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Criminal Procedure—Waiver of Appellate Review of Death Sentences in Arkansas. Standing—Capacity to Litigate Matters of Public Interest in Arkansas. Franz v. State, 296 Ark. 181, 754 S.W.2d 839 (1988).

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NOTES

CRIMINAL PROCEDURE—WAIVER OF APPELLATE REVIEW OF DEATH SENTENCES IN ARKANSAS.

STANDING—CAPACITY TO LITIGATE MATTERS OF PUBLIC INTEREST IN ARKANSAS. *Franz v. State*, 296 Ark. 181, 754 S.W.2d 839 (1988).

On December 28, 1987, Ronald Gene Simmons killed two persons and wounded four others during a shooting spree in Russellville, Arkansas. Later, investigators found the bodies of fourteen members of the Simmons' family at his rural home. Investigators speculated that Simmons killed those living in the household while they slept and that he killed the others as they arrived for the Christmas holidays.[1]

On May 16, 1988, a jury convicted Simmons for the two murders in Russellville and sentenced him to death.[2] As soon as the court announced the sentence, Simmons took the stand and testified that he would not appeal the sentence. Consequently, the trial court conducted a hearing to determine whether Simmons was competent to waive his right to appeal the sentence. After finding that he made the decision knowingly and intelligently, the court held that Simmons was competent to waive his right to appeal and set an execution date.

As the execution date neared and Simmons continued to refuse to appeal the sentence, Reverend Louis Franz, a Catholic priest who counsels inmates at the Arkansas Department of Corrections, filed a motion in the trial court asking that he be allowed to intervene and that the court stay the execution. The court found Simmons competent to act for himself, and denied Franz's motion to intervene. Franz then petitioned the Arkansas Supreme Court to stay the execution and to require at least one appellate review for all death sentences. Franz asserted standing as "next friend"[3] to Simmons and as a tax-

1. Arkansas Gazette, Dec. 30, 1987, at 6, col. 1.

2. The jury also convicted Simmons of five counts of attempted murder and one count of kidnapping. He was sentenced to 147 years in prison for these convictions. Arkansas Gazette, May 17, 1988, at 6, col. 2.

3. A next friend acts for the benefit of a party who lacks the capacity to assert his own legal rights. Next friend standing is commonly asserted where the rights of infants or mentally

payer.[4] He also alleged that the court, by placing form over substance and denying him standing, would leave important constitutional questions unresolved at the appellate level.

The Arkansas Supreme Court denied Franz standing on each basis. However, the court cited the "uniqueness and irreversibility" of the death penalty and proceeded to clarify Arkansas law regarding a capital defendant's right to waive appellate review of a death sentence.[5] The majority held that neither Arkansas law nor the United States Constitution requires review of all death sentences. However, the defendant may waive the appeal process "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."[6] The court also held that it will review the trial court's determination that the defendant possesses the requisite competency anytime a defendant waives the right to appeal a death sentence. After reviewing the trial court's determination of Simmons' competency, the court affirmed that Simmons was competent to waive the right to appeal the sentence.[7] *Franz v. State*, 296 Ark. 181, 754 S.W.2d 839 (1988).

MANDATORY APPELLATE REVIEW

The term "mandatory appeal" refers to appellate review which is initiated automatically upon entry of a death sentence and which the defendant may not waive.[8] Courts and commentators tend to use this

incompetent persons are involved. Kaine, *Capital Punishment and The Waiver of Sentence Review*, 18 HARV. C.R.-C.L. L. REV. 483, 489 n.23 (1983).

4. ARK. CONST. art. XVI, § 13 provides that "[a]ny citizen of any county, city or town may institute suit in behalf of himself and all others interested, to protect the inhabitants thereof against the enforcement of any illegal exactions whatever." *See infra* notes 182-88 and accompanying text.

5. Franz v. State, 296 Ark. 181, 186, 754 S.W.2d 839, 842 (1988).

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

7. Rev. Franz and Darrel Wayne Hill, a death row inmate, subsequently petitioned the United States District Court for the Eastern District of Arkansas for a writ of habeas corpus to prevent Simmons' execution. The petition claimed that Arkansas' failure to provide mandatory appellate review of all death sentences violated the eighth amendment. The district court held that the petitioners lacked standing under traditional standards, but it examined the mandatory appeal claim to determine whether some aspect of mandatory appeal created a special interest sufficient to warrant standing. The court determined that at least one appellate review of every death sentence is constitutionally mandated, but the claim was not sufficient to grant standing to Franz or Hill. However, the court held that it had to make an independent determination of Simmons' competence to waive his federal habeas corpus right, so it ordered that Simmons undergo further psychological evaluation, which is still pending. Franz v. Lockhart, No. PB-B-88-444 (E.D. Ark. Sept. 23, 1988) (WESTLAW, Database: DCT).

8. Franz v. Lockhart, No. PB-B-88-444 at 12.

term interchangeably with the term "automatic appeal."[9] An automatic appeal also refers to appellate review which is initiated automatically upon entry of the sentence. With automatic appeal, however, the defendant may waive review.[10] All states which recognize the death penalty provide automatic appeal of the sentence, and most of these states do not allow the defendant to waive review.[11]

The "cruel and unusual punishment" clause of the eighth amendment of the United States Constitution[12] controls imposition of the death sentence.[13] United States Supreme Court interpretations of the clause as it relates to the death penalty establish three tests which must be met for a capital sentencing statute to pass constitutional scrutiny. First, the procedure must not allow imposition of the sentence in a manner that violates contemporary standards of decency.[14] Second, the procedure must provide safeguards to protect against arbitrary or capricious imposition of the sentence.[15] Finally, the procedure must allow the sentencing body to determine the appropriateness of the sentence as applied to each individual defendant.[16]

The first test reflects traditional eighth amendment analysis.[17] The scope of the amendment changes as the standards of society change; thus, the attitudes of contemporary society determine the scope of the amendment.[18] As a result, resolution of questions con-

