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Third Party Standing--Next Friends as Enemies: Third Party Petitions for Capital Defendants Wishing to Waive Appeal

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THIRD PARTY STANDING—"NEXT FRIENDS" AS ENEMIES: THIRD PARTY PETITIONS FOR CAPITAL DEFENDANTS WISHING TO WAIVE APPEAL

Whitmore v. Arkansas, 110 S. Ct. 1717 (1990)

I. INTRODUCTION

In *Whitmore v. Arkansas*,[1] the United States Supreme Court decided that a third party may not petition for stay of a defendant's capital sentence if the defendant competently waives appeal.[2] The Court denied this "next friend"[3] petition for a writ of habeas corpus on the ground that the next friend petitioner lacked standing to bring such an action.[4]

This Note posits that the *Whitmore* decision is consistent with the majority of Supreme Court cases addressing third party and next friend standing for individuals seeking appeals on behalf of capital defendants. While one might analyze *Whitmore* as a case concerning the philosophical arguments for or against capital punishment, *Whitmore* is best understood as a standing case.

This Note analyzes *Whitmore* in light of third party standing and next friend jurisprudence, and concludes that the Court's approach in *Whitmore* is consistent with the demands of the Constitution's "case or controversy" requirement[5] and the weight of Supreme Court precedent. Additionally, this Note concludes that the Court's strict, traditional application of third party standing principles is preferable to the course urged by the *Whitmore* dissent. The dis-

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1 110 S. Ct. 1717 (1990).

2 *Id.* at 1728-29.

3 "Next friend" status is a jurisdictional grant of standing to a third party. The third party is allowed to pursue the legal rights of the real party in interest. The grant of next friend status historically has been limited to cases where, because of incapacity, incompetence or unavailability, the real party in interest is unable to advocate his or her position. The next friend acts in the real party's stead to pursue the real party's interests as the real party would if he or she were present.

4 *Whitmore*, 110 S. Ct. at 1728-29.

5 *See infra* notes 34-63 and accompanying text for discussion of Article III's case or controversy requirement.

sent's standing theory is outcome-motivated and would reduce the predictability of Supreme Court standing decisions, unnecessarily politicize the Court's standing determinations, and denigrate the value of self-determination for criminal defendants.

II. Facts and Procedural History

On December 28, 1987, at four different locations in the town of Russellville, Arkansas, Ronald Gene Simmons went on a shooting spree, killing two people and wounding three others.[6] Later that day, Russellville police officers arrested Simmons.[7] After his arrest, the county sheriff's office searched Simmons' house in nearby Dover, Arkansas, and discovered the bodies of fourteen members of Simmons' family, all of whom had been murdered.[8] Five of the bodies were found in Simmons' house; seven were buried in a shallow grave outside.[9] Two infant victims were found hidden in the trunks of junk automobiles near the house.[10]

The state of Arkansas filed two sets of criminal charges against Simmons.[11] One charge arose from the two Russellville slayings, and the other concerned the murders of his family members.[12] After a trial on the Russellville murders in Franklin County Circuit Court, the jury convicted Simmons of capital murder and sentenced him to death.[13] Immediately following sentencing, Simmons made the following statement under oath: "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."[14] After the trial court set a date for execution, Simmons continued to refuse his unqualified right to an appeal.[15] The trial court shortly thereafter conducted a hearing to determine Simmons' competence to waive further appeals.[16] The court concluded that Simmons knowingly and intelligently waived his right of appeal.[17]

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6 *Whitmore*, 110 S. Ct. at 1721.

7 Brief for Respondent at 4, Whitmore v. Arkansas, 110 S. Ct. 1717 (1990) (No. 88-7146).

8 *Id.*

9 *Id.*

10 *Id.*

11 Whitmore v. Arkansas, 110 S. Ct. 1717, 1721 (1990).

12 *Id.*

13 *Id.*

14 Franz v. State, 296 Ark. 181, 183, 754 S.W.2d 839, 840 (1988).

15 *Id.*

16 *Whitmore*, 110 S. Ct. at 1721.

17 *Id.*

As Simmons' execution date approached, Louis J. Franz, a Catholic priest who counseled inmates, petitioned the Arkansas Supreme Court for permission to raise an appeal on Simmons' behalf as his "next friend."[18] In that proceeding, *Franz v. State*,[19] the court held that Franz did not have standing as Simmons' next friend.[20] The court also rejected Franz's claim for standing as "a concerned citizen," wherein he argued that he should be heard so that an important legal issue would not remain unresolved at the appellate level.[21] Additionally, in dicta, the court stated that a defendant sentenced to death could waive his direct 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."[22] The Arkansas Supreme Court upheld the trial court's finding that Simmons' waiver met this test.[23]

After this defeat, Franz and another death row inmate, Darrell Wayne Hill, applied for a writ of habeas corpus in Federal District Court for the Eastern District of Arkansas to prevent Simmons' scheduled execution.[24] The district court, like the Arkansas Supreme Court, denied their petition, holding that Franz and Hill lacked standing.[25]

Subsequently, an Arkansas trial court tried Simmons for the murder of his fourteen family members.[26] On February 10, 1989, a jury convicted him of murder and sentenced him to death by lethal injection.[27] Simmons again waived appeal.[28] The Arkansas Supreme Court, pursuant to the rule it recently had established in *Franz*, determined that Simmons had knowingly and intelligently waived his appeal right, and affirmed the trial court's decision.[29]

Three days after the Arkansas Supreme Court's determination, Jonas Whitmore, another Arkansas death row inmate, sought per-

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18 *Id.* *See infra* notes 64-87 and accompanying text for a discussion of next friend and third party standing.

19 296 Ark. 181, 754 S.W.2d 839 (1988).

20 *Id.* at 194, 754 S.W.2d at 842.

21 *Id.*

22 *Id.* at 189, 754 S.W.2d at 843.

23 *Id.* at 194, 754 S.W.2d at 844.

24 Franz v. Lockhart, 700 F. Supp. 1005 (E.D. Ark. 1988). The writ in this case would have postponed the execution for the purpose of assessing the constitutionality of Simmons' conviction in the Arkansas courts.

25 *Id.* at 1014.

