

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JOHN L. LOTTER,)	
)	
Petitioner,)	4:04CV3187
)	
V.)	
)	
ROBERT HOUSTON, Warden,)	MEMORANDUM AND ORDER
Tecumseh State Correctional Center,)	
)	
Respondent.)	
_____)	

Yesterday, the Nebraska legislature repealed the death penalty. The legislative bill repealing the death penalty will become effective in late August or early September.

In my opinion, Lotter has exhausted all available federal and state judicial remedies and he cannot now pursue any further federal or state judicial remedies. Therefore, the only justifiable reason for appointing federal counsel in this matter is to allow Lotter to seek clemency. *See* 18 U.S.C. § 3599 (federal counsel may be appointed for “executive or other clemency as may be available to defendant”; for other matters, appointment is only proper for “*available* judicial proceedings” and “*available* post conviction process”) (emphasis added). *See also Harbison v. Bell*, 556 U.S. 180 (2009) (federal statute, governing appointment of counsel for an indigent state prisoner seeking federal habeas corpus relief to vacate or set aside a death sentence imposed by a state court, authorizes federally appointed counsel to represent the prisoner in subsequent state clemency proceedings).

On my own, I have come to the conclusion that Lotter’s federal counsel should cease all work on this matter until further order of this court¹, and if the death penalty repeal bill becomes effective, I should then dismiss this matter (and the appointment of federal counsel)

¹Counsel for Lotter are informed that yesterday I conferred with Chief Judge Riley regarding their pending ex parte motion. On my recommendation, he will withhold further consideration of that motion until the matters described in this Memorandum and Order are resolved.

without prejudice. However, before I do so, I want to hear counsel for both sides by brief and oral argument.

IT IS ORDERED that:

1. Counsel for Lotter and Nebraska shall file initial briefs addressing the matters set out above no later than Thursday, June 18, 2015.

2. Reply briefs may be submitted no later than Thursday, June 25, 2015.

3. No later than Friday, June 5, 2015, counsel for Lotter and counsel for Nebraska shall contact my judicial assistant, Kris Leininger, at 402.437.1640, in a joint conference call to schedule the precise date and time for oral argument. Counsel for Lotter shall contact counsel for Nebraska and then initiate the joint telephone conference call with my judicial assistant.

4. Oral argument shall be held on or after Monday, June 29, 2015, at a time convenient for the Court and counsel. The undersigned will hear one hour of oral argument.

DATED this 28th day of May, 2015.

BY THE COURT:

Richard G. Kopf

Senior United States District Judge