A next friend is "[o]ne acting for benefit of infant, married woman, or other person not *sui juris*,[1] without being regularly appointed guardian."[2]

The doctrine of standing was created to determine whether a party seeking judicial relief is the proper party to do so.[3] This determination serves to limit federal judicial power to only those cases that properly fall under the article III "case or controversy" requirement.[4] Therefore, a court may justifiably deny adjudication of an otherwise justiciable claim based on a party's lack of standing.[5]

During the last twenty years, the United States Supreme Court's approach to standing has been somewhat inconsistent.[6] Occasion-

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[1] "Having capacity to manage one's own affairs; not under legal disability to act for one's self." BLACK'S LAW DICTIONARY 1286 (5th ed. 1979).

[2] BLACK'S LAW DICTIONARY 941 (5th ed. 1979).

[3] *See* Doernberg, *"We the People": John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CALIF. L. REV. 52, 68-69 (1985). "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Id.* at 69 (quoting Flast v. Cohen, 392 U.S. 83, 99 (1968)). The doctrine of standing invokes a two-part test. *Id.* at 53. First, the court must examine whether the plaintiff has "such a personal stake in the outcome of the controversy as to assure the concrete adverseness which sharpens the presentation of issues. . . ." *Id.* (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)). This "personal stake" has also been referred to as "injury in fact." *Id.* (citing Valley Forge Christian College v. Americans United For Separation of Church & State, Inc., 445 U.S. 464, 472 (1982); Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 72-74 (1978)). Second, there must be "some connection between the official action challenged and some legally protected interest of the party challenging the action." *Id.* (quoting Jenkins v. McKeithen, 395 U.S. 411, 423 (1969)).

[4] *Id.* at 68.

> The judicial power of federal courts is constitutionally restricted to 'cases' or 'controversies'. . . . Embodied in the words 'cases' and 'controversies' are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to other branches of the government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-or-controversy doctrine.

Id. (quoting Flast v. Cohen, 392 U.S. 83, 94-95 (1968)).

[5] *Id.* at 69.

[6] *Id.* at 92.

ally, the Court has appeared to pursue a liberal course which[7] led to an increased judicial acceptance of third party standing arguments.[8] In other instances, the Court has utilized an extremely restrictive approach,[9] which insists on a more substantial third party relationship.[10] Despite this incongruency, the Court has consistently denied standing to third party next friend claims asserted on behalf of a convicted capital defendant who has waived his right to appellate review.[11]

Recently, this judicial tendency was addressed in *Whitmore v. Arkansas*.[12] In *Whitmore*, the Court denied a death row inmate, Jonas Whitmore, next friend standing to bring a petition on behalf of a fellow death row inmate, Gene Simmons, who had waived his right to appeal his sentence.[13] Simmons was tried,[14] convicted of capital

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[7] *See, e.g.*, Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978) (Court granted third party standing to environmental groups and individuals challenging legislative liability limitation for private developers of nuclear power plants); Carey v. Population Serv. Int'l, 431 U.S. 678 (1977) (Court granted third party standing to vendors of contraceptive devices, on behalf of themselves and potential purchasers, challenging legislative limitation on access to contraceptives); Craig v. Boren, 429 U.S. 190 (1976) (Court granted third party standing to beer vendor challenging a gender-based discrimination of sale of beer); United States v. SCRAP, 412 U.S. 669 (1973) (Court granted third party standing to environmental group challenging an Interstate Commerce Commission ruling permitting railroads to access surcharge for transporting recyclable materials).

[8] DOERNBERG, *supra* note 3, at 92.

[9] *Id.* (citing Warth v. Seldin, 422 U.S. 490 (1975) (Court denied plaintiffs' standing to challenge suburban zoning ordinance as violation of Civil Rights Act). In a dissenting opinion, Justice Douglas joined by Justice Brennan, charged that the majority was being antagonistic in its interpretation of the plaintiffs' complaint. *Id.* at 92 n.263 (1985) (citing Warth v. Seldin, 422 U.S. 490, 518 (1975) (Douglas, J., dissenting)). The dissent stated:

> The opinion, which tosses out of court almost every conceivable kind of plaintiff who could be injured by the activity claimed to be unconstitutional, can be explained only by an indefensible hostility to the claim on the merits. I can appreciate the Court's reluctance to adjudicate the complex and difficult legal questions involved. . . . But courts cannot refuse to hear a case on the merits merely because they would prefer not to, and it is quite clear, when the record is viewed with dispassion, that at least three of the groups of plaintiffs have made allegations, and supported them with affidavits and documentary evidence, sufficient to survive a motion to dismiss for lack of standing.

Id. (quoting Warth v. Seldin, 422 U.S. 490, 520-21 (1975) (Brennan, J., dissenting)).

[10] *Id.* at 92.

[11] *See* Lenhard v. Wolff, 443 U.S. 1306 (Rehnquist, Circuit Justice (1979)), *stay of execution denied*, 494 U.S. 807 (1979) (mem.); Evans v. Bennett, 440 U.S. 1301 (Rehnquist, Circuit Justice (1979)), *stay of execution denied*, 440 U.S. 987 (1979) (mem.); Gilmore v. Utah, 429 U.S. 1012 (1976).

[12] 110 S. Ct. 1717 (1990).

[13] *Id.* at 1721.

murder, and sentenced to death for the murders of two individuals and fourteen members of his family.[15] Subsequently, Simmons waived his right to appeal.[16] The trial court conducted hearings and determined that Simmons was competent to make a knowing and intelligent waiver of his right to appellate review.[17] The Arkansas Supreme Court reviewed and affirmed these determinations.[18]

Whitmore then petitioned the Arkansas Supreme Court asking to intervene both individually and as next friend of Simmons.[19] The court dismissed the motion finding that Whitmore lacked standing.[20] As a result, Whitmore sought a stay of execution from the United States Supreme Court.[21] The Court granted the stay pending the filing of a petition for certiorari.[22] Ultimately, the Court granted certiorari.[23]

Chief Justice Rehnquist, writing for the Court,[24] concluded that

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14 *Id.* Simmons was tried in two separate proceedings. *Id.* First, he was tried for a shooting rampage in Russellville, Arkansas, where he killed two people and injured three others. *Id.* Simmons was then tried for the murders of fourteen members of his family. *Id.*

15 *Id.*

16 *Id.* at 1721-22. After his first sentence, Simmons waived his rights under oath, by swearing, "I, Ronald Gene Simmons, Sr., want it to be known that it is my wish and my desire that absolutely no action by anybody be taken to appeal or in any way change this sentence. It is further respectfully requested that this sentence be carried out expeditiously." *Id.* at 1721 (quoting Franz v. State, 296 Ark. 181, 183, 754 S.W.2d 839, 840 (1988)).