26 Whitmore v. Arkansas, 110 S. Ct. 1717, 1722 (1990).

27 *Id.*

28 *Id.*

29 Simmons v. State, 298 Ark. 193, 766 S.W.2d 423 (1989) (per curiam).

mission from the Arkansas Supreme Court to intervene "as a next friend of Ronald Gene Simmons."[30] Again, the Arkansas Supreme Court denied this motion, concluding that Whitmore lacked standing to intervene.[31] On Whitmore's request, the United States Supreme Court granted a stay of Simmons' execution scheduled for March 16, 1989.[32] The Court granted Whitmore's petition for certiorari to consider fully the question of "whether a third party has standing to challenge the validity of a death sentence imposed on a capital defendant who has elected to forgo his right of appeal to [a] state supreme court."[33]

III. BACKGROUND

A. THIRD PARTY STANDING AND THE CASE OR CONTROVERSY DEMANDS OF ARTICLE III OF THE CONSTITUTION

Article III of the Constitution establishes that federal judicial power extends only to "cases" or "controversies."[34] The case or controversy requirement is not easily defined, however. One might argue that it should be defined broadly, because important issues deserve full argument and clear decisions on the merits, regardless of the form in which they are presented. However, the language of Article III itself, separation of powers considerations, overburdened federal dockets, and concerns about paternalism[35] suggest the need

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

31 *Simmons*, 298 Ark. at 255, 766 S.W.2d at 423.

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

33 *Id.* The Court previously had encountered a third party petition to stay the execution of a capital defendant who wished to forgo further appeals in Gilmore v. Utah, 429 U.S. 1012 (1976). In a 5-4 decision, the *Gilmore* Court refused to stay Gary Gilmore's scheduled execution. *Id.* at 1012. The dissent, however, argued that the issues raised by *Gilmore* were sufficiently important to give the matter plenary consideration. *Id.* at 1020. Since *Gilmore*, the Court has received other applications from third parties for stays of execution. *See* Lenhard v. Wolff, 443 U.S. 1306, *stay of execution den.*, 444 U.S. 807 (1979); Evans v. Bennett, 440 U.S. 1301, *stay of execution den.*, 440 U.S. 987 (1979). *Whitmore* was the first case where the Court requested full briefing and argument in order to issue an opinion on the recurring issue of a third party's standing for a capital offender who wished to waive further appeals. 110 S. Ct. at 1722.

34 The Constitution provides in pertinent part that:

> The judicial power shall extend to all *Cases*, in law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to *Controversies* to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State;—between Citizens of different States—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, sec. 2 (emphasis added).

35 One commentator has written that:

for a narrow definition. Thus, the Supreme Court has struggled to develop a consistent body of legal reasoning on the case or controversy standard required by Article III.[36]

The case or controversy demands of Article III are activated by standing doctrine, particularly so when questions of third party standing are addressed. The issues underlying third party standing were first raised in the famous 1803 case *Marbury v. Madison*.[37] In *Marbury*, the Court noted the tension underlying questions of standing: the allocation of legal rights within a legal system organized to serve both the litigants at bar, and the demands of the legal system itself.[38] Chief Justice Marshall recognized in *Marbury* that these interests often clash. He understood the appeal of the substantive arguments made by Marbury, yet was reluctant to threaten the executive branch's ability to make autonomous political determinations. He stated that "the province of the court is, *solely, to decide on the rights of individuals* . . . ."[39]

Other nineteenth century decisions also recognized the relatively limited role of courts by prohibiting "friendly suits"—actions brought by plaintiffs and defendants who agreed to bring a lawsuit jointly after attempts to influence legislation had failed.[40] Despite prohibiting friendly suits, however, the Court did not explicitly discuss third party standing.

In *Mississippi & Missouri Railroad v. Ward*,[41] the Court first focused on the questions raised by a third party seeking to further a generalized interest through litigation.[42] Specifically, the third party in *Ward* sought abatement of a bridge constructed across the

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[C]ourts should be reluctant to act for paternalist reasons in the absence of legislative direction or guidance. But because no general bar to paternalist action is explicit or implicit in our Constitution, legislatures should be freer than courts to embark on paternalist courses, subject only to popular will and to limited constitutional restraints.

Shapiro, *Courts, Legislatures and Paternalism*, 74 VA. L. REV. 519, 521 (1988).

36 "[T]he concept of 'Art[icle] III standing' has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it." Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 475 (1982).

37 5 U.S. (1 Cranch) 137 (1803).

38 The *Marbury* Court recognized that the plaintiff judge-appointee had strong substantive arguments for the delivery of his judicial commission, but noted that other interests were also at issue, such as separation of powers considerations.

39 *Id.* at 170 (emphasis added).

40 *See, e.g.*, Chicago & Grand Trunk Ry. v. Wellman, 143 U.S. 339, 345 (1892) ("it was never the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act").

41 67 U.S. (2 Black) 485 (1863) (complainant's nuisance suit could not be decided on the merits unless the "plaintiff stands in a position to maintain this suit").

42 *Id.* at 491-92.

Mississippi River.[43] The Court rejected the plaintiff's petition because he lacked standing, stating that "[t]he private party sues rather as a public prosecutor than on his own account; and unless he shows that he has sustained, and is still sustaining, individual damage, he cannot be heard."[44]

In *Frothingham v. Melon*,[45] even more clearly than in *Ward*, "standing . . . emerged as the decisive issue."[46] The *Frothingham* plaintiff sought standing to challenge the Federal Maternity Act as an interested taxpayer.[47] The Supreme Court denied standing, declaring that:

> The party who invokes the power [of the courts] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.[48]

In the post-World War II years, the Court's formerly strict application of the third party standing doctrine and the implementation of the case or controversy requirement loosened.[49] For example, *Flast v. Cohen*,[50] decided in 1968 by the Warren Court, was factually similar to *Frothingham*, but in *Flast* the Court reached a different result. In *Flast*, the plaintiff, a taxpayer, sought standing to challenge a federal education spending policy.[51] In contrast to its *Frothingham* ruling, however, the Court held that concerned taxpayers might have standing as third parties "if they could establish a double nexus 'between the status asserted . . . and the claim.' "[52] While the Court's intended meaning of this "double nexus" remained unclear, the language in the opinion left the door open to third parties seeking standing as taxpayers.[53]

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[43] *Id.* at 492.

[44] *Id.*

[45] 262 U.S. 447 (1923).

[46] Note, *More than an Intuition, Less than a Theory: Toward a Coherent Doctrine of Standing*, 86 COLUM. L. REV. 564, 564-65 (1986) [hereinafter Note, *More than an Intuition*].