9. *Id.*

10. *Id.*

11. *See* Pulley v. Harris, 465 U.S. 37, 44 (1984) ("All of the new statutes provide for automatic appeal of death sentences."). *See also* U.S. Dept. of Justice, Bureau of Justice Statistics, Bull., *Capital Punishment 1986* (Sept. 1987) (stating that only Arkansas, Florida, Ohio, and Vermont had no specific provision for automatic review). The following eighteen states specifically provide for automatic appellate review of all capital convictions: ALA. CODE § 13A-5-53 (1982); 17 A.R.S. RULES OF CRIM. PROC., Rule 31.2 (Arizona); CAL. PENAL CODE § 1239(b) (West 1982); DEL. CODE ANN. tit. 11, § 4209(g) (1979); FLA. STAT. ANN. § 921.141(4) (West 1985); GA. CODE ANN. § 17-10-35 (1982); IDAHO CODE § 19-2827 (1987); ILL. REV. STAT. ch. 38, para. 9-1(i) (1981); IND. CODE ANN. § 35-50-2-9(h) (Burns 1985 & Supp. 1988); LA. CODE CRIM. PROC. ANN. art. 905.9 (West 1984); MD. ANN. CODE art. 27, § 414 (1987); NEB. REV. STAT. § 29-2525 (1985); N.H. REV. STAT. ANN. § 630:5(VI) (1986); OKLA. STAT. tit. 21, § 701.13 (West 1983 & Supp. 1989); 42 PA. CONS. STAT. ANN. tit. 42, § 9711(h) (Purdon 1982); S.C. CODE § 18-9-20 (1976); VA. CODE ANN. § 17-110.1 (1988); WYO. STAT. § 6-2-103 (1977).

12. U.S. CONST. amend. VIII provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

13. Furman v. Georgia, 408 U.S. 238 (1972).

14. Gregg v. Georgia, 428 U.S. 153, 173 (1976).

15. *Id.* at 188.

16. *Id.* at 189-92.

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

18. Weems v. United States, 217 U.S. 349 (1910) ("The [cruel and unusual punishment] clause of the Constitution in the opinion of the learned commentators may be therefore pro-

cerning the amendment involves determination of contemporary standards regarding the infliction of punishment.[19] To ascertain these public standards, courts consider legislative attitudes and the decisions of juries.[20]

The other two tests arise from the United States Supreme Court's application of the "contemporary standards of decency test" to death penalty cases. In *Furman v. Georgia*[21] the Court held that the death penalty statutes of three states constituted cruel and unusual punishment in violation of the eighth amendment.[22] Each justice filed a separate opinion expressing a somewhat different view, but the possibility of arbitrary or capricious administration of the sentence underscored the opinions of three justices.[23] The justices attributed these shortcomings to the standardless discretion vested in trial judges and juries.[24] These separate opinions form the key ideas for later Supreme Court decisions clarifying the constitutional requirements for imposition of the sentence.

The variety of opinions in *Furman* created confusion as to the requirements of a constitutional death penalty statute.[25] Nevertheless, states recognizing the death penalty rushed to redraft their laws in an attempt to comply with the mandate of *Furman*.[26] The Court reviewed the first of these post-*Furman* statutes and clarified the constitutional requirements in five landmark cases decided on the same date in 1976.[27] The Court upheld three of these statutes because they provided standards which minimized the possibility of arbitrary or

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gressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."). *Id.* at 378.

19. Trop v. Dulles, 356 U.S. 86 (1958) (plurality opinion) ("The amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."). *Id.* at 101.

20. Thompson v. Oklahoma, 108 S. Ct. 2687, 2691 (1988).

21. 408 U.S. 238 (1972).

22. *Id.* at 240.

23. Justice Douglas noted that the states imposed the penalty in an inconsistent and discriminatory manner. *Id.* at 256-57 (Douglas, J., concurring). Justice Stewart felt that the statutes allowed the penalty to be imposed "wantonly and freakishly." *Id.* at 310 (Stewart, J., concurring). Justice White challenged the statutes because the states infrequently imposed the sentence and because the statutes did not provide a meaningful basis for distinguishing cases which imposed the penalty from cases which did not impose the penalty. *Id.* at 313 (White, J., concurring).

24. *Gregg*, 428 U.S. at 188-95. *See also Pulley*, 465 U.S. at 44.

25. Lockett v. Ohio, 438 U.S. 586, 599 (1978).

26. *Pulley*, 465 U.S. at 44.

27. Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976) (hereinafter *the 1976 cases*).

capricious results by limiting the discretion of trial judges and juries.[28] The Court struck down the other two statutes because they made the death penalty mandatory for certain crimes with no consideration of the individual circumstances of each case.[29]

In each of these cases and in subsequent cases, the Court stressed the importance of appellate review as a safeguard against arbitrary or capricious results.[30] In *Gregg v. Georgia*[31] the Court indicated that states should provide "meaningful appellate review" to insure consistent imposition of death sentences.[32] The Court emphasized that the requirement for mandatory review of each death sentence created "an important additional safeguard against arbitrariness and caprice."[33] In *Proffitt v. Florida*[34] and *Jurek v. Texas*[35] the Court also indicated that automatic appellate review of every death sentence affords an important check on the discretion of the sentencer. In 1982 the Court reaffirmed the importance of appellate review in *Zant v. Stephens*.[36] The *Zant* Court stated that its decision to uphold the challenged death penalty statute depended "in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence . . . ."[37] In 1984 the Court in *Pulley v. Harris*[38] noted that previous decisions relied on the presence of automatic review in upholding capital sentencing schemes.[39] The Court also noted that the joint opinion in *Gregg* "suggested that some form of meaningful appellate review is required."[40]

While these decisions indicate the importance of appellate review, no decision directly addresses the ability of the defendant to waive this review. A criminal defendant may waive constitutional

28. The Court upheld the statutes in *Gregg, Proffitt*, and *Jurek*. *See Pulley*, 465 U.S. at 44-45.

29. The Court struck down the statutes in *Woodson* and *Roberts*. *See Pulley*, 465 U.S. at 44-45.

30. *See, e.g., Pulley*, 465 U.S. at 45.

31. 428 U.S. 153 (1976).

32. *Id.* at 195. *See* Kaine, *supra* note 3, at 484.

33. *Gregg*, 428 U.S. at 198. "An important aspect of the new Georgia legislative scheme, however, is its provision for appellate review. Prompt review by the Georgia Supreme Court is provided for in every case in which the death penalty is imposed." *Id.* at 211 (White, J., joined by Rehnquist, J., concurring).

34. 428 U.S. 242, 250-53 (1976).

35. 428 U.S. 262, 276 (1976).

36. 462 U.S. 862 (1983).

37. *Id.* at 890.

38. 465 U.S. 37, 44 (1984).