17 *Id.*

18 *Id.* The Arkansas Supreme Court denied Louis J. Franz, a Catholic priest who counseled inmates, next friend standing to assert a petition on Simmons' behalf. *Id.* The court dismissed Franz's appeal reasoning that he failed to establish any relationship with the defendant. *Id.* The court further noted that a mandatory appeal of all death sentences is not required in Arkansas. *Id.* Also, the court stated that a defendant may forgo his appeal "only if he has been judicially determined to have the capacity to understand the choice between life and death and to knowingly and intelligently waive any and all rights to appeal his sentence." *Id.* (quoting Franz v. State, 296 Ark. 181, 189, 754 S.W.2d 839, 843 (1988)).

Subsequently, Hill, a death row inmate, joined Franz in petitioning the federal court for a writ of habeas corpus. *Id.* This petition was also dismissed for lack of standing. *Id.* (citing Franz v. Lockhart, 700 F. Supp. 1005 (E.D. Ark. 1988)).

19 *Id.* at 1722. Franz and Hill petitioned the court after the first capital murder conviction. *Id.* at 1721. Whitmore, however, sought permission to intervene after the second capital murder conviction for the murder of the Simmons' family members. *Id.* at 1722.

20 *Id.* (citing Simmons v. State, 298 Ark. 255, 766 S.W.2d 423 (1989)).

21 *Id.*

22 *Id.* (citing Whitmore v. Arkansas, 109 S. Ct. 1522 (1989) (Court granted stay of execution).

23 *Id.* (citing Whitmore v. Arkansas, 109 S. Ct. 3240 (1989)).

24 *Id.* at 1721. Chief Justice Rehnquist delivered the opinion of the Court and was joined by Justices White, Blackmun, Stevens, O'Connor, Scalia, and Kennedy.

Whitmore lacked next friend standing to challenge the propriety of Simmons' death sentence.[25] The decision was based on two factors.[26] First, the Court noted that Simmons competently waived all rights to appellate review.[27] Second, the Court recognized that Whitmore may not have been acting in Simmons' best interests.[28] Thus, the Court concluded that Whitmore failed to allege facts sufficient to support his status as next friend.[29]

The concept of next friend standing in connection with filing a petition on behalf of a detained prisoner has its roots in the seventeenth century.[30] The English Habeas Corpus Act of 1679, allowed the filing of a writ of habeas corpus for a convicted prisoner.[31] In 1704, the House of Lords recognized "that every Englishman, who is imprisoned by any authority whatsoever, has an undoubted right, by his agents or friends, to apply for and obtain a Writ of Habeas Corpus, in order to procure his liberty by due course of law."[32]

At the turn of the century, the Supreme Court, in *Gusman v. Marrero*,[33] denied standing to an individual asserting a claim on behalf of a capital prisoner.[34] The Court determined that a private citizen did not have next friend standing to bring a civil action to secure a capital prisoner's right to appeal.[35] The majority noted that their decision would not be swayed by the emotional sensitivities of the situation.[36] The Court also emphasized that it would also

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Id. at 1720-21. Justice Marshall filed a dissenting opinion and was joined by Justice Brennan. *Id.* at 1721, 1729.

25 *Id.* at 1728-29.

26 *Id.* at 1727.

27 *Id.* at 1721. The Arkansas Supreme Court praised the trial court and Simmons' counsel for performing "an exceptional job in examining and exploring [Simmons'] capacity to understand the choices between life and death and his ability to know and to intelligently waive any and all right he might have in an appeal of his sentence." *Id.* at 1722 (quoting Simmons v. State, 298 Ark. 193, 194, 766 S.W.2d 422, 423 (1989)). Additionally, the Arkansas Court stated that "Simmons' counsel 'thoroughly discussed seven possible points that could be argued for reversal on appeal' and that Simmons acknowledged those points but 'rejected all encouragement and suggestions to appeal.' " *Id.* at 1722 (citing Simmons, 298 Ark. at 194, 766 S.W.2d at 423).

28 *Id.* at 1727.

29 *Id.* at 1726.

30 *Id.*

31 *Id.* (citing 31 Car. II, ch. 2).

32 *Id.* at 1726-27 (quoting Ashby v. White, 14 How. St. Tr. 695, 814 (Q.B. 1704)).

33 180 U.S. 81 (1901).

34 *Id.* at 82. The prisoner, Samuel Wright, was sentenced to death for assault with the intent to commit rape. *Id.*

35 *Id.*

36 *Id.* at 87. The Court reasoned that "[h]owever friendly he may be to the

have denied the plaintiff standing under a habeas corpus petition.[37]

The United States Court of Appeals for the Second Circuit, in *United States ex rel. Bryant v. Houston*,[38] denied next friend standing in connection with a habeas corpus petition.[39] The Second Circuit based its decision on the extent of the relationship between the petitioner and the detainee.[40] Acknowledging the validity of next friend standing in many circumstances,[41] the court, dismissed the writ.[42] The court stressed that next friend standing requires the petitioner to display a significant relation to the detainee and to set forth a satisfactory explanation for the prisoner's failure to verify the petition himself.[43] The court concluded that next friend standing "was not intended . . . [to] be availed of, as a matter of course, by intruders or uninvited meddlers, styling themselves next friends."[44]

Seven years after *Houston,* the Ninth Circuit Court of Appeals, in *Collins v. Taeger*[45] permitted next friend standing in connection with a habeas corpus writ asserted on behalf of a detained prisoner who was incapable of pursuing his own petition.[46] The court indicated that in order for the article III standing requirements to be met, the petitioner must have been given authorization by the prisoner to act in his behalf.[47] The court reasoned that in this case the petitioner was properly acting under the prisoner's authorization because the prisoner was barred from asserting his own writ due to the pending removal of the case from the court's jurisdiction.[48]

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doomed man and sympathetic for his situation, however concerned he may be lest unconstitutional laws be enforced, and however laudable such sentiments are, the grievance they suffer and feel is not special enough to furnish a cause like this." *Id.*

37 *Id.* The court, however, has provided exceptions to habeas corpus petitions regarding deportation. *See* United States *ex rel.* Funaro v. Watchorn, 164 F. 152 (S.D.N.Y. 1908) (often in a deportation case, infancy, incompetency or time constraints require verification of writ of habeas corpus by the prisoner's counsel).

38 273 F. 915 (2d Cir. 1921).

39 *Id.*

40 *Id.* The court reasoned that the writ of habeas corpus cannot be made on the application of any person without explanation. *Id.*

41 *Id.* at 916. The court described these circumstances as ones in which the prisoner is unable to bring his own petition or refuses to do so. *Id.* Common situations occur when the prisoner does not understand the English language, does not have access to the courts or is not mentally competent and waives all petitioning powers. *Id.*

42 *Id.*

43 *Id.* at 915.

44 *Id.* at 916.

45 27 F.2d 842 (9th Cir. 1928).