[47] *Frothingham*, 262 U.S. at 448.

[48] *Id.*

[49] *See generally* Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881 (1983) (criticizes the broad view of standing, particularly as it evolved during the post-World War II period).

[50] 392 U.S. 83 (1968).

[51] *Id.* at 85.

[52] *See* Note, *More than an Intuition*, *supra* note 46, at 565 (citing *Flast*, 392 U.S. at 102).

[53] Third party taxpayer standing was not available for long, however. Just six years after the *Flast* decision, the Court rejected taxpayer standing in United States v. Richardson, 418 U.S. 166 (1974). In *Richardson*, the Court held that the plaintiff did not have standing as a concerned taxpayer to challenge the constitutionality of secret CIA appropriations.

The Court further distanced itself from taxpayer standing in Valley Forge Christian

In the 1973 case *United States v. Students Challenging Regulatory Agency Procedures* ("*SCRAP*"),[54] the Court recognized its broadest conception of standing. In *SCRAP*, a group of George Washington Law School students were granted standing to challenge the Interstate Commerce Commission's failure to prepare an environmental impact statement before implementing a freight surcharge for railroads.[55] The students argued that as park users, their interests would be affected, because implementation of a surcharge would increase the amount of litter in parks the students were likely to frequent.[56]

Since *SCRAP*, the Court's third party standing jurisprudence has returned to its early nineteenth and mid-twentieth century construction of Article III. The Supreme Court has adopted a stricter view of third party standing requiring that the plaintiff must have suffered actual personal injury.[57] Through a long line of decisions, the Court has considerably pared back third party standing. Recently, the Court even mentioned *SCRAP* with disfavor, terming it "attenuated" and deeming it the "very outer limit of the law" regarding third party standing.[58]

College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982). In *Valley Forge*, the Court held that the plaintiff did not have standing as a taxpayer to challenge the transfer of surplus federal property to a religiously affiliated college.

54 412 U.S. 669 (1973) [hereinafter "SCRAP"].

55 *Id.* at 671.

56 *Id.* They claimed this increase in litter would result because recycled goods would cost more after implementation of the freight surcharge. This in turn would make the use of recycled goods less attractive. *Id.* at 678.

57 *See, e.g.*, Allen v. Wright, 468 U.S. 737 (1984) (standing denied to parents of black children in suit against IRS tax policy toward allegedly discriminatory private schools because plaintiffs alleged no personal injury); Los Angeles v. Lyons, 461 U.S. 95 (1983) (standing denied to plaintiff in civil rights action against city for police choke-hold practice because plaintiff could not show that he would actually be subjected to the chokehold); *Valley Forge*, 454 U.S. 464 (1982) (standing denied to plaintiff in suit challenging the transfer of surplus federal property to a religiously affiliated college because plaintiff did not establish that any of its members would actually suffer individual harm); Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976) (standing denied to indigent plaintiffs in suit against Secretary of the Treasury for an IRS ruling, because they could not demonstrate that they would be personally affected by the ruling); Warth v. Seldin, 422 U.S. 490 (1975) (standing denied to community group challenging town's ordinance for its allegedly discriminatory effects because plaintiff could not establish that any of its members were personally harmed); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) (standing denied to association opposed to the Vietnam War in a suit challenging congressional membership in reserves because members of plaintiff group were unable to demonstrate a genuine individual interest); O'Shea v. Littleton, 414 U.S. 488 (1974) (standing denied to community group which brought suit against magistrate and state circuit court judge because the plaintiff could not demonstrate that any of its members were personally injured).

58 Whitmore v. Arkansas 110 S. Ct. 1717, 1725 (1990).

Through this return to the stricter application of standing doctrine and third party standing, the Supreme Court has developed a set of criteria that a litigant must meet to have standing. Specifically, a litigant must: (1) "clearly demonstrate that he or she has suffered an 'injury in fact;' "[59] (2) allege an injury to himself or herself that is "distinct and palpable,"[60] not "abstract,"[61] "conjectural" or "hypothetical;"[62] and (3) demonstrate successfully that the alleged injury "fairly can be traced to the challenged action," and is "likely to be redressed by a favorable decision."[63]

B. NEXT FRIEND STANDING AND CRIMINAL DEFENDANTS

"Next friend" status applies third party standing to criminal law.[64] Traditionally, courts granted next friend status to a third party when the real party in interest was unable to bring the challenge himself or herself because of inaccessibility or mental incompetence.[65] Third parties have successfully represented criminal defendants in such instances as where the defendant was held in a foreign country,[66] subject to prison restrictions limiting his ability to communicate,[67] incarcerated under "lock-down,"[68] and declared judicially mentally incompetent, and thus unable to represent himself.[69]

In addition to assessing the defendant's incompetence or inability to pursue challenges on his own behalf, courts also have weighed the next friend's qualifications or relationship to the real party before granting next friend status.[70] Such assessments attempt to

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59 *Id.* at 1723.

60 *Warth*, 422 U.S. at 501.

61 *O'Shea*, 414 U.S. at 494.

62 Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983).

63 Simon v. Kentucky Welfare Rights Org., 426 U.S. 26, 38, 41 (1976).

64 The concept of next friend standing is not exclusively limited to criminal law. *See, e.g.*, United States *ex. rel.* Funaro v. Watchorn, 164 F. 152 (C.C.S.D.N.Y. 1908) (in civil deportation proceedings against an illegal alien, counsel granted next friend status because of defendant's inability to communicate in English).

65 Strafer, *Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. CRIM. L. & CRIMINOLOGY 860, 908-09 (1983).

66 United States *ex. rel.* Toth v. Quarles, 350 U.S. 11, 13 n.3 (1955) (defendant's sister granted next friend status while defendant was held in Korea).

67 Morris v. United States, 399 F. Supp. 720 (E.D. Va. 1975) (next friend status granted to petitioner's co-defendant when inmate was unable to communicate verbally or by mail with his attorney because of prison restrictions).

68 Warren v. Cardwell, 621 F.2d 319 (9th Cir. 1980) (next friend status granted to attorney when his inmate client was unable to communicate with the outside world).

69 Hays v. Murphy, 663 F.2d 1004 (10th Cir. 1981) (next friend status granted to the mother of a capital defendant found incompetent).