39. *Id.*

40. *Id.* at 45. However, the *Pulley* Court held that appellate review need not include a comparison of the case before the court with sentences imposed in similar cases.

rights which are personal to himself.[41] In *Johnson v. Zerbst*[42] the Court defined such waiver as "an intentional relinquishment or abandonment of a known right or privilege."[43] Further, the defendant must be competent to comprehend these rights and to intelligently waive them.[44]

On the other hand, the defendant may not waive rights where the right or privilege benefits society as a whole as well as the defendant.[45] In such cases, the interest of society overrides the personal interest of the defendant. For example, a defendant may not waive his right to a jury trial without the consent of the prosecuting attorney due to society's interest in the integrity of the criminal justice system.[46] This same interest in the criminal justice system prevents a defendant from waiving the sixth amendment right to confront witnesses and demanding that the state present its case without witnesses.[47] Likewise, the defendant may not waive his right to a speedy trial and ask to be tried three years later after the memories of witnesses have faded.[48] Finally, the public's first amendment right to receive information about the criminal justice system prevents a defendant from waiving the right to a public trial.[49]

Waiver of rights by capital defendants receives special attention. Because of society's interest in the fair and just imposition of the death sentence, capital defendants may not waive rights which are waivable in other criminal cases.[50] A capital defendant may not waive the right to be present at trial and sentencing.[51] In addition, the capital defendant may not waive the right to counsel or the right to abandon post-judgment appeals of his sentence[52] without an in-

41. A person may waive his fourth amendment protection against warrantless searches, his fifth amendment privilege against self-incrimination, and the sixth amendment right to counsel. *See* Kaine, *supra* note 3, at 499-504.

42. 304 U.S. 458 (1938).

43. *Id.* at 464.

44. *Id.*

45. Commonwealth v. McKenna, 476 Pa. 428, 383 A.2d 174 (1978) (defendant may not waive mandatory appellate review of death sentence).

46. Singer v. United States, 380 U.S. 24 (1965).

47. *Id.*

48. Barker v. Wingo, 407 U.S. 514 (1972).

49. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

50. Kaine, *supra* note 3, at 506.

51. Hopt v. Utah, 110 U.S. 574 (1884).

52. Although defendants have not been successful in avoiding the minimum appeal where appeal is mandatory, they have been able to forego further assertion of their rights upon a showing that they are competent to make the decision. *See* Strafer, *Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. CRIM. L. & CRIMINOLOGY 860 (1983).

dependent judicial determination of his competence to make such a decision knowingly and intelligently.[53]

In *Rees v. Peyton*[54] the Court set forth the standard used to determine the defendant's competence to abandon post-judgment challenges to his sentence.[55] In such cases, a court must determine that the defendant possesses the "capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect . . . ."[56] If the defendant lacks the competence to make a knowing and intelligent waiver, the court may appoint a next friend to assert the defendant's rights.[57]

A next friend asserts the rights of another person who is unable to assert his own rights.[58] Early common law recognized next friend petitions to prevent a person from suffering loss of liberty or life.[59] The English Habeas Corpus Act of 1679 expressly authorized next friend petitions.[60] In the United States, federal law incorporates the next friend concept by allowing applications to be filed on behalf of an inmate.[61] By statute, Arkansas allows next friends to file writs of habeas corpus on behalf of infants.[62]

Interested parties frequently attempt to gain next friend standing when a defendant refuses to appeal a death sentence.[63] In these cases, the next friend must demonstrate that a sufficient relationship exists between himself and the defendant.[64] The cases do not clearly define the necessary relationship, but the courts tend to distinguish persons with a genuine and legitimate interest in the defendant from "intruders and uninvited meddlers."[65] Under this standard, courts routinely accept close relatives and former attorneys, but members of the public

53. Rees v. Peyton, 384 U.S. 312 (1966) (per curiam).

54. *Id.*

55. *Id.* at 314.

56. *Id.*

57. *Id. See infra* text accompanying notes 58-70.

58. *See generally* Kaine, *supra* note 3, at 489.

59. Note, *The Eighth Amendment and the Execution of the Presently Incompetent*, 32 STAN. L. REV. 765, 799 (1980). *See* United States *ex rel.* Bryant v. Houston, 273 F. 915, 916 (2d Cir. 1921).

60. The English Habeas Corpus Act, 1679, 31 Car. 2, ch. 2. The Act codified English common law regarding the issuance of the writ. *See* Note, *supra* note 59, at 799 n.135.

61. 28 U.S.C. § 2242 (1971).

62. ARK. CODE ANN. § 16-112-103 (1987). The statute also grants next friend standing to represent the rights of married women, but ARK. CODE ANN. § 9-11-502 (1987) removes the disability of married women and renders this section obsolete.

63. Kaine, *supra* note 3, at 489.

64. Weber v. Garza, 570 F.2d 511 (5th Cir. 1978). *See also* Strafer, *supra* note 52, at 909.

65. United States v. Houston, 273 F. 915, 916 (2d Cir. 1921).

in general are denied.[66]

Even if the next friend demonstrates a sufficient relationship, the court must also find that the defendant lacks the capability to act in his own behalf.[67] Courts grant next friend standing to allow persons to act for infants and for inmates who lack sufficient time to act for themselves.[68] They also allow next friends to act for defendants who lack the mental capacity to act for themselves.[69] In the case of capital defendants who refuse to pursue habeas corpus relief, courts grant next friend standing only if the defendant is incompetent to waive his right.[70]

In *Gilmore v. Utah*[71] the United States Supreme Court applied the waiver doctrine to allow a defendant sentenced to death to waive appeal even though no appellate court had reviewed the sentence.[72] A Utah trial court convicted Gary Gilmore of murder and sentenced him to death.[73] Gilmore refused to appeal the sentence, and the Utah Supreme Court found him competent to waive his right.[74] Asserting standing as his next friend, Gilmore's mother petitioned the United States Supreme Court to stay the execution and to consider the constitutionality of Utah's death penalty statute.[75] After reviewing the Utah court's competency determination, the Supreme Court affirmed that Gilmore "made a knowing and intelligent waiver of any and all federal rights he might have asserted after the Utah trial court's sentence was imposed . . . ."[76] Since Gilmore was competent to act on his own behalf, his mother lacked standing to question the constitutionality of Utah's law, and the question remained unresolved.[77]

In dissent, four justices questioned Gary Gilmore's ability to waive appellate court review. Justices White, Brennan, and Marshall contended "that the consent of a convicted defendant in a criminal case does not privilege a State to impose a punishment otherwise for-

66. *See* Strafer, *supra* note 52, at 909 n.211. *See also* Davis v. Austin, 492 F. Supp. 273, 275 (N.D. Ga. 1980).

67. Strafer, *supra* note 52, at 909.

68. *See* United States *ex rel.* Funaro v. Watchorn, 164 F. 152 (C.C.S.D.N.Y. 1908). *See also* Evans v. Bennett, 467 F. Supp. 1108 (S.D. Ala. 1979).

69. *Evans*, 467 F. Supp. at 1110.