46 *Id.* at 843.

47 *Id.*

48 *Id.* The court also indicated that since no one objected to the petitioner's standing in the trial court, that objection could not be made on appeal. *Id.*

In *Wilson v. Dixon*,[49] the Ninth Circuit Court of Appeals denied next friend standing to a fellow inmate.[50] In *Wilson*, the petitioner brought a writ of habeas corpus on the prisoner's behalf because the prisoner was unable to obtain a writ of habeas corpus.[51] The court denied the writ, positing that the petitioner failed to show a significant relation to the prisoner and a satisfactory reason why the prisoner did not verify the complaint himself.[52]

The Supreme Court has struggled with the issue of whether next friend standing is allowed when asserted on behalf of a capital prisoner who has waived his right to appeal his sentence.[53] In *Gilmore v. Utah*,[54] the Supreme Court vacated a temporary stay of execution which was previously granted to the prisoner's mother.[55]

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[49] 256 F.2d 536 (9th Cir. 1958).

[50] *Id.* at 537.

[51] *Id.* at 537. Title 28 U.S.C. § 2242 (1971) provides that an application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended *or by someone acting in his behalf*. . . . *Wilson*, 256 F.2d at 537 (quoting 28 U.S.C. § 2242 (1971)) (emphasis added)(the writ must set forth a judicially appropriate basis explaining the reason why the prisoner had not attested to the complaint and the identity of the next friend).

[52] *Wilson*, 256 F.2d at 537-38. The court further claimed the complaint was insufficient because it failed to show that the accused exhausted all of the remedies available to him. *Id.* Specifically, the court argued that neither the petitioner nor the prisoner sought relief in a California court. *Id.* Therefore, the court reasoned they were unable to obtain jurisdiction over the case. The court referenced 28 U.S.C. § 2254 which provided:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state, or that there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner. An applicant shall be deemed to have exhausted the remedies available in the courts of the state, within the meaning of this section, if he has the right under the law of the state to raise, by any available procedure, the questions presented.

Wilson, 256 F.2d at 537-38 (quoting 28 U.S.C. § 2254 (1979)).

Additionally, the court affirmed the *Houston* proposition that next friend standing "was not intended [to] be availed of, . . . by intruders or uninvited meddlers, styling themselves as next friends." *Id.* at 538 (quoting United States ex rel. Bryant v. Houston, 273 F. 915, 916 (2d Cir. 1921)).

[53] *See* Whitmore v. Arkansas, 110 S. Ct. 1717 (1990); Lenhard v. Wolff, 443 U.S. 1306 (Rehnquist, Circuit Justice (1979)), *stay of execution denied*, 444 U.S. 807 (1979) (mem.); Evans v. Bennett, 440 U.S. 1301 (Rehnquist, Circuit Justice (1979)), *stay of execution denied*, 440 U.S. 987 (1979); Gilmore v. Utah, 429 U.S. 1012 (1976) (mem.); *see generally* Note, *Capital Punishment: A Review of Recent Supreme Court Decisions*, 52 Notre Dame L. Rev. 261 (1976) (discussion of recent Supreme Court decisions concerning the death penalty and their impact).

[54] 429 U.S. 1012 (1976).

[55] *Id.* at 1013.

Bessie Gilmore sought next friend standing on behalf of her son, Gary Gilmore, who had waived his right to appeal his capital sentence.[56] After careful review of the lower court competency hearing, a divergent Court[57] affirmed that Gilmore "knowingly and intelligently waived all his federal rights."[58]

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[56] *Id.* at 1013. Gilmore also repeatedly insisted on carrying out his conviction. *Id.* at 1013 n.1. He not only sought death, but carried on a media campaign to help the unnecessary delay of his execution. *See* Urofsky, *A Right to Die: Termination of Appeal For Condemned Prisoners*, 75 J. CRIM. L. & CRIMINOLOGY 553, 554 (1984). Gilmore's views were adequately expressed in a letter he wrote to the Utah Supreme Court which was subsequently published nationwide. It read:

> Don't the people of Utah have the courage of their convictions? You sentence a man to die. . .and when I accept this most extreme punishment with grace and dignity, you, the people of Utah want to back down and argue with one about it. You're silly. Look, I am sane, rational and more intelligent than the average person. I've been sentenced to die. I accept that. Let's do it and the hell with all the bullshit. Most sincerely—Gary Gilmore

Note, *The Death Row Right to Die: Suicide or Intimate Decision?*, 54 S. CAL. L. REV. 575, 631 (1981).

[57] Chief Justice Burger, in a concurring opinion, stated that Bessie Gilmore did not have next friend standing to petition her son's sentence because Gary Gilmore was competent enough to bring his own appeal. *Gilmore*, 429 U.S. at 1014 (Burger, C.J., concurring). Justice Powell joined in this concurrence. *Id.* at 1013 (Burger, C.J. concurring). In a separate concurrence, Justice Stevens added that the record not only adequately displayed Gilmore's competency, but also clearly indicated that Gilmore was never denied access to assert his appeal. *Id.* at 1017 (Stevens, J., concurring). Justice Rehnquist joined in this concurrence. *Id.*

In three separate dissents, Justices White, Marshall and Blackmun, articulated the reasons for denying next friend standing to Bessie Gilmore. *See id.* at 1018-20. Justice White, questioned the constitutionality of the Utah death penalty statute. *Id.* at 1018 (White, J., dissenting). The Justice noted that Gary Gilmore may not waive his appellate rights until the constitutionality of the state statute is resolved in state court. *Id.* Justice White determined that since these rights were not waivable, there was no jurisdictional barrier to preclude Gilmore's mother from petitioning the Court. *Id.* In a separate dissent, Justice Marshall agreed with Justice White that a criminal defendant cannot consent to execution pursuant to an unconstitutional statute. *Id.* at 1019 (Marshall, J., dissenting). Justice Marshall further stated that the record did not adequately support the fact that Gilmore knowingly, intelligently and competently waived his right to appeal. *Id.* at 1019. Justice Marshall vigorously asserted that Gilmore's suicide attempt as well as the inadequacy of the state's psychiatric examination strongly supported the prisoner's incompetency. *Id.* at 1019. Justice Blackmun maintained that an issue concerning whether a convicted capital defendant's mother has standing to assert her son's constitutional rights is one of extreme magnitude, and therefore deserving of a plenary hearing. *Id.* at 1020 (Blackmun, J., dissenting).