70 *See, e.g.*, Lenhard v. Wolff, 443 U.S. 1306 (1974) (fact that none of capital defendant's *family members* brought challenge at request of defendant was noted as possible

determine if the alleged next friend has the real party's genuine interests at heart, whether the next friend actually is acquainted with the inmate, or is merely seeking next friend status to further his or her own interests.[71]

The Court has viewed third parties seeking next friend status for uncooperative competent capital defendants suspiciously. In each of the three cases presented to the Court under this fact pattern, the Court has denied next friend status.[72]

In the first of these cases, *Gilmore v. Utah*,[73] Bessie Gilmore, the capital defendant's mother, petitioned for a stay of execution. The Court denied the petition and refused to issue a stay, finding that Gary Gilmore competently had waived appeal.[74] The Court stated that Gilmore's mother could be granted standing "only if it were demonstrated that Gary Mark Gilmore [was] unable to seek relief in his own behalf."[75] In this instance, the Court noted that "the 'next friend' concept [was] wholly inapplicable to this case."[76]

As in *Gilmore*, the next friend applicant in *Evans v. Bennett*[77] was the capital defendant's mother. Like Gary Gilmore, John Evans, the defendant, wished to waive appeal and be executed.[78] Finding him competent to waive his right to appeal,[79] the Court proceeded to

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evidence that next friend petitioner had no real interest in defendant's welfare); *Hays*, 663 F.2d at 1009 (next friend status granted to mother of incompetent capital defendant in part because court believed that her relationship with son would cause her to be a good advocate for him); United States *ex rel.* Funaro v. Watchorn, 164 F. 152 (C.C.S.D.N.Y. 1908) (next friend standing granted to attorney to bring suit on behalf of foreign language-speaking client under a deportation proceeding partly because of attorney-client relationship). *But see* Gilmore v. Utah, 429 U.S. 1012 (1976) (next friend standing denied to mother of capital defendant because defendant wished to waive appeals and was found competent to do so); Davis v. Austin, 492 F. Supp. 273, 275-76 (N.D. Ga. 1980) (next friend status denied to defendant's minister and first cousin); Evans v. Bennett, 467 F. Supp. 1108 (S.D. Ala. 1979) (next friend standing denied to mother of defendant because defendant was found competent and brought no post conviction proceedings on his own behalf).

71 Whitmore v. Arkansas, 110 S. Ct. 1717, 1728 (1990) (quoting United States *ex. rel.* Bryant v. Houston, 273 F. 915 (2d Cir. 1921)) ("it was not intended that the writ of habeas corpus should be availed of, as matter of course, by intruders or uninvited meddlers, styling themselves as next friends").

72 *Lenhard*, 443 U.S. 1306, *stay of execution den.*, 444 U.S. 807 (1979); *Evans*, 440 U.S. 1301, *stay of execution den.*, 440 U.S. 987 (1979); *Gilmore*, 429 U.S. 1012, *reh'g denied*, 429 U.S. 1030 (1976).

73 429 U.S. 1012 (1976).

74 *Id.* at 1017.

75 *Id.* at 1014.

76 *Id.*

77 440 U.S. 1301, *stay of execution den.*, 440 U.S. 987 (1979).

78 *Id.* at 1301.

79 *Id.* at 1302.

deny his mother's application for a stay of execution.[80] As in *Gilmore,* the competent waiver of further appeals precluded next friend standing for a third party's petition on the defendant's behalf.[81]

The facts of *Lenhard v. Wolff*[82] are similar to both *Gilmore* and *Evans*. However, in *Lenhard,* two deputy public defenders sought a stay for the unwilling capital defendant, Jesse Bishop. To initiate this stay, the public defenders first sought a writ of habeas corpus as next friends.[83] As in *Gilmore* and *Evans*, the Court held once again that the petitioners lacked standing, because the defendant had competently waived further appeal.[84]

Though these recent attempts to appeal a capital defendant's sentence have been uniformly unsuccessful when the defendant wished to waive appeal, courts nevertheless have established criteria for establishing next friend status. First, the person asserting next friend status must demonstrate why the real party in interest cannot appear on his or her own behalf.[85] Second, the next friend must be truly dedicated to the best interest of the real party.[86] Finally, courts also may look to the next friend's relationship to the real party.[87] The *Whitmore* Court adopted and applied these criteria.

IV. SUPREME COURT OPINIONS

A. THE MAJORITY

Writing for the majority,[88] Chief Justice Rehnquist dismissed the writ of certiorari, holding that Jonas Whitmore lacked standing.[89] The Court based its holding on the "threshold inquiry" of standing, squarely rejecting Whitmore's claim that his interest in

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80 *Id.*

81 *Id.*

82 443 U.S. 1306, *stay of execution den.*, 444 U.S. 807 (1979).

83 *Id.* at 1308.

84 *Id.*

85 Whitmore v. Arkansas, 110 S. Ct. 1717, 1727 (citing Wilson v. Lane, 870 F.2d 1250, 1253 (7th Cir. 1989)).

86 Morris v. United States, 399 F. Supp. 720, 722 (E.D. Va. 1975).

87 *See supra* notes 70-71 and accompanying text for discussion of this point.

88 Chief Justice Rehnquist was joined by Justices White, Blackmun, Stevens, O'Connor, Scalia and Kennedy.

89 *Whitmore,* 110 S. Ct. at 1721. Whitmore raised an eighth amendment claim that, in addition to abridging his right to bring suit as Simmons' next friend, the Arkansas courts also had infringed rights that the eighth and fourteenth amendments granted to him personally. *Id.* at 1723. The Court declined to address the eighth amendment claim brought by Whitmore on his own behalf, finding that he lacked sufficient Article III standing. *Id.* at 1728-29.

Simmons' execution created a "case or controversy."[90] The majority also found Whitmore's argument for "next friend" standing unconvincing.[91]

At the outset, the Court reviewed the requirements for Article III standing.[92] First, the Court explained that a litigant must demonstrate that he or she has suffered an injury in fact.[93] An injury in fact, Chief Justice Rehnquist emphasized, must be concrete, and the complainant must allege not only that the injury is to himself or herself, but also that it is "distinct and palpable,"[94] not merely "abstract,"[95] "conjectural," or "hypothetical."[96] Second, the Court noted that a litigant must demonstrate that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision."[97]

Whitmore argued that Arkansas' policy of comparative review of sentences provided the basis for his standing to petition the Court on Simmons' behalf.[98] Comparative review, as practiced in Arkansas,[99] would operate if Whitmore were again convicted and sentenced to death, and he subsequently appealed this sentence to the Arkansas Supreme Court. That court would then compare Whitmore's crimes[100] to the crimes committed by other capital de-

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90 *Id.* at 1724-25. *See supra* notes 34-63 and accompanying text for further discussion on the case or controversy standard.

