

PUBLIC

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Further information on EXTRA 51/03 (AMR 51/144/2003, 27 November 2003) - Death penalty / Legal concern

USA (Texas) Kevin Lee Zimmerman (m), white, aged 42

Kevin Zimmerman received a stay of execution from the US Supreme Court shortly before he was due to be executed on 10 December, Human Rights Day. He was sentenced to death in June 1990 for the murder of Gilbert Hooks in October 1987.

Kevin Zimmerman was one of three Texas prisoners who were scheduled for execution on 9, 10 and 11 December. Lawyers brought a civil rights lawsuit on their behalf, claiming that one of the chemicals used in lethal injections, pancuronium bromide, can mask a prisoner's pain as he or she is put to death. The lawsuit included evidence that the combination of chemicals used by Texas to execute people is not allowed in animal euthanasia under the laws of various states (including one recently passed in Texas) as well as under national guidelines for veterinarians (see original EXTRA).

Billy Vickers was scheduled to be killed on 9 December. A federal district court summarily dismissed the lethal injection challenge, refusing to hear the appeal as a civil rights claim (under Title 42, Section 1983 of the US Code) and characterizing it instead as a *habeas corpus* challenge under a different law (28 U.S.C. Sec. 2254) and therefore procedurally barred as a successive *habeas corpus* petition. A three-judge panel of the US Court of Appeals for the Fifth Circuit affirmed the district court's decision. After the lawyers asked for a rehearing in front of the full Fifth Circuit, the court said that it would not rule that day. The execution did not go ahead after the death warrant against Billy Vickers expired at midnight with the appeal still pending. This is reported to be the first time that a death warrant has expired in a Texas case. In all other cases, the prisoner has been executed or a stay of execution has been issued by the courts or the executive.

In Kevin Zimmerman's case on the following day, 10 December, the Fifth Circuit dismissed the civil rights lawsuit, characterizing it as a procedurally barred successive *habeas corpus* petition. Shortly before Kevin Zimmerman was due to be executed, Justice Antonin Scalia of the US Supreme Court granted a stay of execution. This does not necessarily mean that the Court will hear the case. Kevin Zimmerman's stay could yet be dissolved. However, he no longer has an active death warrant against him, and the state would have to set another execution date if the appeal is dismissed.

If the Supreme Court does agree to hear the case, it may examine only the broader procedural issue of whether lower federal courts should consider such civil rights claims by condemned inmates. It has already agreed to hear the appeal of David Nelson, an Alabama death row inmate, who has challenged his execution in a civil rights suit, arguing that, because he has collapsed veins, the prison authorities will have to conduct painful surgery (known as a "cut-down" procedure) on him before it can carry out his lethal injection. On 1 December, the Supreme Court announced that it would take David Nelson's case in order to resolve the question: "Whether a complaint brought under 42 U.S.C. Sec. 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the procedures for carrying out the execution, is properly recharacterized as a *habeas corpus* petition under 28 U.S.C. Sec. 2254?" The Court is expected to rule in mid-2004.

The execution of the third Texas prisoner, Bobby Hines, was stayed in order that the courts could consider evidence of his mental retardation (see fu EXTRA 53/03, AMR 51/151/2003, 10 December 2003). Another

execution scheduled for Human Rights Day, that of Eddie Crawford in Georgia, was also stayed pending a decision on whether the prisoner could obtain DNA testing on blood evidence in the case.

No further action by the UA Network is requested at present. Many thanks to all who sent appeals.