

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20240

RICHARD LEE BEAVERS, By and Through
His Next Friend, LYNN LAMBERTY,

Petitioner,

VERSUS

JAMES A. COLLINS, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent.

Appeal from the United States District Court
for the Southern District of Texas
(H-94-CV-1070)

(April 2, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:¹

Richard Lee Beavers is to be executed shortly after 12:00 a.m. on April 4, 1994. Lynn Lamberty, claiming next friend standing for Beavers, and appealing from the district court's orders denying a stay of execution, refusing to appoint counsel, and denying his motion to alter and amend judgment, seeks a stay of execution.²

¹ Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

² Lamberty is represented by David Cunningham, as discussed *infra* note 3.

I.

Beavers was convicted of capital murder by a Texas jury, and was sentenced to death; the Texas Court of Criminal Appeals affirmed the conviction and sentence on direct appeal. See **Beavers v. State**, 856 S.W.2d 429 (Tex. Crim. App.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 399 (1993).

In February 1994, the trial court appointed Lamberty, an attorney with the Texas Resource Center, to represent Beavers in state habeas proceedings. Beavers, however, sent letters to an assistant district attorney and Lamberty, expressing his desire that an execution date be scheduled. The trial court conducted a hearing on March 2, 1994, and found that Beavers was competent to waive further legal proceedings; therefore, it rescinded its appointment of Lamberty and scheduled Beavers' execution for April 4.

On March 21, 1994, Lamberty, claiming next friend standing for Beavers, filed an appeal of the trial court's action (including motions to stay execution and appoint counsel) with the Texas Court of Criminal Appeals. That court deferred to the trial court's determination that Beavers was "mentally competent to choose to forego collateral attack upon his conviction and sentence." Accordingly, it ruled that Lamberty was in "no position to maintain a 'next friend' status on behalf of Beavers." On March 28, Lamberty filed a petition for certiorari, accompanied by a request for an emergency stay of execution, with the Supreme Court (93-

8492); to our knowledge, no action has been taken on that petition and request.

In addition, on March 30, Lamberty filed motions in the United States District Court to appoint counsel, to stay execution, and to proceed *in forma pauperis*. Lamberty did not apply for a writ of habeas corpus; rather, he attached a petition for habeas corpus relief as an exhibit to his motions, contending that he would

file the petition ... only if the court agrees to treat it for what it is, a means to acquire jurisdiction to stay Mr. Beavers execution and appoint counsel and not as a formal or complete application for habeas relief. In short, counsel cannot agree to file this application unless the court agrees it will refrain from addressing it on the merits.

The district court on March 31 held "that the filing of the habeas petition as an exhibit is not the equivalent of the filing of an application for habeas relief. Accordingly, as there is currently no habeas corpus proceeding pending ..., the instant motions should be denied."

The next day, April 1, Lamberty filed a motion to alter and amend judgment pursuant to Fed. R. Civ. P. 59(e). The district court denied that motion on April 1, apparently relying again on the absence of a habeas petition.³

That same day, Lamberty filed his notice of appeal from the district court's rulings; on April 2, his motion for a stay and supporting memorandum.

³ The district court also noted that the Rule 59(e) motion was filed by David Cunningham, rather than Lamberty, who appeared on the original papers.

II.

Jurisdiction is lacking on two separate bases.

A.

First, because there is no habeas application, this court lacks jurisdiction. See **McFarland v. Collins**, 7 F.3d 47 (5th Cir.), *cert. granted in part*, ___ U.S. ___, 114 S. Ct. 544 (1993);⁴ see also, e.g., **Clayton v. Collins**, No. 94-10189 (5th Cir. March 10, 1994) (unpublished), *stay granted*, No. A-745 (93-8233) (U.S. March 11, 1994).⁵

B.

Second, although Lamberty asserts that this case raises the same question as **McFarland**, there is another, distinct jurisdictional defect in the instant case: Lamberty lacks standing to pursue this appeal. To have standing as Beavers' next friend, Lamberty must, among other things, provide an explanation, such as mental incompetence, as to why Beavers cannot appear on his own to prosecute the action. See **Whitmore v. Arkansas**, 495 U.S. 149, ___, 110 S. Ct. 1717, 1727 (1990). "The burden is on the 'next friend' clearly to establish the propriety of his status, and thereby justify the jurisdiction of the court." **Id.** (citations omitted). The Supreme Court has cautioned that the mental incompetence "prerequisite for 'next friend' standing is not satisfied where an

⁴ The Supreme Court heard oral argument in **McFarland** on March 29.

⁵ There is a powerful argument that **McFarland** is not implicated at all, because, as discussed *infra*, Lamberty's contention, in the final analysis, is that his termination by Beavers was not legally effective.

evidentiary hearing shows that the defendant has given a knowing, intelligent, and voluntary waiver of his right to proceed, and his access to the courts is otherwise unimpeded." *Id.* at ____, 110 S. Ct. at 1728 (citation omitted).

In this case, the state trial court conducted an evidentiary hearing regarding Beavers' desire to schedule an execution date and forego collateral attack on his conviction and sentence. Among other things, Lamberty, the trial court, and a representative of the district attorney's office all questioned Beavers. Moreover, the trial court had previously ordered a psychiatric examination of Beavers relating to a prior effort to forego challenges to his conviction and sentence, and had before it the written findings of two examiners.⁶ According to one psychiatrist who examined Beavers and reviewed his medical records, Beavers had "both a rational and factual understanding of his legal position and the options that are available to him", and he was deemed competent to choose to forego further appeals. Another examiner, a psychologist, attempted to meet with Beavers, but Beavers refused to submit to another examination. Nevertheless, that psychologist stated that from his "brief observations" of Beavers and his review of other information he found no indication that Beavers "is suffering from a mental disease or mental defect of sufficient severity to prevent

⁶ It appears that once before, while the Texas Resource Center was obtaining counsel to file Beavers' petition for certiorari in the Supreme Court during his direct appeal, Beavers sought to schedule an execution date and abandon his appeal; this he was allowed to do; however, as his execution date approached, after much contact with Lamberty, Beavers changed his mind, and Lamberty was appointed to represent him.

him from understanding his legal position and the options available to him or to prevent him from making a rational choice among his options."

Reviewing the evidentiary hearing and materials before the state trial court, we "find no reason to disturb" its judgment that Beavers is mentally competent. See *id.*; cf. *Streetman v. Lynaugh*, 835 F.2d 1521, 1524-27 (5th Cir. 1988) (reviewing district court's findings regarding appellant's competency to abandon additional legal proceedings). Therefore, Lamberty lacks standing to pursue this appeal.

III.

For the foregoing reasons, the motion to stay is

DENIED.