70. Gilmore v. Utah, 429 U.S. 1012, 1016 (1976).

71. 429 U.S. at 1012.

72. *Id.*

73. *Id.*

74. *Id.* at 1015.

75. *Id.* at 1013.

76. *Id.*

77. *Id.* at 1017.

bidden by the Eighth Amendment."[78] Likewise, Justice Marshall, in a separate opinion, expressed the belief "that the Eighth Amendment not only protects the right of individuals not to be victims of cruel and unusual punishment, but that it also expresses a fundamental interest of society in ensuring that state authority is not used to administer barbaric punishments."[79] Finally, Justice Blackmun stated that "the question of Bessie Gilmore's standing and the constitutional issue are not insubstantial . . . ."[80] Thus, he contended that the Court should give the matter "plenary, not summary consideration," notwithstanding Gilmore's waiver.[81] Nevertheless, the plurality held that "whatever may be said as to the merits of [the waiver issue,] the question simply is not before us."[82]

Like other states, Arkansas also rewrote its capital sentencing statute in the wake of *Furman*.[83] The new statute limited imposition of the sentence to crimes meeting the statutory definition of capital felony murder.[84] It also provided for a bifurcated trial with separate guilt determination and sentencing proceedings.[85] To guide the discretion of sentencers, the new scheme listed aggravating[86] and mitigating[87] circumstances for the jury to consider. After returning a guilty verdict, the jury must consider these circumstances and answer three questions affirmatively before imposing the death sentence.[88]

78. *Id.* at 1018 (White, J., joined by Brennan, and Marshall, J.J., dissenting).

79. *Id.* at 1019 (Marshall, J., dissenting).

80. *Id.* at 1020 (Blackmun, J., dissenting).

81. *Id.*

82. *Id.* at 1017 (Burger, C.J., joined by Powell, J., concurring).

83. *See* ARK. CODE ANN. § 5-4-601 to -617 (1987) (formerly ARK. STAT. ANN. § 41-4701 to 4713 (Cum. Supp. 1973)).

84. *See* ARK. CODE ANN. § 5-4-601 to -617 (1987).

85. *Id.* § 5-4-602.

86. *Id.* § 5-4-604. These aggravating circumstances include commission of the crime by a person already imprisoned for a felony, commission of the crime by a person unlawfully at liberty after being convicted of a felony, previous conviction for a felony involving the use or threat of violence, commission of the capital murder knowing that a person other than the victim is placed at risk, commission of the capital murder for the purpose of avoiding arrest or escaping from custody, commission of capital murder for pecuniary gain, commission of capital murder for the purpose of disrupting or hindering governmental or political processes, or commission of the capital murder in "an especially heinous, atrocious, or cruel manner." *Id.*

87. *Id.* § 5-4-605. These mitigating circumstances include commission of the capital murder while the defendant was experiencing extreme mental or emotional disturbance, commission of the crime while the defendant acted under unusual pressures or influences or under the domination of another person, commission of the crime while the defendant lacked the capacity to appreciate the wrongfulness of his conduct due to mental disease or defect, intoxication, or drug abuse, commission of the crime by a youth, or commission of the crime by one with no significant prior criminal history.

88. *Id.* § 5-4-603.

First, the jury must find that one of the aggravating circumstances accompanied the offense.[89] Then, it must find that the aggravating circumstance outweighs any mitigating circumstances,[90] including but not limited to those listed.[91] Finally, the jury must find that the aggravating circumstances justify the death sentence beyond a reasonable doubt.[92] If the jury answers negatively to any question, the court imposes a sentence of life in prison without parole instead of the death sentence.[93]

A capital defendant first challenged the constitutionality of Arkansas' new statute in *Collins v. State*.[94] Convicted of capital murder and sentenced to death, Alfred Collins appealed his sentence to the Arkansas Supreme Court. The court affirmed the conviction and held that the new Arkansas sentencing scheme complied with the constitutional mandate of *Furman*.[95] Collins then petitioned the United States Supreme Court for certiorari. The Court granted Collins' writ, vacated the judgment, and remanded the case back to the Arkansas Supreme Court to reconsider in light of the 1976 cases decided after the Arkansas Supreme Court's initial review.[96] On remand, the Arkansas Supreme Court found that the new Arkansas procedure "provides adequate safeguards against arbitrary, capricious or freakish imposition of the death penalty to successfully pass constitutional examination in the light of the Eighth and Fourteenth Amendment standards ascertainable from the *Woodson-Roberts-Gregg-Proffitt-Jurek* quintuplet offspring of *Furman*."[97]

In the later *Collins* opinion, the Arkansas Supreme Court conceded that the Arkansas procedure did not provide for mandatory appellate review of death sentences,[98] but the majority held that its absence did not render the procedure unconstitutional.[99] Although the court acknowledged that appellate review is an important safeguard, the majority held that the 1976 cases only require that "a *meaningful* appellate review is available to insure that death penalties

89. *Id.* § 5-4-603(a)(1).
90. *Id.* § 5-4-603(a)(2).
91. *Id.* § 5-4-605.
92. *Id.* § 5-4-603(a)(3).
93. *Id.* § 5-4-603(c).
94. 259 Ark. 8, 531 S.W.2d 13, *vacated*, 429 U.S. 808 (1976).
95. *Collins*, 259 Ark. at 12-13, 531 S.W.2d at 15.
96. 429 U.S. 808 (1976).
97. Collins v. State, 261 Ark. 195, 219, 548 S.W.2d 106, 119-20 (1976), *cert. denied*, 434 U.S. 878 (1977).
98. *Collins*, 261 Ark. at 211, 548 S.W.2d at 115.
99. *Id.* at 205, 548 S.W.2d at 112.

are not arbitrarily, capriciously, or freakishly imposed."[100] The court stated that the idea of required mandatory review of all death penalties "crumbled with the . . . actions of the court in *Gilmore v. Utah*."[101] "If the Constitution of the United States requires that a state provide a mandatory appeal," the Arkansas Supreme Court could "not see how there can be a knowing and intelligent waiver of 'any and all federal rights' when there has been no appeal from the state trial court's judgment imposing the death sentence."[102]

In *Franz v. State*[103] the Arkansas Supreme Court held that neither the United States Constitution nor Arkansas law mandates review of all death sentences. Quoting *Collins*[104] extensively, the court reaffirmed that there "is no mandatory appellate review in Arkansas"[105] and that the lack of mandatory review does not render the law unconstitutional.[106] The court also dismissed the contention that a statutory requirement that the "Supreme Court shall review all errors prejudicial to the rights of the appellant" in all capital cases mandates review of all capital cases.[107] The court held that these provisions "simply mean that this Court must make its own examination of the record when an appeal is taken in such cases; they do not mandate an appeal."[108]