[58] *Id.* Gilmore was executed in 1977 by a firing squad. *See* Strafer, *Volunteering For Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. CRIM. L. & CRIMINOLOGY 860, 865-66 (1983). Justice Marshall noted that since 1976, when the death penalty was reinstated, Gary Gilmore has been the only person to be executed without any appellate review of his sentence. Whitmore v. Arkansas, 110 S. Ct. 1717, 1733 (1990). The Justice further noted that following

Three years later, in *Evans v. Bennett*,[59] the Supreme Court granted a stay of execution to Betty Evans, mother of convicted murderer, John Louis Evans.[60] Evans was unable to waive his appeal because the Alabama capital punishment statute provides for an automatic appellate review of every capital sentence.[61] The appellate court, however, affirmed Evans' sentence.[62] Betty Evans subsequently filed a next friend petition contending that her son was not competent to pursue his own appeal.[63] Justice Rehnquist, writing as a Circuit Justice, found that Evans was competent enough to knowingly and intelligently waive his post-conviction rights.[64] The Justice stipulated that, given the circumstances, Evans' choice to accept a quick death over life in prison was rational.[65] Justice Rehnquist, however, permitted Betty Evans' stay of execution pending further consideration by the full Court[66] which ultimately va-

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Gilmore's execution, Utah changed its capital punishment statute to require a mandatory, nonwaivable appeal of each sentence. *Id.*

59 440 U.S. 1301 *stay of execution denied*, 440 U.S. 987 (1979) (mem.) (Rehnquist, Circuit Justice (1979)).

60 *Id.*

61 *Id.*

62 The sentence and judgment were affirmed by the Alabama Court of Criminal Appeals and the Supreme Court of Alabama. *See* Evans v. State, 361 So.2d 654 (Ala. Crim. App. 1977); Evans v. State, 361 So.2d 666 (Ala. 1978). Subsequently, a petition for a writ of certiorari was filed; however, the writ was denied by the Supreme Court. *See* Evans v. Alabama, 440 U.S. 930 (1979).

63 *Evans*, 440 U.S. at 1301. To support the claim of her son's incompetency, Betty Evans presented a psychiatrist's affidavit which stated that Evans was "not able to deal rationally with his situation and. . . probably needs someone to make legal decisions affecting his life for him." The Court, however, noted that the psychiatrist never personally interviewed or examined Evans. *Id.* at 1304. Additionally, the Court stressed that Evans was competent to stand trial and there were no intervening physical or mental disabilities between the time of trial and his mother's filing for a writ of habeas corpus. *Id.* Accordingly, the Court reasoned "[c]learly one who is competent to stand trial is competent to make decisions as to the course of his future." *Id.*

64 *Id.* at 1305.

65 *Id.* Specifically, Justice Rehnquist wrote:

> The fact that Evans has elected not to pursue post-conviction remedies that would serve to forestall the impending execution is not controlling, since it may well be . . . that John Evans has confronted his option of life imprisonment or death by execution and has elected to place his bets on a new existence in some world beyond this. The Court finds no evidence of irrationality in this; indeed . . . it may well be that John Evans has made the more rational choice.

Id.

66 *Id.* Justice Rehnquist articulated that "[i]f I were casting my vote on this application for a stay as a Member of the full Court, I would vote to deny the stay." *Id.* at 1303. The Justice instead reasoned that as surrogate of the full Court he was required to grant the stay. *Id.* at 1306. In reaching his decision, Justice Rehnquist examined the dissenting opinions of Justice White, joined by Justice Brennan, Jus-

cated the stay.[67]

Justice Rehnquist again acting as Circuit Justice, decided *Lenhard v. Wolff* later the same year.[68] In *Lenhard*, a convicted murderer, Jesse Walter Bishop, also waived his right to appeal his capital sentence.[69] Subsequently, two Nevada public defenders filed for a stay of execution acting as next friends on Bishop's behalf.[70] The attorneys asserted that their moral and ethical obligations as Bishop's representatives provided them with adequate grounds for next friend standing.[71] Justice Rehnquist affirmed the lower court's findings,[72] and concluded that Bishop was competent[73] when he

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tice Marshall and Justice Blackmun in Gilmore v. Utah, 429 U.S. 1012 (1976). Based on these dissents, Justice Rehnquist posited:

> Were this a case involving an issue other than the death penalty, I think I would be justified in concluding that because the Alabama Court of Criminal Appeals and the Alabama Supreme Court have fully reviewed Evans' conviction and sentence, the same considerations which led four Members of this Court to disagree with our denial of a stay of execution in Gilmore's case would not necessarily lead all of them to do so here. But because of the obviously irreversible nature of the death penalty and because of my obligation as Circuit Justice to act as surrogate for the Court, I do not feel justified in denying the stay on that assumption.

Id.

67 Evans v. Bennett, 440 U.S. 987 (1979) (mem.). Eventually Betty Evans convinced her son to pursue his own appeal. Urofsky, *supra* note 56, at 561. The process continued for another four years. *Id.* In the end, Evans' sentence was affirmed and he was executed on April 22, 1983. *Id.*

68 443 U.S. 1306 (Rehnquist, Circuit Justice (1979)), *stay of execution denied*, 444 U.S. 807 (1979) (mem.).

69 *Id.* at 1307.

70 *Id.* at 1308.

71 *See id.*

72 *Id.* at 1311. At the circuit court level, Judge Sneed, in a concurring opinion concluded:

> I am convinced that Bishop is sane and that he has made a knowing and intelligent choice to forego his federal remedies. Bishop is an individual who, for reasons I can fathom only slightly, has chosen to forego his federal remedies. Assuming his competence, which on this record I must, he should be free to so choose. To deny him that would be to incarcerate his spirit — the one thing which remains free and which the state need not and should not imprison.

Lenhard v. Wolff, 603 F.2d 91, 94 (9th Cir. 1979) (per curiam) (Sneed, J., concurring).

73 *Lenhard*, 443 U.S. at 1312. Justice Rehnquist specifically wrote:

> Bishop was found to be competent at the time of trial by three psychiatrists; he was observed by the panel of three judges during the penalty hearing; he was observed in a subsequent proceeding before the trial court on July 25, 1979; he appeared personally before the United States District Court on August 23, 1979; and he was examined by a licensed psychiatrist on August 21, 1979. On none of these occasions was there an indication to those responsible persons that he was in-

knowingly and intelligently chose not to pursue his appeal.[74] Justice Rehnquist explained that he believed the stay should be denied.[75] As in *Evans*, however, the Justice determined that the stay should be granted until disposition of the matter by the full Court due to his obligation as surrogate of the Court and considering the "irreversible nature"of the penalty.[76] In a memorandum decision, *Lenhard v. Wolff*,[77] the Court denied the application for the stay of execution.[78]

In *Whitmore v. Arkansas*,[79] the Supreme Court issued its first full opinion concerning applications for stays of execution asserted by next friends of capital prisoners.[80] Chief Justice Rehnquist began his analysis in *Whitmore* by explaining that the Court could not address Whitmore's claim on the merits until he had established his entitlement to standing.[81] The Court maintained that in order to establish standing, a party must prove that he is the appropriate entity to assert the claim.[82] Chief Justice Rehnquist added that this

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> competent. We find there has been no evidence of incompetence sufficient to warrant a hearing on the issue.