91 *Id.* at 1727.

92 *Id.* at 1722-26.

93 *Id.*

94 *Id.* (citing Warth v. Seldin, 422 U.S. 490 (1975) (standing denied to organizations and individuals in suit against zoning board because no named plaintiff asserted an actual injury)).

95 *Id.* (citing O'Shea v. Littleton, 414 U.S. 488 (1974) (residents denied standing to pursue discriminatory practices case against county magistrate and associate judge of county court because none of named plaintiffs asserted an actual injury)).

96 *Id.* (citing Los Angeles v. Lyons, 461 U.S. 95 (1983) (plaintiff denied standing in civil rights action against city for police choke-hold practice because he could not show that practice would actually affect him)).

97 *Id.* (citing Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976) (indigent plaintiffs denied standing in suit against Secretary of the Treasury for IRS ruling because plaintiffs were unable to show that their injury resulted from the revenue ruling)).

98 *Id.* at 1723.

99 *See* Collins v. Arkansas, 261 Ark. 195, 548 S.W.2d 106 (Arkansas Supreme Court explicitly adopted comparative review as a feature of capital case appeals in Arkansas, and outlined the procedures to be followed), *cert. denied*, 434 U.S. 878 (1977).

100 Whitmore had inflicted ten stab wounds on his victim, cut her throat, and carved an "X" on her face. Whitmore v. State, 296 Ark. 308, 756 S.W.2d 890 (1988). Convicted for murder, he was sentenced to death. *Id.* When he petitioned the court for next friend status for Simmons, Whitmore had already exhausted his direct appellate review. *Id.* Arkansas also denied him state post-conviction relief. Whitmore v. State, 299 Ark. 55, 771 S.W.2d 266 (1989). Whitmore's assertion that the sentencing data base should

fendants to insure that his sentence was not arbitrarily or freakishly applied.[101] Whitmore reasoned that if Simmons' death sentences were not reviewed, then the horrible crimes committed by Simmons would not be made part of the sentencing data base that later would be used by a court to review Whitmore's sentence. Accordingly, the omission of Simmons' sentence would skew the sentencing data base, which would substantially impair Whitmore's interests.[102] Such a turn of events, Whitmore argued, could harm his chance of having his sentence overturned on appeal, because Simmons' heinous crimes would not counterbalance his single murder.[103]

The majority refused to accept this claim, not only because it found such reasoning "too speculative,"[104] but also because such an argument assumed that Simmons' mass murder conviction would be used in a comparative review of Whitmore's single murder.[105] Further, the Court noted that Whitmore's claim was at least as speculative as other cases where future injuries alleged by a third party were found inadequate to establish standing.[106]

Whitmore next asserted that he deserved standing due to his interest as a citizen in the Arkansas appellate process for capital

include Simmons' crimes depended on Whitmore's receiving future habeas corpus relief entitling him to a new trial. *Whitmore*, 110 S. Ct. at 1724.

101 *See Collins*, 261 Ark. 195, 548 S.W.2d 106.

102 *Whitmore*, 110 S. Ct. at 1727.

103 *Id.* In its comparative review of Whitmore's original sentence, the Arkansas Supreme Court found that his capital sentence was similar to capital sentences handed down for felony murders committed in similar robbery situations. *Whitmore*, 296 Ark. at 317, 756 S.W.2d at 895. The Arkansas Supreme Court's employment of the Arkansas comparative review system suggests that Whitmore's "complete data base" theory was unrealistic. His sentence was compared to the sentences for other single murder defendants, not multiple murderers like Simmons. *Id.*

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

105 *Id.*

106 *Id.* *See* Diamond v. Charles, 476 U.S. 54 (1986) (Court rejected doctor's prediction of the effects of state law restricting abortions as pure speculation too remote for him to establish third party standing); Los Angeles v. Lyons, 461 U.S. 95 (1983) (allegation that police choke-hold practice could potentially injure petitioner if he were arrested in the future was found too remote, and plaintiff was denied standing); Ashcroft v. Mattis, 431 U.S. 171 (1977) (standing denied to plaintiff who brought suit against police for the possibility that excessive force might be used against him in the future if he were arrested); Golden v. Zwickler, 394 U.S. 103 (1969) (standing denied to former Congressman who based his injury on possibility that he might later run for political office).

The Court also distinguished *Whitmore* from *SCRAP*, a case it termed "the very outer limit of the law" regarding the standing question. *Whitmore*, 110 S. Ct. at 1725. In *SCRAP*, the majority argued, at least the plaintiffs alleged that certain specific and perceptible harms "would befall its members." *SCRAP*, 412 U.S. 669, 688 (1973). No such argument was made by Whitmore. *See supra* notes 54-58 and accompanying text for further discussion of the *SCRAP* case.

crimes.[107] Specifically, Whitmore expressed an interest in the Simmons execution as a citizen concerned with the proper administration of the Arkansas death penalty.[108] The Court summarily dismissed this argument, quoting *Allen v. Wright*:[109] " 'This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction.' "[110]

The majority also rejected Whitmore's argument that traditional standing requirements ought to be relaxed in death penalty cases where the defendant waives appeal.[111] The majority explained that Article III's case or controversy requirement was not a judicial rule of practice, but an important constitutional requirement, and "it [was] not for [the] Court to employ untethered notions of what might be good public policy to expand our jurisdiction in an appealing case."[112]

Finally, the majority declined to accept Whitmore's alternative appeal for "next friend" standing, holding that his interests did not satisfy the demands for granting such status:[113] Simmons was not mentally incompetent, nor was he held in a foreign country or otherwise unable to petition the Court on his own behalf.[114] Furthermore, Whitmore not only had no meaningful relationship to Simmons, but was acting in *opposition* to Simmons' wishes, as an "uninvited meddler" rather than as a next friend.[115]

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107 *Whitmore*, 110 S. Ct. at 1725.

108 *Id.*

109 468 U.S. 737 (1984) (standing denied to parents of black children in suit against IRS for its granting of tax-exempt status to allegedly racially discriminatory private schools because parents' theory that their children were less likely to be educated in racially integrated schools was too remote).