In regard to waiver, the court held that it would not "automatically acquiesce" in the defendant's decision not to appeal.[109] In a previous case, the court held that a capital defendant must knowingly and intelligently decide to waive his right to further appeals of his sentence before waiver will be allowed;[110] however, the court did not enunciate a clear standard to apply in such cases.[111] In *Franz* the court noted that the federal standard, as enunciated in *Rees*,[112] for determining whether a defendant competently waived his rights is roughly equivalent to the standard applied to determine a defendant's

100. *Id.*
101. *Id.*
102. *Id.* at 206, 548 S.W.2d at 112.
103. 296 Ark. 181, 754 S.W.2d 839 (1988).
104. *See supra* text accompanying notes 94-102.
105. 296 Ark. at 186, 754 S.W.2d at 842 (quoting Collins v. State, 261 Ark. 195, 211, 548 S.W.2d 106, 115 (1977)).
106. *Id.* at 188, 754 S.W.2d at 843.
107. *Id.*
108. *Id.*
109. *Id.*
110. Remeta v. State, 294 Ark. 206, 740 S.W.2d 928 (1987).
111. Franz v. State, 296 Ark. at 188, 754 S.W.2d at 843.
112. Rees v. Peyton, 384 U.S. 312 (1966).

competence to stand trial.[113] The court observed that competence to stand trial and competence to waive challenges to a death sentence are distinctly different.[114] In the latter instance, the defendant must have the capacity to understand the choice between life and death.[115] As a result, the court articulated a higher standard for application to waiver cases in Arkansas. To waive appellate review in Arkansas, the defendant must possess the capacity to understand the difference between life and death and to knowingly and intelligently waive any and all rights to appeal his sentence.[116]

In dissent, Justice Glaze contended that "Arkansas's [sic] present procedure is . . . constitutionally suspect" and insisted that the "court could avoid those constitutional questions and potential pitfalls by reviewing the sentence phase of death penalty cases."[117] He asserted that no United States Supreme Court decision resolves the question of whether a capital defendant may waive state appellate review.[118] In *Gilmore* the Supreme Court dealt solely with Bessie Gilmore's standing, and the Court's decision relied solely on Gary Gilmore's competence to act for himself.[119] Other than an implicit requirement that an appellate court must review the competency proceeding, Justice Glaze asserted that "little more can be gleaned from the *Gilmore* decision."[120] Moreover, Justice Glaze observed that the special requirements and great scrutiny which the United States Constitution and Arkansas law require cannot be consistently measured without review of all capital sentences.[121] He also observed that the court's holding results in Arkansas being the only state that does not review all death sentences.[122]

In addition to avoiding these constitutional problems, Justice Glaze contended that mandatory review expedites disposal of capital cases.[123] He noted that defendants who initially waive their right to appeal tend to subsequently change their minds and decide to appeal.

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113. A defendant is competent to stand trial if he "understands the charges against him and has the capacity to communicate with his attorney." *Franz*, 296 Ark. at 189, 754 S.W.2d at 843 (citing White, *Defendants Who Elect Execution*, 48 U. PITT. L. REV. 853, 863 (1987)).

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 198, 754 S.W.2d at 848 (Glaze, J., dissenting).

118. *Id.* at 195, 754 S.W.2d at 847.

119. *Id.* at 196, 754 S.W.2d at 847.

120. *Id.*

121. *Id.* at 195-97, 754 S.W.2d at 847-48.

122. *Id.* at 196, 754 S.W.2d at 847.

123. *Id.* at 198, 754 S.W.2d at 848.

This results in extensions and delays in carrying out the sentence.[124] By reviewing all sentences as a matter of procedure, Justice Glaze contended that the court could minimize such delays.[125] He insisted that the court, not a criminal defendant, should control the state's criminal policy; thus, "no criminal defendant, including Simmons in this cause, should dictate this state's policy concerning whether death sentences should be reviewed."[126]

Also dissenting, Justice Hays argued that the court should adopt a rule requiring review of all death sentences.[127] Noting the societal interest in fair administration of the penalty, he contended that appellate review is a basic step in a death sentencing procedure.[128] To illustrate the relationship of mandatory appeal to this procedure, he observed that a defendant cannot "by-pass a trial or, if a plea of guilty is entered, a hearing on the guilty plea."[129] Just as these procedures are basic to our criminal justice system and cannot be avoided by the defendant, appellate review of death sentences is basic to a capital sentencing scheme and cannot be by-passed by the defendant.[130] Justice Hays also contended that nothing prevented the court from adopting such a rule, for the discussion of mandatory appeal in *Collins* was dictum and not binding on the court.[131] The court could adopt a requirement for mandatory review of all cases under the court's rule-making power.[132] He concluded that by "rejecting the opportunity to adopt a rule of mandatory review the majority has put Arkansas at odds with all but one of the thirty-seven states which have the death penalty, not an enviable position, and not one likely to endure."[133]

Clearly, the court's decision establishes the procedure that Arkansas courts will follow anytime a capital defendant waives the right to appeal a death sentence. The procedure includes mandatory appellate review of the trial court's determination that the defendant pos-

124. *Id.* As an example, convicted murderer Michael O'Rourke decided after his initial appeal to the Arkansas Supreme Court to forego his right to further appeal his sentence. He was scheduled to be executed on May 18, 1988, but on May 16, 1988, he changed his mind. His execution has been stayed until his federal appeals are exhausted. Arkansas Gazette, May 17, 1988, at 6, col. 5.

125. 296 Ark. at 198, 754 S.W.2d at 848.

126. *Id.* at 197-98, 754 S.W.2d at 848.

127. *Id.* at 199, 754 S.W.2d at 849 (Hays, J., dissenting).

128. *Id.* at 200, 754 S.W.2d at 849.

129. *Id.*

130. *Id.*

131. *Id.* at 199, 754 S.W.2d at 849.

132. *Id.*

133. *Id.* at 200, 754 S.W.2d at 849-50.

sesses the requisite competency to waive his right to appeal. However, the court's failure to provide for mandatory appellate review of at least the sentencing phase of every trial where the death penalty is imposed leaves the procedure constitutionally suspect.

