

STEVENS, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 03A497

KEVIN L. ZIMMERMAN *v.* GARY JOHNSON,
EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF
CRIMINAL JUSTICE ET AL.

ON APPLICATION FOR STAY

[December 15, 2003]

The application for stay of execution of sentence of death presented to JUSTICE SCALIA and by him referred to the Court is denied. The temporary stay entered by JUSTICE SCALIA is vacated.

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

Applicant has filed an action pursuant to Rev. Stat. §1979, 42 U. S. C. §1983, in the United States District Court for the Southern District of Texas in which he alleges that Texas plans to put him to death by using a cruel and unusual method of execution. Applicant contends that the Texas Legislature has recently outlawed the use of the method for animal euthanasia because it is so excruciatingly painful. Relying on Circuit precedent, the Court of Appeals for the Fifth Circuit affirmed the dismissal of the action on the procedural ground that §1983 is not an appropriate vehicle for challenges to the method of execution; applicant should have proceeded by applying for a writ of habeas corpus. See *Martinez v. Texas Court of Criminal Appeals*, 292 F. 3d 417 (CA5), cert. denied, 535 U. S. 1091 (2002). The order did not question the merits of the underlying claim. Other Courts of Appeals disagree with the procedural ground of the decision, and we have granted certiorari to review that precise procedural issue in another case. *Nelson v. Campbell*, 540 U. S. ____ (2003).

STEVENS, J., dissenting

I would postpone review of this case until *Nelson* has been decided and stay applicant's execution until that time. Accordingly, I respectfully dissent from the order vacating the stay of execution.