Id.

74 *Id.* Bishop was executed on October 22, 1979. Note, *supra* note 56, at 589.

75 *Lenhard*, 443 U.S. at 1312-13.

76 *Id.*

77 444 U.S. 807 (1979) (mem.).

78 *Id.* at 808. Justice Marshall, in dissent, expressed his belief that the death penalty was an unconstitutional form of punishment. *Id.* at 808 (Marshall, J., dissenting). Hence, the dissent opined that all capital sentences should be automatically reviewed whether or not the defendant authorized the appeal. *Id.* at 810 (Marshall, J., dissenting). Justice Marshall reasoned that a mandatory, nonwaivable appeal would adequately secure the eighth amendment protections afforded to the defendant as well as to society as a whole. *Id.* at 810-11 (Marshall, J., dissenting). Justice Marshall claimed that "society's interest in the protections afforded by the eighth amendment cannot be compromised by a defendant's waiver." *Id.* at 811 (Marshall, J., dissenting). The dissent concluded that if the state allowed Bishop to waive his right to appeal it would essentially be assisting him in committing suicide. *Id.* at 811-12 (Marshall, J., dissenting).

79 110 S. Ct. 1717 (1990).

80 *Id.* at 1722. Chief Justice Rehnquist articulated:

> Since *Gilmore*, we have been presented with other applications from third parties for stays of execution, *see* Lenhard v. Wolff, 443 U.S. 1306 (Rehnquist, Circuit Justice (1979)), *stay of execution denied*, 444 U.S. 807 (1979) (mem.); Evans v. Bennett, 440 U.S. 1301 (Rehnquist, Circuit Justice (1979)), *stay of execution denied*, 440 U.S. 987 (1979) [(mem.)] [(Circuit Justice Rehnquist granted stay of execution as surrogate of full Court, subsequently full Court vacated stay in memorandum opinion)]; but until the present case, we have not requested full briefing and argument and issued an opinion of the Court on this recurring issue.

Id. Additionally, in Gilmore v. Utah, 429 U.S. 1012 (1976), the Court issued a brief order instead of a full opinion. *Id.* at 1012.

81 *Whitmore*, 110 S. Ct. at 1722.

82 *Id.* at 1722-23 (citing Valley Forge Christian College v. Amns. United for Sep-

prerequisite reinforces the limitation on a federal court's power to hear only those disputes which satisfy the article III "case or controversy" requirement.[83]

Recognizing the Courts' historically inconsistent application of the doctrine of standing, the Court nonetheless reiterated that certain basic principles exist which must be met.[84] Chief Justice Rehnquist maintained that a party must demonstrate an "injury in fact" in which the injury or harm is either actual, concrete, palpable or imminent.[85] The Chief Justice stressed that an abstract, conjectural or hypothetical injury is an insufficient basis to grant standing.[86] Additionally, the Justice indicated that a party must show that the injury "fairly can be traced to the challenged action, [and] is likely to be redressed by a favorable decision."[87] The Court explained that without a party presenting facts sufficient to support its allegation of standing a federal court cannot expand its jurisdictional power, hence, a party must present factual proof to support the proposition that the party has standing.[88]

Utilizing these basic principles, the Court first denied Whitmore standing in his individual capacity.[89] Chief Justice Rehnquist dismissed Whitmore's principal "injury in fact" claim[90] because it was much too speculative to serve as a basis for granting standing.[91]

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aration of Church and State, Inc., 454 U.S. 464, 471-76 (1982)). *See also supra* notes 3-4 and accompanying text.

83 *Whitmore*, 110 S. Ct. at 1723.

84 *Id.*

85 *Id.* (citing Warth v. Seldin, 422 U.S. 490, 501 (1975)). *See also supra* note 9 and accompanying text.

86 *Whitmore*, 110 S. Ct. at 1723 (citing Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983); O'Shea v. Littleton, 414 U.S. 488, 494 (1974)).

87 *Id.* The Court refers to this second principle as the "causation" and "redressable" prongs of article III. *Id.* (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38, 41 (1976)).

88 *Id.* (citing Warth v. Seldin, 422 U.S. 490, 501 (1975)).

89 *Id.*

90 *Id.* Specifically, Whitmore's "injury in fact" claim was contingent upon Arkansas' system of comparative review of all death sentences. *Id.* Whitmore claimed he had "a direct and substantial interest in having the data base against which his crime is compared to be complete and to not be arbitrarily skewed by the omission of any other capital case." *Id.* Whitmore further reasoned that Simmons' crime was much more severe and heinous and therefore would belittle his crime in a future comparison. *Id.* at 1724.

91 *Id. See, e.g.*, Diamond v. Charles, 476 U.S. 54 (1986) (Court denied physician standing based on speculative injury that legislative restriction on abortions results in fewer paying patients); Los Angeles v. Lyons, 461 U.S. 95 (1983) (Court denied individual standing based on hypothetical injury that if arrested by a certain police officer, officer would administer illegal chokehold upon him); Ashcroft v. Mattis, 431 U.S. 171 (1977) (Court denied plaintiff standing based on speculative injury claim that if arrested by certain police officer, officer would use deadly force on

The Court further opined that even if Whitmore's injury was foreseeable, Whitmore provided no factual support to prove that Simmons' decision to waive an appeal had any relation to his injury.[92]

The majority dismissed Whitmore's next claim that as a citizen he was entitled to certain protections which are afforded to the public pursuant to the eighth amendment.[93] Whitmore asserted that he had a constitutional right to prevent the Court from carrying out an execution without proper appellate review.[94] Chief Justice Rehnquist stressed that this was an inadequate ground for standing because an individual cannot invoke the power of the courts merely by claiming that the government has violated the law.[95] Additionally, the majority rejected Whitmore's assertion that the Court should establish a special type of standing for capital punishment cases.[96] Whitmore argued that the irreversible nature of the death penalty and society's compelling interest in assuring that the punishment is properly imposed warranted this special exception.[97] The Court refuted Whitmore's position by claiming that it cannot expand its jurisdictional powers by creating policy exceptions to constitutionally mandated law.[98] Chief Justice Rehnquist concluded that Whitmore did not have individual standing to assert his eighth amendment objection.[99]

The Court next addressed Whitmore's second basis for standing as a next friend of Simmons.[100] The majority, identified two conditions that must be met before next friend standing is

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him); O'Shea v. Littleton, 414 U.S. 488 (1974) (Court denied town resident standing based on hypothetical injury that if brought before certain tribunal in the future, resident would suffer from the judge's alleged illegal procedures). *But see* United States v. SCRAP, 412 U.S. 669 (1973) (Court permitted standing of environmental group challenging Interstate Commerce Commission ruling enabling railroads to access surcharge for transporting recyclable materials).