This question as to the constitutionality of the procedure arises from the court's failure to apply the proper constitutional analysis to the issue. By merely reaffirming the *Collins*[134] decision, the court ignored cases decided after the 1976 cases which clarify the requirements of a constitutional death penalty procedure and stress the importance of appellate review to such a scheme. The three tests utilized by the United States Supreme Court when considering death penalty cases[135] and the Court's emphasis on appellate review in its application of these tests[136] strongly suggests the necessity of appellate review. Review by a judicial body separated from the passion and emotion of the trial court provides one final opportunity to certify that the sentencing guidelines and procedures established by the legislature are followed. This reduces the chance of arbitrary or capricious results and assures individualized consideration of each case.

More significantly, the court failed to consider the "evolving standards of decency" analysis. This analysis clearly falls on the side of mandatory review.[137] The overwhelming legislative and judicial embracement of mandatory appellate review as an essential element in the capital sentencing procedure reflects society's current attitude toward the minimum requirements necessary to assure fair administration of the sentence.[138] This broad acceptance also reflects the interest of society in seeing that the protections afforded by the eighth amendment are safeguarded. The action of the state in taking the life of one of its citizens is different from any other state action. The eighth amendment protects society against improper assertion of this authority. Thus, society maintains an interest in seeing that the state does not transgress the limits of the amendment.

Likewise, the acceptance of the death penalty by thirty-seven states reflects society's acceptance of the penalty as a proper means of promoting a state's criminal policy. However, the court, not the capital defendant, must determine whether imposition of the penalty in any given case best promotes the state's interests. Allowing any criminal defendant to select his punishment would encourage, not deter,

134. 261 Ark. 195, 548 S.W.2d 106 (1977).
135. *See supra* notes 14-24 and accompanying text.
136. *See supra* notes 30-40 and accompanying text.
137. *See supra* notes 17-20 and accompanying text.
138. *See supra* text accompanying note 20.

crime.[139] If Ronald Gene Simmons deserves to be executed and if his execution furthers proper state interests, he should be executed. However, the decision is not for Mr. Simmons to make.

STANDING[140]

Standing refers to the aspect of justiciability that governs the capacity of a party to prosecute an action or to raise an issue.[141] Questions regarding a party's standing commonly arise when the litigation involves matters of public interest because of the generalized nature of such issues.[142] The United States Supreme Court's recent imposition of rigid standing requirements limits the ability of persons seeking to litigate such issues from pursuing their claims in a federal forum.[143] As a result, state courts assume a more important role in protecting the fundamental rights represented by these claims.[144]

Federal standing law includes two separate doctrines.[145] The first doctrine emerges from the case and controversy requirement of Article III of the United States Constitution.[146] This constitutional limitation restricts Article III courts to cases presented in an adversary context.[147] Thus, parties seeking standing to invoke the jurisdiction of federal courts must allege a personal stake in the outcome of the controversy.[148] To demonstrate a sufficient personal stake, the plaintiff must establish that he suffers from an injury or a threatened injury caused by the challenged action which a favorable decision will

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139. *See* Strafer, *supra* note 52, at 903-04. "Certainly deterrence is not served by executing the individual who murdered only because he wished to die but does not have the courage to do it himself . . . . To the extent that execution is sought only because the inmate considers it less painful than life imprisonment, the State's interests in retribution are probably better served by requiring life imprisonment." *Id.* at 904. Ronald Gene Simmons testified that he decided he wanted to die on December 28, 1988, the date on which the Russellville murders occurred. Brief for Appellant at 4, Franz v. State, 296 Ark. 181, 754 S.W.2d 837 (1988).

140. *See supra* notes 58-70 and accompanying text for discussion of next friend standing.

141. Kritchevsky, *Justiciability in Tennessee, Part Two: Standing*, 15 MEM. ST. U.L. REV. 179, 180 (1985).

142. C. WRIGHT, THE LAW OF FEDERAL COURTS § 13, at 60 (4th ed. 1983) (stating that "[i]t is only where the question is of a public nature that the interested bystander is likely to attempt suit"). *See* Merrick, *Standing to Sue in Colorado: A State of Disorder*, 60 DEN. L.J. 421 n.1 (1983) (stating that "[a]s a practical matter, standing issues arise less frequently when the suit seeks to challenge private action having limited consequence beyond the parties").

143. Kritchevsky, *supra* note 141, at 181.

144. *Id.*

145. Stewart v. Board of County Comm'rs of Big Horn County, 175 Mont. 197, 573 P.2d 184, 186 (1977).

146. U.S. CONST. art. III, § 2.

147. Flast v. Cohen, 392 U.S. 83 (1968).

148. Nichol, *Rethinking Standing*, 72 CALIF. L. REV. 68, 71 (1984).

redress.[149] The second doctrine consists of judicially imposed restraints aimed at prudent management of judicial review.[150] This prudential doctrine includes limitations such as prohibitions against a litigant raising another person's rights and rules barring adjudication of generalized grievances.[151]

The Supreme Court uses standing limitations to establish the proper role of federal courts in our system of government. Concern for the separation of powers doctrine and for principles of federalism underlie these restraints.[152] Thus, the standing limitations balance the court's role in the federal system of government by preventing intrusion into areas reserved for co-equal branches of government.[153] Likewise, the restrictions maintain balance in the relationship that exists between the federal government and state governments by preventing federal intrusion into state activities.[154] More importantly, the limitations maintain balance in the concurrent operation of federal and state courts by preventing intrusion into the orderly operation of state judicial processes.[155]

The autonomous operation of two court systems requires the establishment of principles and standards to allocate the power exercised by each tribunal.[156] The supremacy clause of the United States Constitution assures the primacy of federal tribunals.[157] However, by restraining the exercise of federal judicial authority, the jurisdictional limitations of Article III and the prudential restraints adopted by the Supreme Court establish the outer boundaries of federal power.[158] On the other hand, Article III does not address state courts, and state courts are not bound by the prudential restraints imposed by the Supreme Court.[159] Thus, state courts may assume jurisdiction in ar-

149. Baker v. Carr, 369 U.S. 186, 204 (1962). *See, e.g.*, Los Angeles v. Lyons, 461 U.S. 95 (1983).

150. *See* Nichol, *supra* note 148, at 71.

151. *Id.*

152. *Id.* at 101. *See also* Younger v. Harris, 401 U.S. 37, 44 (1971) (describing the basis for federal court restraint as "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.").

153. Allen v. Wright, 468 U.S. 737 (1984).

154. *Lyons*, 461 U.S. at 112.

155. O'Shea v. Littleton, 414 U.S. 488, 499 (1974) (stating that "recognition of the need for a proper balance in the concurrent operation of federal and state courts counsels restraint . . . .").

156. Nichol, *Federalism, State Courts, and Section 1983*, 73 VA. L. REV. 959, 960 (1987).

157. *Id.* U.S. CONST. art. III, § 1.