110 *Whitmore*, 110 S. Ct. at 1725-26 (quoting *Allen*, 468 U.S. at 754). The Court also quoted from Valley Forge College v. Americans United for Separation of Church & State, Inc., 454 U.S 752 (1982) (standing denied to organization dedicated to separation of church and state seeking to challenge government's transfer of surplus federal property to religious college because plaintiff did not prove actual injury), and Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974) (generalized interest of citizens opposed to the Vietnam War was insufficient to establish standing in suit challenging Reserve membership of members of Congress).

111 *Whitmore*, 110 S. Ct. at 1726.

112 *Id.*

113 *Id.* *See supra* notes 64-87 and accompanying text for a discussion of the traditional requirements for granting next friend status.

114 *Whitmore*, 110 S. Ct. at 1728-29.

115 *Id.* at 1727-28.

B. THE DISSENT

Writing the dissent,[116] Justice Marshall condemned the majority for failing to address Whitmore's eighth amendment claim.[117] The majority's emphasis on the standing issue to the exclusion of the more important constitutional issue, in Justice Marshall's opinion, was a "rigid application" of a mere "common law doctrine that the Court has the power to amend."[118]

Justice Marshall first addressed the question of appellate review of criminal matters.[119] While granting that the Constitution did not require such review in non-capital cases,[120] Justice Marshall distinguished capital cases as uniquely irrevocable.[121]

Justice Marshall next addressed mandatory appellate review for capital offenders. He cited the Court's approval of state capital punishment statutes,[122] arguing that the Court had upheld the constitutionality of these state statutes because they provided procedural safeguards against arbitrary or erroneous capital sentences.[123] Thus, the Court approved state death penalty sentences for Georgia,[124] Florida,[125] and Texas[126] "in large part because the statute[s] required appellate review of every death sentence."[127] For further evidence of his assertion, Justice Marshall pointed to statistics showing that a relatively high rate of death sentences are overturned upon appeal.[128]

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116 Justice Marshall was joined by Justice Brennan in the dissent.

117 *Whitmore*, 110 S. Ct. at 1729 (Marshall, J., dissenting).

118 *Id.* (Marshall, J., dissenting).

119 *Id.* (Marshall, J., dissenting).

120 *Id.* (Marshall, J., dissenting) (citing Ross v. Moffitt, 417 U.S. 600, 611 (1974)).

121 *Id.* (Marshall, J., dissenting). Justice Marshall cited Justice O'Connor's concurrence in Thompson v. Oklahoma, where she stated:

> Under the Eighth Amendment, 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.

487 U.S. 815, 856 (1988) (O'Connor, J., concurring).

122 *Whitmore*, 110 S. Ct. at 1730 (Marshall, J., dissenting).

123 *Id.* (Marshall, J., dissenting).

124 Gregg v. Georgia, 428 U.S. 153 (1976) (joint opinion) (Georgia death penalty held constitutional).

125 Profitt v. Florida, 428 U.S. 242 (1976) (joint opinion) (Florida death penalty held constitutional).

126 Jurek v. Texas, 428 U.S. 262 (1976) (joint opinion) (Texas death penalty held constitutional).

127 *Whitmore*, 110 S. Ct. at 1730 (Marshall, J., dissenting).

128 *Id.* at 1731 (Marshall, J., dissenting). For instance, since 1983, the Arkansas

In addition to constitutional demands for mandatory appellate review, Justice Marshall also found a societal interest in preserving the integrity of the criminal justice system by such review.[129] This important interest, he asserted, was evidenced by the fact that "almost all of the 37 states with the death penalty apparently have prescribed mandatory, non-waivable appellate review of at least the sentence in capital cases."[130] Furthermore, Justice Marshall noted that Arkansas was the only state where a capital defendant's waiver of appellate review could effectively preclude that review entirely.[131]

Finally, Justice Marshall addressed the standing issue, arguing that it should be relaxed in capital cases.[132] He asserted that standing was a common law doctrine, susceptible to adaptation and change, and that review of capital cases was of such importance that rigid standing requirements should yield to weightier concerns.[133] Lastly, Justice Marshall rejected the majority's worries about "meddlers," essentially arguing that the defendant's life was worth more than judicial convenience.[134]

V. ANALYSIS

The Court's decision in *Whitmore v. Arkansas* was consistent with both the case or controversy requirement of Article III of the Constitution and the great weight of Supreme Court precedent dealing with third party and next friend standing. The majority recognized the value of allowing competent criminal defendants to determine for themselves whether further appeals were desirable. The dissent

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Supreme Court had reversed 8 out of 19 death penalty sentences it had been presented upon appeal. *Id.* (Marshall, J., dissenting).

129 *Id.* at 1732 (Marshall, J., dissenting). Justice Marshall stated that, "[b]ecause a wrongful execution is an affront to society as a whole, a person may not consent to being executed without appellate review." *Id.* This statement drew on language from his *Gilmore* dissent, where he argued that Gilmore's mother should be allowed to petition on Gilmore's behalf, even though Gilmore wished to waive his appeals, because of the stakes involved. *See* Gilmore v. Utah, 429 U.S. 1012, 1019 (1976) (Marshall, J., dissenting).

130 *Whitmore*, 110 S. Ct. at 1733 (Marshall, J., dissenting) (citing BUREAU OF JUSTICE STATISTICS BULLETIN, CAPITAL PUNISHMENT 1988 5 (U.S. Dept. of Just., July 1989); Carter, *Maintaining Systemic Integrity in Capital Cases: The Use of Court-Appointed Counsel to Present Mitigating Evidence When the Defendant Advocates Death*, 55 TENN. L.R. 95, 113-14 (1987)).

131 *Id.* (Marshall, J., dissenting) (citing Franz v. State, 296 Ark. 181, 196-97, 754 S.W.2d 839, 847 (1988) (Glaze, J., concurring and dissenting)).

132 *Id.* at 1735 (Marshall, J., dissenting).

133 "I would . . . permit Whitmore to proceed as Simmons' next friend. The requirements for next-friend standing are creations of common law, not of the Constitution." *Id.* (Marshall, J., dissenting).

134 *Id.* at 1736-37 (Marshall, J., dissenting).

ignored this precedent. The dissent also erred in treating *Whitmore* as a forum for debate about capital punishment, rather than as a relatively routine standing case. The dissent's view of third party and next friend standing could distort the judicial process, leading to a far more politicized world of Supreme Court jurisprudence, and seriously threatening the value of self-determination for competent criminal defendants.