In *Whitmore*, the Court noted that *SCRAP* was "probably the most attenuated injury conferring [a]rticle III standing . . . and that *SCRAP* surely went to the very outer limits of the law . . . ." *Whitmore*, 110 S. Ct. at 1725.

92 *Whitmore*, 110 S. Ct. at 1724. Specifically, the Court stated that "Whitmore provides no factual basis for us to conclude that the sentence imposed on a mass murderer like Simmons would even be relevant to a future comparative review of Whitmore's sentence." *Id.*

93 *Id.* at 1725.

94 *Id.*

95 *Id.* at 1725-26 (citing Allen v. Wright, 468 U.S. 737, 754 (1984)).

96 *Id.* at 1726.

97 *Id.*

98 *Id.*

99 *Id.*

100 *Id.*

granted.[101] First, the Court maintained that a next friend must show that the real party in interest is unable to pursue his own appeal because of mental incompetency, inaccessibility or some other disability.[102] The Chief Justice affirmed the lower court's finding that Simmons had the mental competency to make an intelligent and knowing waiver of his right to appeal.[103] The Court concluded that Whitmore failed to prove that Simmons was incompetent or otherwise disabled.[104] The majority reasoned that because Simmons was capable of pursuing his own appeal, he did not need a next friend to assert his rights.[105]

Next, the Court articulated that an individual pursuing next friend status must be motivated by the desire to act in the capital prisoner's best interest.[106] Noting that next friend standing is not automatically granted to every petitioner who chooses to pursue an action on another's behalf, the Court mandated that the petitioner establish some significant relation to the prisoner.[107] The Court determined that Whitmore not only failed to demonstrate that he was acting in Simmons' best interests, but that he also failed to show any meaningful relation to Simmons.[108] Chief Justice Rehnquist explained that by imposing such restrictions on next friend standing, the courts limit intrusions by "uninvited meddlers, styling themselves as next friends."[109] Accordingly, the Court held that Whit-

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101 *Id.* at 1727.

102 *Id.* (citing Wilson v. Lane, 870 F.2d 1250, 1253 (7th Cir. 1989)).

103 *Id.* at 1728 (citing Simmons v. State, 298 Ark. 193, 194, 766 S.W.2d 422, 423 (1989) (per curiam)). The Court had three grounds upon which it affirmed Simmons' competency determination:

(1) Simmons' answers to questions he was asked by both the court and counsel at trial and after his conviction. *Id.* These answers displayed that he clearly understood all of the possible remedies available to him and the consequences of each one. *Id.*

(2) A psychiatric interview in which Simmons stated that he felt it would be "a terrible miscarriage of justice for a person to kill people and not be executed." *Id.*

(3) The absence of meaningful evidence displaying any sign of mental disease, disorder or defect that would impair Simmons' ability to make a rational decision. *Id.*

104 *Id.*

105 *Id.* at 1728-29.

106 *Id.* at 1727. The majority noted that Whitmore was not seeking a writ of habeas corpus. *Id.* at 1728. Rather, Whitmore was attempting to appeal Simmons' death sentence. *Id.* "Under these circumstances, there is no federal statute authorizing the participation of 'next friends'." *Id. See* 28 U S.C. § 2254 (1977).

107 *Whitmore*, 110 S. Ct. at 1728. *See, e.g.*, Davis v. Austin, 492 F. Supp. 273, 275-76 (N.D. Ga. 1980) (capital prisoner's minister and first cousin denied next friend standing).

108 *Whitmore*, 110 S. Ct. at 1728.

109 *Id.* at 1727-28 (quoting United States *ex rel.* Bryant v. Houston, 273 F. 915, 916 (2d Cir. 1921)).

more did not have next friend standing to bring a petition to challenge Simmons' sentence.[110]

In a dissenting opinion, Justice Marshall joined by Justice Brennan, began his analysis by asserting that the death penalty is a unique form of punishment due to its irrevocable nature.[111] The Justice opined that the Court should therefore utilize every available measure to ensure that the sentence is not arbitrarily or capriciously imposed.[112] The dissent also advocated a mandatory appellate review of every execution sentence to ensure that the sentence was not illegally imposed.[113]

Justice Marshall expressed his belief that capital appeals are constitutionally mandated procedures that are required by the eighth and fourteenth amendments in order to assure that states provide adequate protection against wrongful executions.[114] In support of its stance, the dissent presented statistical proof of the high percentage of death sentences that are subsequently reversed on appeal.[115] The Justice asserted that this proof demonstrates that each capital sentence necessitates a mandatory, nonwaivable appellate review.[116]

Justice Marshall further pointed out that capital appeals are not only necessary to protect a defendant against cruel and unusual punishment, but are also necessary to protect society as a whole from a state's unwarranted exercise of its police power.[117] In addi-

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110 *Id.* at 1729.

111 *Id.* at 1729-30 (Marshall, J., dissenting).

112 *Id.* The Justice stated:

> Under the [e]ighth [a]mendment, the death penalty has been treated differently from all other punishments. Among the most important and consistent themes in this Court's death penalty jurisprudence is the need for special care and deliberation in decisions that may lead to the imposition of that sanction. The Court has accordingly imposed a series of unique substantive and procedural restrictions designed to ensure that capital punishment is not imposed without the serious and calm reflection that ought to precede any decision of such gravity and finality.

Id. (quoting Thompson v. Oklahoma, 487 U.S. 815, 856 (1988) (O'Connor, J., concurring)).

113 *Id.* at 1731 (Marshall, J., dissenting). *See* Zant v. Stephens, 462 U.S. 862, 890 (1983) (Court claimed its decision to uphold the Georgia death penalty statute was contingent upon legislative mandatory appellate review provision); Gregg v. Georgia, 428 U.S. 153 (1976) (Court upheld Georgia's procedures for capital sentencing because its legislature required appeal for every death sentence).

114 *Whitmore*, 110 S. Ct. at 1731-32 (Marshall, J., dissenting).

115 *Id.* at 1731 (Marshall, J., dissenting).