158. Nichol, *supra* note 148, at 101.

159. *Lyons*, 461 U.S. at 113.

eas not preempted by federal authority.[160] Beginning in the early 1970s, the Supreme Court began imposing rigid barriers which impede access to federal courts.[161] As one justification for these barriers, the Court emphasized its concern for principles of federalism.[162] This emphasis on federalism evidenced a return to the relationship that existed between federal and state courts during the early history of the country.[163] Prior to the Civil War, the perception that federal intrusion into the states' affairs constituted the most serious threat to fundamental rights resulted in great federal restraint where matters of local concern were involved.[164] Under this view, local tribunals provided the best protection for fundamental rights, so state courts functioned relatively free of federal court interference.[165]

After the Civil War, a system of federal oversight gradually evolved.[166] The struggle against slavery destroyed the perception that states provided the best protection for fundamental rights. Furthermore, many blamed state court judges for failing to protect these rights and accused the judges of assisting in efforts to deprive the freed slaves of their newly acquired rights.[167] Consequently, the states ratified the Civil War Amendments,[168] and under the authority of these amendments, Congress granted federal courts authority to assure compliance. Federal courts slowly accepted this authority and gradually assumed the primary role in the protection of fundamental rights.[169] This shift in judicial primacy peaked in the 1960s as the Warren Court invoked the authority granted under the Civil War Amendments to implement systematic social reform.[170] However, the Burger Court halted this expansion of federal authority in the early 1970s by restricting the Court's role in protecting fundamental rights.[171] The present Court continues to narrowly construe its role in

160. *Id.*

161. Kritchevsky, *supra* note 141, at 179-80. These barriers are created by rigorous application of the doctrines of standing, ripeness, mootness, and the political question doctrine.

162. *Lyons*, 461 U.S. at 112. *See also O'Shea*, 414 U.S. at 499.

163. Comment, *Protecting Fundamental Rights in State Courts: Fitting a State Peg to a Federal Hole*, 12 HARV. C.R.-C.L. L. REV. 63, 64 (1977).

164. Tribe, *The Emerging Reconnection of Individual Rights and Institutional Design: Federalism, Bureaucracy, and Due Process of Lawmaking*, 10 CREIGHTON L. REV. 433, 435 (1977).

165. Nichol, *supra* note 156, at 960.

166. *Id.*

167. *Id.* at 975.

168. U.S. CONST. amends. XIII, XIV, and XV.

169. Nichol, *supra* note 156, at 960.

170. Tribe, *supra* note 164, at 439.

171. *Id.*

the protection of these rights.[172]

As a result of the Supreme Court's retrenchment in the area of fundamental rights, state courts now provide the only forum for many litigants.[173] Thus, state courts may expect an increasing number of persons seeking to litigate matters of public interest.[174] Consequently, state courts must decide justiciability questions and establish standards and principles sufficient to accept their renewed importance in the dual court system.[175]

Traditionally, state courts impose less rigid standing barriers than federal courts.[176] When deciding standing questions, most state courts find the prudential restraints of the Supreme Court useful,[177] but they apply these restraints less rigidly.[178] Many states liberally construe their standing laws and decide issues federal courts would not adjudicate because the litigant failed to demonstrate a sufficient personal stake in the outcome of the litigation.[179] Instead of focusing on the nature of the injury suffered by the litigant, these states focus more on whether the interest raised deserves protection.[180] Also, many states provide independent grounds for standing to raise public interest questions. For example, a vast majority of states recognize taxpayer status as an independent basis for standing, and some states allow their courts to issue advisory opinions, thereby eliminating the need for concern over a litigant's standing.[181]

The Arkansas Constitution grants taxpayers standing to challenge "illegal exactions."[182] Justification for taxpayer standing relies on the theory that taxpayers are the equitable owners of public funds and that their liability to replenish funds exhausted by misapplication entitles them to relief.[183] Therefore, it follows that the term "illegal

172. Kritchevsky, *supra* note 141, at 180.

173. *Id.* at 181.

174. *Id. See also* Merrick, *supra* note 142, at 421.

175. Nichol, *supra* note 156, at 960. "It is not only essential that principles be set forth allocating the powers to be exercised by the constituent judiciaries, but that standards be developed to determine how each tribunal will deal with the other." *Id.* at 960.

176. Comment, *supra* note 163, at 90.

177. *Id. See, e.g.*, Life of the Land v. Land Use Comm'n, 63 Haw. 166, 623 P.2d 431 (1981).

178. Comment, *supra* note 163, at 90.

179. *Id.* at 91.

180. *See, e.g.*, Wisconsin Envtl. Decade v. Public Service Comm'n of Wisconsin, 69 Wis. 2d 1, 230 N.W.2d 243 (1975).

181. Comment, *supra* note 163, at 90.

182. ARK. CONST. art. XVI, § 13 provides that "[a]ny citizen of any county, city or town may institute suit in behalf of himself and all others interested, to protect the inhabitants thereof against the enforcement of any illegal exactions whatever."

183. Farrell v. Oliver, 146 Ark. 599, 226 S.W. 529 (1921).

exaction" includes the misapplication of public funds as well as direct exactions.[184] Furthermore, the remotest effect upon the taxpayer by any unlawful action of a tax-supported program or institution gives the taxpayer standing to challenge the action.[185] Consequently, the Arkansas Supreme Court has upheld the standing of taxpayers to oppose unauthorized use of convicts by the corrections department,[186] to question improper election procedures,[187] and to challenge the governor's appointment of a state highway commissioner.[188]

Aside from the provision allowing taxpayer standing, litigants seeking standing in Arkansas must demonstrate that they possess a right which the challenged action infringes.[189] The infringed right and the injury suffered must be personal to the litigant; thus, third parties may not assert the rights of others.[190] In addition, the court refuses to address constitutional issues unless resolution is essential to disposition of the case,[191] and the court refrains from issuing advisory opinions.[192] Consequently, the litigant must establish the unconstitutionality of the challenged action as directly applied to the litigant.[193]

In *Franz v. State*[194] the Arkansas Supreme Court held that Rev. Franz failed to allege a sufficient relationship with Simmons to confer next friend standing.[195] The court analogized the case to *Davis v. Aus-*

184. Samples v. Grady, 207 Ark. 724, 182 S.W.2d 875 (1944).

185. Green v. Jones, 164 Ark. 118, 261 S.W. 43 (1924).

186. *Id.* (challenge to practice of contracting for inmate labor to be used for private uses).