A. THE MAJORITY POSITION WAS CONSISTENT BOTH WITH ARTICLE III DEMANDS AND NEXT FRIEND PRECEDENT

The majority properly decided *Whitmore*. The decision is consistent with the Supreme Court's standing jurisprudence both of the last twenty years and the weight of traditional Court standing jurisprudence. Given the precedents regarding next friend status in capital cases, it is unlikely that Jonas Whitmore or his counsel could have been genuinely optimistic about succeeding on the next friend standing claim. Not only has the Supreme Court returned to the traditional, strict application of third party standing in the last two decades, but the Court has consistently denied next friend petitions in capital cases where a third party sought to appeal a capital sentence for an "uncooperative" defendant.

The first of these cases, *Gilmore,* is analogous to *Whitmore.*[135] In fact, *Gilmore* represented an even stronger case for granting next friend status, because Gilmore's next friend petitioner was his mother, who was more closely related to the condemned than Jonas Whitmore was to Ronald Simmons. Nevertheless, the Court still denied standing to Bessie Gilmore.

More important, Simmons did not meet the chief criterion for next friend status articulated in *Gilmore*; namely, the third party seeking next friend status would be granted standing only if he or she could demonstrate that the real party was "unable to seek relief in his own behalf."[136]

Like *Gilmore,* both *Evans* and *Lenhard* also were cases where the Court denied standing to next friends seeking stays of capital sentences for defendants who had competently waived appeal. Thus, the Court has denied standing in every case in which a next friend sought to appeal a capital sentence for a defendant who

[135] The factual and procedural similarities between *Gilmore* and *Whitmore* are striking. Both defendants were convicted of multiple murders. Both waived further appeal and were judicially found to be competent to do so on the basis of psychiatric evaluations. Lastly, the sentences in both cases were not reviewed by the respective state supreme courts.

[136] Gilmore v. Utah, 429 U.S. 1012, 1014 (1976).

wished to waive appeal. The Court in *Whitmore* recognized this consistency in precedent and decided accordingly.

B. THE MAJORITY'S STRICT APPLICATION OF STANDING DOCTRINE IS PREFERABLE TO THE DISSENT'S APPROACH

Though respect for consistency, precedent and self-determination is an important value, the majority's opinion in *Whitmore* also advances an approach to third party standing that is preferable in the long run.[137] An approach allowing third parties with separate legal or political agendas to enter a law suit where they have no meaningful interest harms the judicial process and all citizens.

The dissent's position in *Whitmore* advocates the principle that standing requirements are important, but not if the issues presented by the case are particularly attractive or interesting to individual judges.[138] Chief Justice Rehnquist's criticism of such an approach is well placed.[139] The dissent's view would cause Supreme Court jurisprudence to degenerate into a political popularity contest—a potential litigant would merely need to tally up the ideologies of the members of the Court and determine if his or her potential claim is attractive to a majority of the justices, regardless of constitutional

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137 It is important to recognize that in the context of capital punishment, there is a certain set of individuals who would support virtually any court decision somehow reducing the net number of executions carried out, regardless of other effects such a decision would produce. It could be argued that Justices Brennan and Marshall typify such a view. These "perennial dissenters" have consistently voted against any action by the Court where capital punishment is mentioned, even if the philosophical arguments about the death penalty were not at issue, as in *Whitmore*.

Similarly, there is also a set of individuals who favor the execution of as many convicted murderers as possible. These persons would support any Court decision leading to more executions, regardless of further considerations. Perhaps this group is typified by the individuals who hold tailgate parties at prisons on days when executions are carried out.

Any arguments about the effects of Supreme Court decisions on broader issues can be expected to be ignored by the individuals mentioned above. Thus, the arguments in this Note about standing assume that the reader is genuinely interested in further discussion of issues *surrounding* capital punishment and can lay aside absolute opinions about the philosophical arguments underlying the capital punishment debate to engage in further thought about a case that has far more to say about third party and next friend standing than about executions.

138 Justice Marshall's view is that standing is merely "a common law doctrine that the Court has the power to amend." *Whitmore*, 110 S. Ct. at 1729 (Marshall, J., dissenting). He seems to find no autonomous requirement in the language of Article III or the last two hundred years of Supreme Court cases demanding competent parties to assert their own interests. Perhaps, he believes that standing is a legitimate constitutional requirement, but one that should be trumped when the Court is presented with particularly attractive cases.

139 "It is not for this Court to employ untethered notions of what might be good public policy to expand our jurisdiction in . . . appealing case[s]." *Id.* at 1726.

standing demands or existing standing precedent. If a sufficient number of the justices find the issue interesting, then the potential litigant would be granted standing. If not, then he or she would be denied standing.

Such an approach, however, has the potential to burden as well as to benefit advocates of particular policy choices. Once the Court is released from Article III requirements and its own precedent, an individual gaining today by a broad view of third party and next friend standing may very well lose tomorrow.

A hypothetical from another area of criminal law illustrates this point. Imagine that a large industrial corporation illegally dumps toxic wastes and pollutes a residential area around its plant. The corporation is caught and criminally prosecuted. It loses at trial, and the court assesses a large criminal penalty against it. To dispense with the matter and to avoid negative publicity, the corporation determines to forgo appeals and pay the criminal fine to make the suit "go away." At this point, however, one of the corporation's competitors who is concerned about future criminal liability for illegal dumping decides to appeal on the first corporation's behalf as its next friend. Though the actual defendant wishes to waive appeal, the membership of the Supreme Court at the time might have an unbounded interest in protecting large corporations, and thus grant next friend standing to the second corporation.

Individuals willing to employ an expansive view of standing in capital cases might be disappointed by the outcome of the hypothetical. Under the broad view of next friend third party standing doctrine advocated by Justices Marshall and Brennan, this set of facts would be quite plausible.[140]

Other situations are similarly illustrative. What if we allowed third parties to be involved in the negotiation of plea bargains for criminal defendants, regardless of the actual defendant's wishes? Similarly, should we allow third parties to argue for or against a criminal defendant's waiver of a jury trial, regardless of the competent defendant's wishes? Is this a state of affairs with which we would be comfortable? Is such a situation consistent with traditional notions of *individual* possession of rights and liberties?