116 *Id.*

117 *Id.* at 1732 (Marshall, J., dissenting) (citing Gilmore v. Utah, 429 U.S. 1012, 1019 (1976)).

tion, the Justice posited that "a defendant's voluntary submission to a barbaric punishment does not ameliorate the harm that imposing such a punishment causes to our basic societal values and to the integrity of our system of justice."[118] The dissent noted that almost every state which allows the death penalty has required a nonwaivable, automatic review of at least the capital sentence.[119] Justice Marshall claimed that this uniformity is further evidence that society

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118 *Id.*

119 *Id.* at 1733 (Marshall, J., dissenting). The dissent noted:

> Thirteen States, by statute, rule, or case law, explicitly provide that review of at least the capital sentence will occur with or without the defendant's election or participation. ALA. CODE § 12-22-150 (1986); CAL. PENAL CODE ANN. § 1239(b) (West Supp. 1990); People v. Stanworth, 71 Cal.2d 820, 832-34, 80 Cal. Rptr. 49, 58-59, 457 P.2d 889, 898-99 (1969); DEL. CODE ANN. Tit. 11, § 4209(g) (1987); Goode v. State, 365 So.2d 381, 384 (Fla. 1978) (construing Fla. Stat. § 921.141(4) (1989)); ILL REV. STAT., ch. 110A, ¦ 606(a) (1987); Judy v. State, 275 Ind. 145, 157-58, 416 N.E.2d 94, 102 (1981) (construing IND. CODE § 35-50-2-9 (1988)); MO. REV. STAT. § 565.035 (1986); NEV. REV. STAT. § 177.055(2) (1989); Cole v. State, 101 Nev. 585, 590, 707 P.2d 545, 548 (1985); N.J. STAT. ANN. § 2C:11-3(e) (West Supp. 1989); Commonwealth v. McKenna, 476 Pa. 428, 439-40, 383 A.2d 174, 181 (1978) (construing predecessor statute to 42 PA. CONS. STAT. § 9711(h) (1988)); TENN. CODE ANN. § 39-2-205 (1982); State v. Holland, 777 P.2d 1019, 1022 (Utah 1989) (construing UTAH CODE ANN. § 77-35-26(10) (Supp. 1989)); *see also* UTAH CODE ANN. § 76-3-206(2) (1978); VT. RULE APP. PROC. 3(b). Twenty-two states' statutes or rules employ language indicating that their appellate courts must review at least the sentence in every capital case. ARIZ. RULE CRIM. PROC. 31.2(b); COLO. REV. STAT. § 16-11-103(7)(a) (Supp. 1989); CONN. GEN. STAT. § 53a-46b (1985); GA. CODE ANN. § 17-10-35 (1982); IDAHO CODE § 19-2827 (1987); KY. REV. STAT. ANN. § 532.075 (Michie 1985); LA. CODE CRIM. PROC. ANN., Art. 905.9 (West 1984); MD. ANN. CODE, Art. 27, § 414 (1987); MISS. CODE ANN. § 99-19-105 (Supp. 1989); MONT. CODE ANN. § 46-18-307 (1989); NEB. REV. STAT. § 29-2525 (1989); N.H. REV. STAT. ANN. § 630:5(VI) (1986); N.J. STAT. ANN. § 31-20A-4 (1987); N.C. GEN. STAT. § 15A-2000(d)(1) (1988); OKLA. STAT., tit. 21, § 201.13 (Supp. 1989); ORE. REV. STAT. § 163.150(1)(g) (1989); S.C. CODE § 16-3-25 (1985); S.D. CODIFIED LAWS § 23A-27A-9 (1988); TEX. CRIM. PROC. CODE ANN. § 37.071(h) (Supp. 1990); VA. CODE § 17-110.1 (1988); WASH. REV. CODE § 10.95.100 (1989); WYO. STAT. § 6-2-103 (1988). Ohio's rule as to waiver is unclear. *See* OHIO REV. CODE ANN. § 2929.05 (1987). In State v. Brooks, 25 Ohio St. 3d 144, 495 N.E.2d 407 (1986), however, both the Ohio Court of Appeals and Ohio Supreme Court reviewed the defendant's death sentence after the state court of appeals denied his motion to withdraw his appeal.

Whitmore, 110 S. Ct. at 1733 n.1 (Marshall, J., dissenting). The Justice further noted that the Supreme Court of Arkansas is the only state supreme court that has precluded *all* appellate review when waived by a competent capital prisoner. *Id. See* Franz v. State, 296 Ark. 181, 196-97, 754 S.W.2d 839, 847 (1988) (Glaze, J., concurring and dissenting).

has a monumental interest in requiring a mandatory, nonwaivable appellate review.[120] The Justice stressed that even though some death row inmates may prefer execution over life in prison, society still has a duty to see that the state entitles the prisoner to every procedural safeguard before taking his life.[121]

Justice Marshall next condemned the majority for rigidly applying the requirements of the next friend standing doctrine in denying Whitmore's claim.[122] The Justice acknowledged that the Court has the power to amend any common law doctrine when a critical societal or judicial interest is at stake.[123] The Justice added that by not relaxing the requirements of that doctrine, the Court is allowing a voluntary execution to take place without ensuring that the sentence was fairly imposed.[124] The dissent charged that the Court was more concerned with preventing judicial access to "uninvited meddlers" than with society's more compelling interest in prohibiting an unwarranted execution of an innocent human being.[125] Justice Marshall concluded that the majority's holding not only promotes unwarranted killings by the state, but also impedes the constitutionally guaranteed rights of the convicted defendant in particular and of society in general.[126]

In *Whitmore v. Arkansas*, the Court aptly displayed the importance of adhering to the basic principles of standing to limit federal

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120 *Whitmore*, 110 S. Ct. at 1732 (Marshall, J., dissenting). The Justice based his proposition on Commonwealth v. McKenna, 476 Pa. 428, 383 A.2d 174 (1978) which provided that:

> The doctrine of waiver developed not only out of a sense of fairness to an opposing party but also as a means of promoting jurisprudential efficiency by avoiding appellate court determinations of issues which the appealing party had failed to preserve. It was not, however, designed to block giving effect to a strong public interest, which itself is a jurisprudential concern. It is evident from the record that [the convicted defendant sentenced to death] personally prefers death to spending the remainder of his life in prison. While this may be a genuine conviction on his part, the waiver concept was never intended as a means of allowing a criminal defendant to choose his own sentence. The waiver rule cannot be exalted to a position so lofty as to require this [c]ourt to blind itself to the real issue — the propriety of allowing the state to conduct an illegal execution of a citizen.

McKenna, 476 Pa. at 441, 383 A.2d at 181.

121 *Whitmore*, 110 S. Ct. at 1734 (Marshall, J., dissenting).

122 *See id.*

123 *Id.* at 1735 (Marshall, J., dissenting). Justice Marshall argued that since next friend standing is a common law doctrine and not a constitutional mandate, the Court should expand the doctrine. *Id.*

124 *Id.* at 1737 (Marshall, J., dissenting).

125 *Id.* at 1736 (Marshall, J., dissenting).