187. Townes v. McCollum, 221 Ark. 920, 256 S.W.2d 716 (1953).

188. White v. Hankins, 276 Ark. 562, 637 S.W.2d 603 (1982).

189. Thompson v. Arkansas Social Services, 282 Ark. 369, 669 S.W.2d 878 (1984).

190. Cox v. Stayton, 273 Ark. 298, 619 S.W.2d 617 (1981). The court cited an exception to this rule where the issue presented "would not otherwise be susceptible of judicial review and it appears that the third party is sufficiently interested in the outcome" to assure that the rights of the other party will be protected. *Id.* at 302, 619 S.W.2d at 619 (citing Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965)).

191. Martin v. State, 79 Ark. 236, 96 S.W. 372 (1906). *See* Bell v. Bell, 249 Ark. 959, 462 S.W.2d 837 (1971).

192. McCuen v. Harris, 271 Ark. 863, 611 S.W.2d 503 (1981). *See* Stafford v. City of Hot Springs, 276 Ark. 466, 637 S.W.2d 553 (1982).

193. Carter v. State, 255 Ark. 225, 500 S.W.2d 368 (1973), *cert. denied*, 416 U.S. 905 (1973) (defendants accused of sodomy did not have standing to challenge constitutionality of statute based on its failure to distinguish between acts committed in public and acts committed in private because the acts committed by the defendants were committed in public); May v. State, 254 Ark. 194, 492 S.W.2d 888 (1973) (defendant accused of violating statute prohibiting laymen from performing abortions lacked standing to challenge constitutionality of abortion statute because the statute was constitutional as applied to him); Sumlin v. State, 266 Ark. 709, 587 S.W.2d 571 (1979) (defendant sentenced to life imprisonment without parole lacked standing to challenge the death penalty).

194. Franz v. State, 296 Ark. at 184-85, 754 S.W.2d at 841.

195. *See supra* notes 58-70 and accompanying text for a discussion of next friend standing.

tin.[196] Davis, a Presbyterian minister and director of the Southern Prison Ministry in Georgia, sought next friend standing to appeal the conviction of an inmate sentenced to death. The federal court in Georgia held "that members of the public in general do not have a right to intercede as 'next friend' . . . because they are morally or philosophically opposed to the death penalty."[197] The *Davis* court was concerned that "however worthy and highminded the motives of 'next friends' may be, they inevitably run the risk of making the actual defendant a pawn to be manipulated on a chess board larger than his own case."[198]

The Arkansas Supreme Court held that Rev. Franz's connection to Simmons was even more tenuous than that which existed in *Davis*.[199] In *Davis*, the petitioner alleged personal contact with the defendant, and she alleged that she occasionally counseled the defendant. However, the Arkansas court held that this relationship was insufficient to confer next friend standing.[200] The Arkansas Supreme Court observed that the petition filed by Franz failed to "indicate that he is Simmons' minister, spiritual advisor, or confidant, or even less, that the two have ever met."[201]

The court denied Franz taxpayer standing for two reasons. First, the court held that "a suit to prevent an illegal exaction must be commenced in a trial court."[202] Second, the court declared that the constitutional grant of taxpayer standing is "not so broad that it gives one taxpayer the right to intervene in the merits of a criminal case against another person."[203] The court did not provide support for either conclusion.

The court also declared that the existence of unresolved constitutional questions is not sufficient to give a third person standing.[204] The court cited *Gilmore v. Utah*[205] to support this holding. The *Gilmore* Court noted that Utah's death penalty statute was constitutionally suspect.[206] Since Gilmore's mother lacked standing and Gilmore refused to appeal his sentence, there was no party before the Court

196. 492 F. Supp. 273 (N.D. Ga. 1980).
197. *Id.* at 275.
198. *Id.* at 276.
199. Franz v. State, 296 Ark. at 185, 754 S.W.2d at 841.
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.* at 186, 754 S.W.2d at 842.
205. 429 U.S. 1012 (1976).
206. *Id.* at 1017.

with standing to challenge the statute.[207] Thus, the constitutional question remained unresolved.[208]

The court's decision sends a distorted message to persons seeking to litigate matters of public interest in Arkansas. On one hand, the limitations which the court imposes on taxpayer standing[209] reflect a narrowing attitude toward public interest litigation. Under the court's previous interpretations of taxpayer standing,[210] the court could easily have justified granting Rev. Franz standing to raise the mandatory appeal issue, for, if the constitution grants taxpayers standing to challenge even the remotest expenditure, the provision arguably grants a taxpayer standing to challenge the expenditure of public funds to carry out an allegedly illegal execution.

On the other hand, by proceeding to resolve the issue after holding that Rev. Franz lacked standing, the court appears to adopt the attitude of state courts which look more at the importance of the interest raised than at the party raising the issue.[211] Contrary to the court's long standing rule not to address constitutional questions unless necessary for resolution of a controversy,[212] the court's resolution of the mandatory appeal issue amounts to an advisory opinion. Thus, the decision may indicate a liberalization of the court's attitude toward advisory opinions and public interest litigation in general.

More significantly, if the court continues to adhere to the rationale underlying federal court decisions, litigants seeking to litigate matters of public interest will lack a forum in Arkansas. By relying on federal precedent to determine whether a party has standing in Arkansas courts, the Arkansas Supreme Court limits itself to the same constitutional and prudential restraints that limit the jurisdiction of federal courts. This approach by a state court thwarts the federalistic goal of the United States Supreme Court to limit federal intrusion into the autonomy of state courts.[213] For such a model of federalism to succeed in defining the respective role of each court in the dual court system, state courts must move to fill the void left by federal court restraint. To do so, state courts must affirmatively accept their role in the protection of fundamental rights. If the state requirements simply mirror the federal requirements, litigants barred from federal forums

207. *Id.*
208. Franz v. State, 296 Ark. at 186, 754 S.W.2d at 842.
209. *See supra* notes 202-03 and accompanying text.
210. *See supra* notes 182-88 and accompanying text.
211. *See supra* note 180 and accompanying text.
212. *See supra* notes 191-92 and accompanying text.
213. *See supra* notes 152-60 and accompanying text.

due to federal deference to state courts will be totally without a forum to protect their rights in Arkansas.

Because of the United States Supreme Court's retrenchment in the protection of fundamental rights, the Arkansas Supreme Court can expect an increase in litigants seeking to prosecute matters of public interest. The court must clarify its position and establish its own prudential standards for management of judicial review. Furthermore, these standards must be fashioned so that the court can assume its proper role in the dual system of courts. Until the court clarifies its position, it can expect to be faced with litigants hoping that the court will decide their case on its merits whether they are granted standing or not, as did the *Franz* court.

Michael White