[140] Imagine another hypothetical. A white supremacist engages in "hate motivated" speech and is prosecuted under criminal laws prohibiting such speech. He loses at trial and decides not to appeal. Because it is concerned with an adverse precedent, however, a white supremacist group with vast resources decides to bring an appeal as his next friend. A majority of the Supreme Court finds this an attractive issue, and thus grants next friend status. Again, it is doubtful whether many of those advocating a broad application of standing rules to "attractive" cases would find the result of this case attractive.

These examples demonstrate that making standing determinations on the basis of the attractiveness of an issue, or what a majority of Supreme Court justices might deem to be "society's fundamental interest"[141] in a particular policy choice, is dangerous. Legislative bodies are established to channel democratic impulses into policy; courts are not.[142] There are severe problems with allowing third parties to act as real parties in interest when their aims are in conflict with the real party's wishes. If such a course is pursued, Supreme Court standing jurisprudence will likely degenerate into an exercise in tolling up ideologies and hoping the numbers are sufficient.[143]

This last point illustrates the chief problem with the dissent's view. The dissent fails to recognize, because of its preoccupation with the capital punishment debate, that standing is a far-reaching, important demand made by the Constitution, specifically applied by a long line of Supreme Court cases. Ignoring the case or controversy demands of the Constitution and the weight of Supreme Court third party and next friend precedents would change the entire function of the judicial branch for the worse.

C. THE DISSENT'S POSITION WAS INCONSISTENT WITH THE VALUE OF SELF-DETERMINATION

Oddly, the dissenters failed to recognize that their approach to next friend standing was inconsistent not only with a general liberal[144] view of the value of self-determination,[145] but that it also clashes with the positions the dissenters have taken in a host of equally important cases where self-determination questions were presented.[146]

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141 *Whitmore*, 110 S. Ct. at 1732 (Marshall, J., dissenting).

142 *See generally* Scalia, *supra* note 48.

143 It is odd that members of the Court who represent a distinct ideology would advocate such a course of action, when the ideology they represent seems to be greatly outnumbered on the Court. If the Court's standing jurisprudence degenerates into an ideological head count, the ideology the dissent is generally thought to represent will lose out now, and for the foreseeable future. *See* Moore, *Tugging from the Right*, NAT'L L.J., Oct. 20, 1990, at 2510; Gest, *Where the New Court is Heading*, U.S. NEWS & WORLD REP., Aug. 6, 1990, at 20; McMahon, *Recent Criminal Law Rulings from the Supreme Court: The Conservative Bloc Begins to Exercise Control*, 3 DEL. LAWYER 49, 49-55 (1984).

144 "Liberal" in the sense that the dissenters' positions on other cases involving an individual's right to make important decisions regarding his or her legal rights have been expansive, and have consistently favored the value of self-determination.

145 This general point about self-determination is raised in Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 310-15 (1979).

146 This is not to say that members of the *Whitmore* majority have not previously taken positions that could similarly be viewed as inconsistent under this criticism. A narrow

In cases involving an individual's ability to purchase contraceptives,[147] possess obscene materials,[148] choose his preferred sexual practices,[149] or have an abortion,[150] Justices Marshall and Brennan consistently favored the right to self-determination regarding important personal decisions. Most striking, they recently argued in *Cruzan v. Missouri*[151] for the principle that an incompetent person has the right to have food and water tubes withdrawn and end her life. Apparently, the dissent believed that persons in comas who have expressed only a vague interest in not being "kept alive by a machine" should enjoy a right to "die with dignity," but that duly convicted, competent capital defendants have no right to choose to waive protracted appeal, be executed, and "die with dignity." If the value of self-determination is worth anything, it must be especially protected in cases where the individual's choice is unpopular, as Simmons' choice to waive appeal and be executed was to Justices Marshall and Brennan. The dissenters failed to give sufficient weight to Ronald Gene Simmons' interests in this regard.

VI. CONCLUSION

In *Whitmore*, the Supreme Court held that a third party seeking next friend status to appeal a capital defendant's sentence would be denied standing because the defendant was found to have competently waived appeal. The Court correctly recognized that the case or controversy standard of Article III and the Court's own third party and next friend precedents demanded such an outcome. The Court also correctly identified the danger in allowing uninterested third parties with separate legal or political agendas to inject themselves into an "uncooperative" capital defendant's case. Finally, the

application of standing doctrine, consistent with the weight of Supreme Court precedents would, however, tend to reduce the possibility that self-determination issues would be successful or unsuccessful solely because of the membership of the Court at any particular moment.

147 Eisenstadt v. Baird, 405 U.S. 438 (1972) (state law prohibiting the distribution of contraceptives by non-medical personnel to unmarried persons held unconstitutional in opinion written by Justice Brennan).

148 Stanley v. Georgia, 394 U.S. 557 (1984) (state law making the possession of pornographic materials illegal held unconstitutional in opinion written by Justice Marshall).

149 Bowers v. Hardwick, 478 U.S. 186 (1986) (state law criminalizing consensual sodomy upheld over vigorous dissent of Justices Blackmun, Brennan and Marshall).

150 Roe v. Wade, 410 U.S. 113 (1973) (state laws criminalizing abortion held unconstitutional, with Justices Brennan and Marshall in the majority).

151 Cruzan v. Missouri, 110 S. Ct. 2841 (1990) (Justices Brennan, Marshall and Blackmun dissented, arguing that a woman in a vegetative state had the constitutional right to have food and oxygen withheld, in order to "die with dignity," if it could be determined on remand that she had expressed the wish not to be kept alive to friends, family members or co-workers before her accident).

majority in *Whitmore* accurately treated the standing issue presented by the case on its own merits, and declined the temptation to view *Whitmore* as a forum for further debate on capital punishment where no such forum existed.

The dissenters in *Whitmore* argued that important constitutional issues were at stake, apart from the standing question, and that standing is merely a common law convention rather than a firm constitutional requirement imposed on the judicial branch. However, the dissenters ignored the weight of Supreme Court cases dealing with standing, and in particular, the holdings of the three cases the Court previously decided on next friend standing for third parties seeking to appeal the sentences of "uncooperative" capital defendants. The dissenters also did not recognize the danger of abandoning a meaningful doctrine of standing in favor of policy preferences. Traditional standing doctrine makes litigation predictable and standing determinations less political and arbitrary. We cannot allow the Court to grant standing to some litigants and deny it to others merely because a majority of the justices find a particular issue sufficiently attractive to bend the standing rules. A strict application of standing doctrine, consistent with precedent, reduces the chance that this will occur.

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