126 *See id.* at 1736-37 (Marshall, J., dissenting).

court jurisdiction.[127] In this particular instance, the Court correctly denied Whitmore standing in his individual capacity because he failed to demonstrate that he was exposed to the kind of injury sufficient to assert his claim.[128] More significantly, the Court cleverly unmasked Whitmore's next friend claim revealing a clearer picture of the unwelcomed "uninvited meddler."[129] Chief Justice Rehnquist properly ruled that Whitmore failed to display any significant relation to Simmons, that Simmons was incompetent or otherwise disabled, or that Whitmore was acting in Simmons' best interests.[130] The Court poignantly determined that Whitmore was acting pursuant to his own interests and was therefore not entitled to next friend standing.[131]

From *Gilmore* to *Whitmore*, the Court has consistently based its denial of next friend standing on the petitioner's failure to adequately establish the prisoner's incompetence.[132] In fact, it is questionable whether a capital prisoner is capable of making a competent decision while facing the realities of "life" on death row. Prisoners have defined this lifestyle as a "living death" existence known for its "barbaric conditions [which have] debilitating and life-negating effects on [each prisoner]."[133] Typically, a death row inmate's environment is in itself an independent source of stress and suffering.[134] Consequently, the prisoner's ability to think clearly and rationally may be hampered by the overwhelming pressure of his environment.[135] The inmate is faced with the dubious choice of

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127 *See supra* notes 3-4 and accompanying text.

128 *Whitmore*, 110 S. Ct. at 1724.

129 *See* Wilson v. Dixon, 256 F.2d 536, 538 (9th Cir. 1958); United States *ex rel.* Bryant v. Houston, 273 F. 915, 916 (2d Cir. 1921).

130 *Whitmore*, 110 S. Ct. at 1727-28.

131 *Id.*

132 *See, e.g.*, Whitmore v. Arkansas, 110 S. Ct. 1717 (1990) (Court denied death row inmate next friend standing because he did not prove that fellow inmate incompetently waived his right to appeal); Lenhard v. Wolff, 443 U.S. 1306 (Rehnquist, Circuit Justice (1979)), *stay of execution denied*, 444 U.S. 807 (1979) (mem.) (Court denied public defenders next friend standing because they did not prove that capital prisoner incompetently waived his right to appeal); Evans v. Bennett, 440 U.S. 1301 (Rehnquist, Circuit Justice (1979)), *stay of execution denied*, 440 U.S. 987 (1979) (mem.) (Court denied capital prisoner's mother next friend standing because she did not prove that her son incompetently waived his right to appeal); Gilmore v. Utah, 429 U.S. 1012 (1976) (Court denied capital prisoner's mother next friend standing because she did not prove that her son incompetently waived his right to appeal).

133 Strafer, *supra* note 58, at 869.

134 *Id.* at 868.

135 *Id.* Specifically, the experience has been described as:

> [A] painful oscillation between hope and despair. 'It's just like you are in the middle of a vice and one part of the vice is pulling you this

selecting the slow torture of life in prison or the horror and certainty of death. Accordingly, the prisoner is placed in a situation that often entices him to choose the quick way out—to abandon all appeals and accept his death sentence, for any delay will just prolong the torture.[136]

The inmate's hopeless existence causes him debilitating stress in which the trauma "play[s] a critical role in determining the nature and outcome of [his] coping efforts."[137] Because the inmate struggles to cope with an irreconcilable situation, any decision the inmate makes will be tainted. In light of the foregoing, the Court's requirement that a next friend prove an inmate's incompetence is anomalous, because the inmate's environment alone casts significant doubt upon his ability to make competent decisions.

Perhaps in the future judicial inquiry should focus on whether a more objective next friend would be capable of representing the inmate. Allowing this objective next friend standing to challenge a death sentence on behalf of a capital prisoner, whose mental capacity is suspect, would protect both the interests of the state as well as the individual prisoner.[138] The state may assume this role in its exercise of parens patriae authority.[139] Traditionally, the state uses the parens patriae power to act as a guardian of incompetents, minors or other legally disabled persons.[140]

Opponents of such state interference advocate the inmate's individual fundamental rights to privacy and death over the state's

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> way and one of them is pulling you the other way. And the vice is sharp.' Within parameters of one's existence cast in terms of uncertain hope and uncertain despair, arduous and recurring battles for peace of mind ensue. *Id.*

136 *See id.* at 872. Specifically one California inmate stated, "I would rather go downstairs to that gas chamber then [sic] have to spend the rest of my life here. Being free is being alive. If a person goes down to the gas chamber he's escaped. It is going to cost him his life, but he's escaped." *Id.* (footnote omitted).

137 *Id.* at 871.

138 Note, *supra* note 56, at 597. A capital defendant's death wish has been viewed as a "prima facie evidence of mental incapacity." *Id.* at 597 n.150.

139 *Id.* The parens patriae power has been defined as "a power which the members of the community have granted the state for the protection of their future well-being." *Id.* at 597 (footnote omitted). This power originated under English common law, which authorized the king to act as "general guardian of all infants, idiots and lunatics." *Id.* at 597 n.152 (quoting Note, *Developments in the Law — Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1208 (1974)). Specifically, "[t]he sovereign, as father of the country, was responsible for the care and custody of 'all selves.' In acting as parens patriae, the King . . . was required to promote the interests and welfare of his wards and was not empowered to sacrifice the ward's welfare to the welfare of others." *Id.* (quoting Note, *Developments in the Law — Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1207-08 (1974)).

140 *Id.* at 597.

general interests.[141] The state's interest in the preservation of life, however, is more compelling and is firmly rooted in a longstanding constitutional foundation which requires that it not be abridged in furtherance of a private or individual fundamental interest.[142] Accordingly, the state exercises its police power to protect the welfare and safety of its citizens as a whole. It frequently prevents society's members from voluntarily engaging in dangerous activities.[143] This duty is based upon the state's interest in preserving the family, economy and the general welfare of society.[144] As a result, the individual's private interest is overridden by the greater interest of society as a whole.

By analogy, the state as *parens patriae* has a duty to protect the prisoner from foregoing an appeal when such waiver is a product of unbalanced or illogical judgments.[145] Similarly, next friend standing should be accorded the same deference given to the state when exercising its authority as parens patriae. For unlike Whitmore, persons acting under the parens patriae doctrine are acting in the best interests of the prisoner and society in general. Under this analysis, a careful case-by-case review would not only screen out the "uninvited meddler," but would also protect the greater interests of society and the significant individual fundamental rights of the prisoner.

Lisa Ann Chiappetta

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141 For further discussion of the inmate's right to die and right to privacy, *see* Note, *supra* note 56, at 603-14.

142 *Id.* at 614-15. For example, the United States Supreme Court has held that the state has a compelling interest in preserving the life of a child which cannot be abridged by an individual's fundamental interest in freedom of religion. *See, e.g.*, Jehovah's Witnesses v. King County Hosp., 390 U.S. 598 (1968) (per curiam) (state required Jehovah Witness' to allow hospital to give their children blood transfusions to save the child's life, even though such action was against religious beliefs).

143 Note, *supra* note 56 at 597. The state for example has a duty to prevent suicide. For further discussion *see id.* at 617-19.

144 *Id.*

145 *Id.* at 618.